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# **Copyright and Education in Europe:**

**15 everyday cases  
in 15 countries**

Final Report

April 2017

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*With the support of Open Society Foundations*

# Copyright and Education in Europe: 15 everyday cases in 15 countries

Final Report  
April 2017

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## Executive Summary

For the first time in more than a decade, the European Union is entertaining a reform of its copyright laws with the potential to address some of the limitations copyright law places on education.

However, this proposal continues to impose several restrictions on the use of protected materials for educational purposes.

This study intends to demonstrate the impact exerted by narrow educational exceptions in everyday practices by analysing 15 educational scenarios involving the use of protected materials under the copyright laws of 15 European countries: the Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain and the United Kingdom.

### Materials available for educational uses

This study's findings indicate that not all copyrighted works are treated equally in the context of education. Some educational exceptions exclude the use of certain types of works (textbooks and academic books in France and Germany, dramatic works and cinematographic works in Denmark and Finland and musical scores in France and Spain). Other laws contain restrictions in relation to the extent or degree to which a work can be used for educational purposes, thus creating obstacles to the use of entire works, namely short works (e.g. individual articles, short videos and short poems) and images (e.g. artworks, photographs and other visual works). Finally, several legal provisions only permit educational uses of "published works", thus potentially excluding the use of works made available to the public by ephemeral or transient means that do not involve the making of copies of the work, such as performance, exhibition and broadcasting.

## **Traditional Educational Practices**

Performances, recitations and displays of protected works and other subject matter are permitted in most of the countries analysed under general educational exceptions. Extent restrictions in France, Luxembourg, Portugal and Spain, and the exclusion of certain types of works from the scope of the exception in Denmark, Finland, France and Spain prevent the performance in class of an entire piece of music and/or a dramatic work and/or the screening of an entire film.

Italy, Germany (through case law), the Netherlands, and the United Kingdom do not consider performances, recitations or displays made in the context of an educational activity to be public performances. In other words, those activities are excluded from the scope of copyright protection, and educators and learners in these countries do not have to worry about the extent of use, the payment of compensation/remuneration, or compliance with the three-step test.

## **Modern Educational Practices**

Most of the countries under analysis permit the acts of use involved in classroom visualization of materials that are freely available online. This activity may even be permitted in all of the 15 countries considering the interpretation given by the Court of Justice of the European Union on the scope of application of the harmonized right of communication to the public. However, since EU case law is not clear-cut and straightforward, a cautious approach was adopted and uses were analysed in light of the existing national copyright exceptions. The application of national copyright exceptions only leads to contrasting results when a teacher screens an entire film on a DVD in class and when that same teacher shows an entire online video in class in two countries: Italy and the Netherlands.

The legal standing of sharing educational materials via email, the cloud, chatrooms, etc. is not entirely clear in some of the countries under analysis, though most of them allow the use of these means of communication. When it comes to sharing resources through online platforms, several of these countries curtail the potential beneficiaries of these types of uses, but only Spain and the United Kingdom expressly require such use to be made through a closed/secure electronic network, accessible only by students and teachers from a given educational establishment.

## **Creation of Educational Materials**

Compilations are only prohibited in Spain. Nevertheless, many countries do not draw a distinction between a set of materials created by a teacher and a publication intended for commercial use. This means that in both cases, compensation/remuneration must be remitted (Denmark, Finland, Germany, Italy and Portugal), thereby potentially acting as a deterrent to teachers creating educational materials.

Denmark, Finland, Italy and Spain are the only countries in the selected group that do not have legal provisions in their national laws permitting translations or other adaptations of protected works and other subject matter for educational purposes. Educational translations are allowed in all the remaining countries.

## **Non-Formal Education**

The majority of the countries under analysis does not discriminate against the person or entity running the educational activity, focusing solely on the educational purpose of the use. However, a significant number of these countries only allows educational uses if they are made by schools or other formal educational establishments. These are Germany, Italy, Poland, Portugal, Romania, Spain and the United Kingdom. In these countries, museums, libraries and other providers of non-commercial education must therefore ask for permission before making certain uses of protected materials in their educational programmes.

## **Conclusion**

In sum, four main obstacles to traditional and modern ways of using protected works and other subject matter in an educational context were identified in the national laws of the 15 countries analysed: act of use, type of user, type of work and extension of work.

While the European Commission does not restrict the types of works or other subject matter that can be used under the proposed exception for digital and cross-border teaching activities or the extent to which those works can be used, the proposed exception only covers certain acts of use and limits the type of users that can benefit from the exception. Indeed, its proposal focuses solely on digitally supported education for the benefit of a closed list of persons providing or receiving education in educational establishments.

More than half of the hypothetical scenarios considered in this study regard non-digital activities and four of these scenarios involve persons or entities not contemplated by the Commission's proposal (parents of students and pupils, museums, libraries and non-profit organizations). These scenarios show that, unless the Commission's proposal is substantially amended, several European countries will be stuck with narrow copyright exceptions that will continue to curtail educational practices at various levels.

Surely, even if the scope of the Commission's proposed exception is extended to cover non-digital educational uses and uses made by other potential beneficiaries, several of the uses analysed herein will not be harmonised because EU law has not harmonised the entire spectrum of rights protected by copyright and related rights, namely, the public performance right and the translation right. Notwithstanding that, a broad "use" formulation, similar to the one set forth in the current proposal, may lead to the inclusion of rights harmonised by EU law and rights that have not yet been harmonised in countries that elect to implement a similar "use" formulation.

## Introduction

For the first time in more than a decade, the European Union is entertaining a reform of its copyright laws<sup>1</sup> with the potential to address some of the limitations copyright law places on education. The European Commission has proposed to harmonise the national copyright laws across Europe to allow for uses of copyrighted works and other subject matter in digital and cross-border teaching activities<sup>2</sup>. However, this proposal continues to impose several restrictions on the use of protected materials for educational purposes<sup>3</sup>.

First, the European Commission fails to embrace the fact that education is now conducted in various locations by a multitude of institutions and learners. In addition, it disregards multiple initiatives that use the open Internet to provide innovative education to learners from various backgrounds, and with different languages and literacies, across Europe.

The Internet age has created new possibilities for educational practices to take place offsite and without the participation of an educational establishment. Nevertheless, the Commission's proposal only covers uses that take place on the premises of an educational establishment or through closed networks accessible solely by teachers and students in those establishments.

Even in a formal education setting, teachers carry out educational activities in a variety of venues. Constraining educational uses that occur face-to-face to the premises of an educational establishment creates unnecessary obstacles to modern and traditional educational activities that take place off campus, such as educational events held by educational establishments on the premises of other institutions.

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1 European Union: European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593> [accessed 12 April 2017] (hereinafter "Proposed Digital Single Market Directive").

2 See article 4.<sup>o</sup> of the Proposed Digital Single Market Directive.

3 For an overview of all the restrictions identified by the author, see COMMUNIA Position Paper: Better Copyright Reform for Education, available at <http://www.communia-association.org/2016/12/05/commissions-proposal-education-devil-detail> [accessed 12 April 2017].



Second, even though the proposal only covers digitally supported education, the obstacles and legal uncertainty the education community faces when using protected materials go beyond digital and online environments. Indeed, national laws across the European Union do not always provide for exceptions and limitations to copyright that support necessary access, use and reuse of protected works and other subject matter in the context of non-digital educational activities.

For as long as literary and artistic works and other subject matter are protected by copyright and related rights, there will always be a duty for teachers to use protected works and other subject matter for the purposes of teaching their students. This imperative towards society persists in the context of non-digital educational uses, non-formal education, and online learning activities.

Several studies<sup>4</sup> have analysed the national educational exceptions laid down in the copyright laws of European countries. The author has also previously analysed the fragmented landscape of provisions allowing for educational uses of protected works and other subject matter in Europe in a working paper<sup>5</sup>. This study continues to delve into that subject matter and updates some of that paper's findings.

This study intends to demonstrate that the European legal landscape does not cover the entire range of traditional educational activities and even discourages the development of modern educational activities. It accomplishes this purpose by analysing 15 educational scenarios involving the use of protected materials under the copyright laws of 15 European countries: the Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain and the United Kingdom.

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4 Raquel Xalabarder, WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, 5 November 2009, SCCR/19/8, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_19/sccr\\_19\\_8.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf) [assessed 12 April 2017].

PPMI, Assessment of the impact of the European copyright framework on digitally supported education and training practices (European Union, 2016), available at <http://bookshop.europa.eu/en/assessment-of-the-impact-of-the-european-copyright-framework-on-digitally-supported-education-and-training-practices-pbNC0115883/> [assessed 12 April 2017] (hereinafter "EC 2016 Study").

Daniel Seng, WIPO Study on Copyright Limitations and Exceptions for Educational Activities, 9 November 2016, SCCR/33/6, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_33/sccr\\_33\\_6.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_6.pdf) [assessed 12 April 2017].

5 Teresa Nobre, Educational Resources Development: Mapping Copyright Exceptions and Limitations in Europe (Creative Commons, June 2004), available at [http://oerpolicy.eu/wp-content/uploads/2014/07/working\\_paper\\_140714.pdf](http://oerpolicy.eu/wp-content/uploads/2014/07/working_paper_140714.pdf) [assessed 12 April 2017].

These everyday uses are grouped under five topics: (i) materials available for educational uses, focusing on different types of protected works and other subject matter, and on different extensions of use; (ii) traditional educational practices, featuring non-tangible disseminations or communications of copyrighted works to the public when the communication originates from the same place and at the same time as the location of the public (classroom and school events); (iii) modern educational practices, covering the visualization of online materials in class and modern ways of transmitting materials outside the classroom; (iv) teachers' creation of educational materials based on existing copyrighted works without commercial purposes; and (v) non-formal education provided for non-commercial purposes by institutions such as libraries and museums.

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The author would like to thank Natalia Mileszyk and John Hendrik Weitzmann for contributing their expertise to this study; Judith Blijden for her translation of a decision handed down by a Dutch court, and Alek Tarkowski and Olga Jurkowska with whom the author consulted to devise the hypothetical scenarios presented herein. All the errors in this study are solely of the author's making.

## Methodology

This report presents the findings of a legal study into copyright exceptions and limitations<sup>6</sup> for educational purposes in 15 European countries.

The national copyright exceptions were analysed by resolving 15 hypothetical scenarios grouped under the following topics: (i) materials available for educational uses; (ii) traditional educational practices; (iii) modern educational practices; (iv) creation of educational materials; and (v) non-formal education.

To devise each hypothetical scenario, the author consulted with Alek Tarkowski and Olga Jurkowska of Centrum Cyfrowe, which conducted a qualitative study on the perception and application of copyright by school teachers<sup>7</sup> in the scope of the COMMUNIA project entitled “Copyright for Education”.

The main source of inspiration for crafting the scenarios analysed herein were (a) interviews conducted with teachers in the context of the above-mentioned study conducted by Centrum Cyfrowe and (b) the findings of the EC 2016 Study<sup>8</sup>.

The author carried out the legal analysis and resolved the hypothetical legal scenarios in all of the 15 countries except Poland. Natalia Mileszyk of Centrum Cyfrowe analysed the relevant Polish provisions and resolved the 15 scenarios in close consultation with the author.

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<sup>6</sup> “Limitations” often refer to legal provisions that exclude certain subject matter from copyright protection; they can also be used to indicate that use is subject to compensation/remuneration. “Exceptions” are normally used to refer to uses exempted by law, either subject to compensation/remuneration or not; they can also be used to indicate just those uses that do not require any payment. In this report these terms will be used interchangeably for the purpose of simplicity.

<sup>7</sup> Tomasz Kasprzak, Olga Jurkowska, Alek Tarkowski, Creator, rebel, guardian, unsuspecting user. Teachers and modern educational practices. (COMMUNIA, March 2017), available at <https://rightcopyright.eu/wp-content/uploads/2017/03/teachers-and-modern-educational-practices.pdf> [assessed 12 April 2017].

<sup>8</sup> We looked in particular to the findings resulting from interviews conducted with teachers across several European countries, which are presented in the following tables of said study: Impact of copyright frameworks on use of digital materials for education (Table 5), Digital actions regularly carried out by respondents for educational purposes (Table 6), Distributions of reasons for peer production among learners (Table 9), Restrictions encountered in relation to different types of digital material (Table 13).

The author consulted with John Hendrik Weitzmann of Wikimedia on the interpretation of a few German legal provisions. Mr. Weitzmann did not, however, review the author's legal analysis. Once again, all the errors in this study are attributable solely to the author.

No case law was analysed, except for the Netherlands. Judith Blijden of Kennisland provided the author with an English summary of case number 137758 by the Rechtbank's-Hertogenbosch dated 16 May 2007, AMI 2007, 133, on the interpretation of art.12(5) of the Dutch Copyright Act.

No licenses were analysed, so educational uses permitted under a licensing scheme, namely extended collective licenses, are not scrutinised in this publication.

Various sources were used to perform the legal analysis:

- the study conducted by the author in 2014<sup>9</sup> and the study commissioned by the World Intellectual Property Organization entitled "Study on Copyright Limitations and Exceptions for Educational Activities"<sup>10</sup> were used as guides to the legal provisions in most of the countries analysed.

Nevertheless, the author did not limit herself to the specific legal provisions presented therein;

- the results of the legal analysis performed for each scenario were compared to the findings presented in the EC 2016 Study<sup>11</sup>, and where appropriate the author rectified her findings. It should, however, be underlined that in a few cases of divergence the author considered her results to be legally sound and disregarded the findings presented in said study;

- the author analysed original versions and/or official or unofficial translations into English of the copyright laws of the countries analysed, as shown in the table below.

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9 Teresa Nobre, op. cit.

10 Daniel Seng, op. cit.

11 In particular, the author scrutinised the findings presented in the country fiches of the 15 selected countries and in the following tables: Educational uses allowed by exceptions and limitations (Table 8), Scope of exceptions and limitations in terms of purpose of use allowed (Table 10), Restrictions to applicability of exceptions and limitations based on context of education (e.g. level of education or training, commercial purpose) (Table 11), Restrictions on types of works that can be used for digitally-supported education under exceptions and limitations (Table 12), Obstacles and uncertainties related to ensuring normal exploitation of works (Table 14) and Compensation mechanisms for use of copyrighted works under exceptions and limitations (Table 15).

	Legal Basis	Links
<b>Czech Republic</b>	Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendments to Certain Acts (the Copyright Act, as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.)	<a href="http://bit.ly/2puE5pz">http://bit.ly/2puE5pz</a>
<b>Denmark</b>	Consolidated Act No. 1144 of 23 October 2014	<a href="http://bit.ly/2nUnHyv">http://bit.ly/2nUnHyv</a>
<b>Estonia</b>	Copyright Act of 11 November 1992 (RT I 1992, 49, 615), as last amended by the Act of 23 March 2016 (RT I, 01.04.2016, 2)	<a href="http://bit.ly/2p9freq">http://bit.ly/2p9freq</a>
<b>Finland</b>	Copyright Act (404/1961, amendments up to 608/2015)	<a href="http://bit.ly/2pslxCh">http://bit.ly/2pslxCh</a>
<b>France</b>	Code de la propriété intellectuelle (version consolidée au 17 mars 2017)	<a href="http://bit.ly/2pHPmPB">http://bit.ly/2pHPmPB</a>
<b>Germany</b>	Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714)	<a href="http://bit.ly/2oFi720">http://bit.ly/2oFi720</a>
<b>Italy</b>	Legge 22 aprile 1941 n. 633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (G.U. n.166 del 16 luglio 1941) [testo consolidato al 6 febbraio 2016 (DLgs 15 gennaio 2016, n. 8)]	<a href="http://bit.ly/1pe4eoz">http://bit.ly/1pe4eoz</a>
<b>Luxembourg</b>	Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données	<a href="http://bit.ly/2p9sYm8">http://bit.ly/2p9sYm8</a>
<b>Malta</b>	Copyright Act of 2000 (Chapter 415) as amended up to Act No. VIII of 2011	<a href="http://bit.ly/2omo8gj">http://bit.ly/2omo8gj</a>
<b>Netherlands</b>	Copyright Act 1912 (referred to as "Aw") Related Rights Act 1993 (referred to as "WNR")	<a href="http://bit.ly/2p9Fan5">http://bit.ly/2p9Fan5</a> <a href="http://bit.ly/2nVeMNV">http://bit.ly/2nVeMNV</a>
<b>Poland</b>	Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych	<a href="http://bit.ly/2ohJ8WB">http://bit.ly/2ohJ8WB</a>
<b>Portugal</b>	Código do Direito de Autor e dos Direitos Conexos (versão actualizada até Lei n.º 49/2015, de 5 de junho)	<a href="http://bit.ly/2oOSBHN">http://bit.ly/2oOSBHN</a>
<b>Romania</b>	Legea nr 8/1996 privind dreptul de autor si drepturile conexe (actualizata pina in Aprilie 2011)	<a href="http://bit.ly/2p9fRBw">http://bit.ly/2p9fRBw</a>
<b>Spain</b>	"Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (texto consolidado el 5 de noviembre de 2014)"	<a href="http://bit.ly/1GEsANj">http://bit.ly/1GEsANj</a>
<b>United Kingdom</b>	Copyright, Designs and Patents Act 1988 (Chapter 48)	<a href="http://bit.ly/1bCSMBd">http://bit.ly/1bCSMBd</a>

The results of the legal analysis performed for each scenario are presented in tables. Countries that allow a specific use free of charge are marked with “Yes”, countries that make the use subject to compensation/remuneration are marked with “Yes, paid”, countries that do not allow a specific use are marked with “No”, and countries where legal uncertainty exists as to whether use is permitted or not are marked with a question mark “?”. The respective legal basis is given for each answer. For countries where use is not allowed, the author identified the main legal impediment.

# I. Materials Available for Educational Use

In this section, three educational scenarios involving uses of different types of protected works and other subject matter are analysed: the quotation of an entire artwork, the scanning of parts of a textbook and the recording of an entire TV programme.

Through the analysis of these everyday uses, it is possible to ascertain that not all copyrighted works are treated equally in the context of education. Some educational exceptions exclude the use of certain types of works (textbooks and academic books in France and Germany, dramatic works and cinematographic works in Denmark and Finland and musical scores in France and Spain). Other laws contain restrictions on the extent or degree to which a work can be used for educational purposes, thus creating obstacles to the use of entire works, namely short works (e.g. individual articles, short videos and short poems) and images (e.g. artworks, photographs and other visual works). Finally, several legal provisions only permit educational uses of “published works”, thus potentially excluding the use of works made available to the public by ephemeral or transient means that do not involve the making of copies of the work, such as performance, exhibition and broadcasting.

		73%	0%	27%	0%	<p><b>A student wants to quote an entire artwork in a digital presentation - is that legal?</b></p>		
						Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)		
Denmark	●					Sec. 22; Sec. 23(1)		
Estonia	●					Sec. 19(1)		
Finland	●					Sec. 22; Sec. 25(1)		
France	●		●			Art. L122-5(3°)(a)	Extension of work	
Germany	●					Art. 51(1)		
Italy	●			●		Art. 70(1)	Extension of work	
Luxembourg	●			●		Art. 10(1)	Extension of work	
Malta	●					Art. 9(1)(k)		
Netherlands	●					Art.15a Aw		
Poland	●					Art. 29		
Portugal	●					Art.75(2)(g)		
Romania	●			●		Art. 33(1)(b) and (c)	Extension of work	
Spain	●					Art. 32(1)		
United Kingdom	●					Sec. 30(1ZA)		
<b>Table 1</b>	<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<p><b>Extension of work:</b> <i>the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</i></p>			

Images are one of the types of works used most frequently in education in the EU, with more than 72% of educators and 65% of learners reporting the use of digital images at least once a week in a survey of learners and educators commissioned by the European Union<sup>12</sup>. In this survey, 47% of educators and almost 38% of learners stated that they encountered restrictions on their use of digital images in an educational context<sup>13</sup>.

The quotation of entire images (e.g. artworks, photographs and other visual works) for educational purposes is not allowed in four of the countries analysed. None of the quotation exceptions implemented in the laws of the selected countries contains any restriction as to the type of quotable works. The use of images is therefore permitted in all of them. However, some of these

<sup>12</sup> EC 2016 Study, Figure 15, p. 59.

<sup>13</sup> EC 2016 Study, Table 13, p. 84.

legal provisions delineate the degree or extent to which a copyrighted work is quotable, thereby hindering the quotation of an entire image e.g. in a student's presentation.

By definition, the extent to which a copyrighted work may be quoted is already limited. That does not mean that a work cannot be quoted in its entirety provided that the degree of use is consistent with the permitted purpose<sup>14</sup>.

In all the countries examined, quotations are only allowed to the extent required by the purpose<sup>15</sup>. However, some national lawmakers have decided not to let the extent to which a work can be quoted to be determined on a case-by-case basis; they have, instead, narrowed the scope of the exception by inserting wording that explicitly<sup>16</sup> or implicitly<sup>17</sup> imposes an extent limitation. This means that, unless a proper provision is in place to exempt the quotation of entire artworks, such works can only be partially quoted and, consequently, the exception is of little use for those types of works. That is the case with the national legislation of France, Italy, Luxembourg and Romania.

Finally, it is worth mentioning that the selected quotation exceptions are technologically neutral, thus permitting digital uses of quoted works.

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14 That is a common understanding with regards to the quotation exception stipulated by art. 10(1) of the Berne Convention for the Protection of Literary and Artistic Works, adopted at Paris on September 9, 1886, as revised and amended (hereinafter "Berne Convention"). See Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 5 April 2003, SCCR/9/7, available at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf) [assessed 12 April 2017], p.12. See also Xalabarder, *op.cit.*, p.19.

15 Domestic laws use formulas equivalent or similar to the Berne Convention: "provided that (...) their extent does not exceed that justified by the purpose" (see art. 10(1)). Others use wordings similar to 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 (hereinafter "InfoSoc Directive"): "to the extent required by the specific purpose" (see art. 5(3)(d)).

16 Italy expressly states that one can only quote a part of a work ("parti di opera").

17 France, Luxembourg and Romania use expressions that suggest that one cannot quote an entire work: "courtes citations" ("short citations") is the wording used in France and Luxembourg; "scurte citate dintr-o opera" ("brief quotations of a work") is the expression used in Romanian law.



		67%	7%	26%	0%	<p><b>A teacher wants to scan a few pages from a textbook to show them in class via an interactive whiteboard - is that legal?</b></p>		
		yes, free	yes, paid	no	?	Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)	Act of use	The use may be allowed under an extended collective license [see Sec. 13(1)]
Denmark			●			Sec. 19(2) and (3)		Act of use
Estonia	●					Art. L122-5(3°)(e)	Type of work	
Finland				●		Art. 53(3)	Type of work	
France				●		Art. 70(1); Art. 15, 2nd para.		
Germany				●		Art. 10(2)		
Italy	●					Art. 9(1)(g) and (h)		
Luxembourg	●					Art.16(1) Aw; Art. 12(5) Aw.		
Malta	●					Art. 27(1)		
Netherlands		●				Art.75(2)(f)		
Poland	●					Art. 33(1)(e) and (2)(d).		
Portugal	●					Art. 32(3)		
Romania	●					Sec. 36(1),(4) and (5); Sec. 34(1).		
Spain	●							
United Kingdom	●							Licenses take precedence [see Sec. 36(6)]
<b>Table 2</b>						<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.  <b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.</p>		

Textual works are one of the types of works used most frequently in education in the EU with more than 70% of educators and nearly 80% of learners using digital text works in an educational context at least once a week<sup>18</sup>. In general, copyright laws do not restrict uses of textual works for educational purposes. However, in the aforementioned survey commissioned by the European Union, more than 45% of educators and 66% of learners stated that they encountered restrictions in their use of text documents for educational purposes<sup>19</sup>.

This may be partially related to the fact that, in some countries, the use of textbooks or academic books is not permitted under the educational exception. That is the case in France and Germany. In those countries, teachers and students always need to ask for permission to use them, even if the intended educational activity involves only the use of a few pages of said works.

18 EC 2016 Study, Figure 15, p. 59.

19 EC 2016 Study, Table 13, p. 84.

None of the copyright exceptions analysed specified the means of reproduction covered by the legal provision. Therefore, the author concluded that digital copies made by scanning or otherwise were permitted.

		26%	0%	67%	7%	<h2 style="text-align: center;">A teacher wants to record a TV programme to show in class - is that legal?</h2>		
Czech Republic Denmark Estonia Finland France Germany Italy Luxembourg Malta Netherlands Poland Portugal Romania Spain United Kingdom	●			●		<b>Legal Basis</b> Sec. 31(1); Sec. 86	<b>Obstacles</b> Act of use	<b>Notes</b> The use may be allowed under an extended collective license [see Sec. 13(1)]
				●		Sec. 19(2) and (3); Sec. 75(1)(2)	Type of work?	The broadcasting of literary or artistic works does not constitute publication [see Sec. 9(3)]
				●		Art. L122-5(3°)(e)	Act of use	The use may be allowed under an extended collective license [see Sec. 14(1)]
				●		Art. 53(3)	Extension of work	
				●		Art. 70(1)	Extension of work	
				●		Art. 10(2)	Extension of work	
		●		●		Art. 9(1)(g) and (h); Art. 21	Extension of work	The broadcasting of works does not constitute publication [see Art. 6(3)]
				●		Art.16(1) Aw	Extension of work	Public communication includes showing a broadcast work [see Art. 15(2)]
				●		Art. 27(1)	Extension of work	Public communication includes showing a broadcast work [see Art. 20(2)(b)]
		●		●		Art.75(2)(f)	Type of work; Extension of work	Licenses take precedence [see Sec. 35(4)]
	●		●		Art. 33(1)(e); Art.33(2)(d); Art. 112			
	●		●		Art. 32(3)	Extension of work		
					Sec. 35(1); Sec. 34(2); Schedule 2 para. 5			
<h2 style="text-align: center;">Table 3</h2>	<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use. <b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation. <b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.			

Video media are one of the least frequently used types of works in education in the EU, with a little more than 40% of educators and nearly 35% of learners stating that they use digital video works in an educational context at least once a week<sup>20</sup>. Save for Nordic countries that restrict the use of cinematographic works in education, and Germany that may impose a time-lapse of 2 years from the release of the cinematographic work before certain educational uses can be made, none of the other countries analysed treat audio-visual works differently from other copyrighted works. Nevertheless, in a survey of stakeholders commissioned by the European Union, more than 60% of right holders and more than 60% of users reported that digital video media have limited use in education as a result of copyright concerns<sup>21</sup>.

20 EC 2016 Study, Figure 15, p. 59.

21 EC 2016 Study, Table 5, p. 60.

The hypothetical scenario presented herein involves two acts of use: reproduction of a work and related subject matter and communication of the resulting copies to the classroom. Copying an entire TV programme for private use would not be a problem in most of the countries analysed, but to show it in a classroom would be. The extent to which a protected work or other subject matter can be copied is the main obstacle found in this hypothetical scenario. While only four of the countries analysed prevent a teacher from showing an entire TV programme in a classroom, a total of eight countries prohibit the act of recording that TV programme in its entirety.

Interestingly, Estonia, the country that has implemented one of the most generous copyright exceptions for educational purposes, may not allow this educational activity because the educational exception is only applicable to “published works”. According to sec. 9(3) of the Estonian Copyright Act, which resembles the second sentence of art. 3(3) of the Berne Convention, the act of broadcasting a literary or artistic work does not itself constitute publication. The meaning of “publication” is a difficult question and it is subject to different interpretations<sup>22</sup>. It appears that a TV programme is not considered to be published if it is broadcasted without actual copies of the TV programme being placed at the disposal of the public (or at least at the disposal of the broadcasters for purposes of public display). Therefore, the author concluded that there is legal uncertainty in Estonia regarding the educational activity presented herein.

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<sup>22</sup> For an analysis of the concept of “publication” in the Berne Convention, see Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Volume I (2nd Ed., Oxford 2006), 6.22 to 6.52.

## II. Traditional Educational Practices

This section presents three educational uses of protected works and other subject matter involving non-tangible disseminations or communications of copyrighted works to the public when the communication originates from the same place and at the same time as the location of the public: a public performance of a piece of music in a classroom, a public performance of a dramatic work in a school event and the screening of a film in a classroom.

The legal analysis done to resolve these hypothetical cases shows that performances, recitations and displays of protected works and other subject matter are permitted in most of the countries analysed under general educational exceptions. However, extent restrictions in France, Luxembourg, Portugal and Spain, and the exclusion of certain types of works from the scope of the exception in Denmark, Finland, France and Spain hinder the performance of an entire piece of music and/or a dramatic work and/or the screening of an entire film in class.

Italy, Germany (through case law), the Netherlands, and the United Kingdom do not consider performances, recitations or displays to be public performances if they are made in the context of an educational activity. In other words, those activities are excluded from the scope of copyright protection, and educators and learners in these countries do not have to worry about the extent of use, the payment of compensation/remuneration or compliance with the three-step test. It should be noted, however, that these national laws will not necessarily treat a performance made inside a classroom the same way as a performance made during a school event, namely a school event in which parents are in the audience.

		73%	0%	27%	0%	<p><b>A teacher wants her students to play a piece of music in class from a musical score - is that legal?</b></p>		
						Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)(c)		
Denmark	●					Sec. 21		
Estonia	●					Sec. 19(2); Sec. 22		
Finland	●					Sec. 21		
France	●		●			Art. L122-5(3°)(e)	Type of work; Extension of work	
Germany	●					Case Law		
Italy	●					Art. 15, 2nd para.		
Luxembourg	●			●		Art. 10(2)	Extension of work	A class in school (primary and secondary education) is not considered a public (see LG München I, 30.03.2004, 21 O 4799/04)
Malta	●					Art. 9(1)(g)		
Netherlands	●					Art. 12(5) Aw		
Poland	●					Art. 27(1)		
Portugal	●			●		Art.75(2)(f)	Extension of work	
Romania	●					Art. 33(1)(g)		
Spain	●			●		Art. 32(3)	Type of work; Extension of work	
United Kingdom	●					Sec. 34(1)		
<b>Table 4</b>	<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<p><b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</p> <p><b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.</p>			

As we saw above, four of the countries analysed do not consider an educational performance made in a classroom to be a public performance, thus permitting students to play entire pieces of music before an audience consisting of their fellow students and teachers.

Denmark, Estonia, Finland and Malta have implemented specific exceptions to copyright to deal with public performance of works for educational purposes, and none of those exceptions excludes musical works from the scope of the exception, nor do they restrict the extent to which a musical work can be performed.

France, Luxembourg, Portugal and Spain treat educational performances the same way as they treat educational reproductions or educational communications: the legal provisions restrict the extent or degree to which a work can be used for educational purposes. This means that the performance of an entire piece of music in class for training purposes is not allowed in these countries. Moreover, France and Spain expressly prohibit the use of printed musical scores in education.

		40%	0%	47%	13%	<p><b>A group of students wants to perform a theatrical play in a school event attended by students, teaching staff and parents - is that legal?</b></p>		
Czech Republic Denmark Estonia Finland France Germany Italy Luxembourg Malta Netherlands Poland Portugal Romania Spain United Kingdom	●			●		Legal Basis	Obstacles	Notes
				●		Sec. 31(1)(c)	Type of work Act of use?	Public communication includes public performance [see Art. 15(2)(f)]
				●		Sec. 21		
				●		Sec. 19(2); Sec. 22	Type of work Extension of work	Performances that do not occur within traditional school hours do not fall under Art. 12(5) (see Rechtbank's-Hertogenbosch, case number 137758 of 16 May 2007, AMI 2007, 133)...
				●		Sec. 21		
				●		Art. L122-5(3°)(e)	Extension of work	EC 2016 Study: legal uncertainty exists regarding public performance in educational institutions
				●		Art. 52(1)		
				●		Art. 15, 2nd para.	Act of use?	
				●		Art. 10(2)		
				●		Art. 9(1)(g)	Act of use?; Extension of work	
			●		Art. 12(5) Aw; Case Law			
			●		Art. 31(1)	Type of user		
			●		Art.75(2)(f)			
			●		Art. 33(1)(g)			
			●		Art. 32(3)			
			●		Sec. 34(1) and (3)			
<p><b>Table 5</b></p>		<p><b>yes, free</b></p>	<p><b>yes, paid</b></p>	<p><b>no</b></p>	<p><b>?</b></p>	<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.</p> <p><b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</p> <p><b>Type of user:</b> the copyright exception or limitation is not for the benefit of such entity or person.</p> <p><b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.</p>		

The results of this hypothetical scenario differ from the previous one because of the type of work involved and/or the context of use.

In Denmark and Finland, dramatic works cannot be performed publicly in the context of education. In spite of relying on extended collective licenses to authorize most educational uses of copyrighted works and other subject matter, these countries have implemented specific exceptions in their laws permitting public performances of published works. However, the utility of these provisions is greatly diminished by the exclusion of two types of works from the scope of application of these exceptions: dramatic works and cinematographic works.

The change of context from classroom to school event plays a decisive role in the Netherlands, the United Kingdom and Malta. Case law in the Netherlands suggests that not all performances inside a school's walls can be excluded from the concept of public performance<sup>23</sup>. The District Court of Hertogenbosch ruled that performances that do not occur during traditional school hours, and performances for entertainment (such as during school parties and national holiday celebrations), should not be excluded from the scope of protection of the public performance right under article 12(5) Aw.

For its part, the United Kingdom excludes all performances from the concept of public performance that take place "in the course of the activities of the educational establishment", but limits the audience to teachers, pupils and other persons directly connected with the activities of the educational establishments. The English provision further states that a person is not to be considered directly connected with the establishment "simply because he is the parent of a pupil at the establishment"<sup>24</sup>.

Estonia also requires the educational performance to take place before teaching staff, students and other persons directly connected with the educational institution. However, contrary to English law, the Estonian law mentions parents, guardians and caregivers as examples of persons that are to be considered as such<sup>25</sup>. The only uncertainty posed by Estonian law to this hypothetical scenario is with regards to the nature of the school event. According to this national law, public performances have to occur "in the direct teaching process".

<sup>23</sup> See Rechtbank's-Hertogenbosch, case number 137758 of 16 May 2007, AMI 2007, 133.

<sup>24</sup> See Sec. 34(3).

<sup>25</sup> See Sec. 22.

		60%	0%	40%	0%	<p><b>A teacher wants to screen and discuss a movie from a DVD personally owned by the teacher in class - is that legal?</b></p>		
		yes, free	yes, paid	no	?	Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)(c); Sec. 82	Type of work	A class in school (primary and secondary education) is not considered a public (see LG München I, 30.03.2004, 21 O 4799/04)
Denmark	●			●		Sec. 21	Type of work	
Estonia	●					Sec. 19(2); Sec. 75(1)(2)	Type of work	Public communication includes showing a film [see Art. 15(2)]
Finland	●			●		Sec. 21	Extension of work	
France	●					Art. L122-5(3°)(e)	Extension of work	Public communication includes showing a film [see Art. 20(2)(b)]
Germany	●					Case Law	Extension of work	
Italy	●					Art. 15, 2nd para.	Extension of work	Public communication includes showing a film [see Art. 15(2)]
Luxembourg	●			●		Art. 10(2)	Extension of work	
Malta	●					Art. 9(1)(g); Art. 21	Extension of work	Public communication includes showing a film [see Art. 20(2)(b)]
Netherlands	●					Art. 12(5) Aw	Extension of work	
Poland	●					Art. 27(1) and Art. 100	Extension of work	Public communication includes showing a film [see Art. 20(2)(b)]
Portugal	●			●		Art.75(2)(f)	Extension of work	
Romania	●					Art. 33(2)(d); Art. 112	Extension of work	Public communication includes showing a film [see Art. 20(2)(b)]
Spain	●			●		Art. 32(3)	Extension of work	
United Kingdom	●					Sec. 34(2); Schedule 2, para. 5	Extension of work	
<b>Table 6</b>		<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<p><b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.</p> <p><b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</p>		

Some countries consider showing a film to be an act akin to a public performance, while others differentiate between these two acts of communicating a work to the public. Despite the conceptual differences, the outcomes of this legal scenario do not differ from those of the first scenario by reason of the specific acts of use involved therein. The distinction lies in the type of works and other subject matter used in the two cases. As we noted above, in Denmark and Finland, cinematographic works cannot be shown in the context of education. This exclusion is common only in Nordic countries. No other legal provisions analysed in this study contain a similar restriction.

It should also be underlined that provisions dealing with related subject matter analysed in this study treat the educational uses of subject matter such as films in a way similar to the one contemplated for copyrighted works<sup>26</sup>.

<sup>26</sup> National laws address this issue in three different ways: by including related subject matter under the exceptions applicable to works; by applying the exceptions to author's rights mutatis mutandis to related rights; or by means of specific exceptions that either use the same wording of the legal provisions applicable to works, or have similar scopes of application.



## III. Modern Educational Practices

This section features three educational uses of protected works and other subject matter involving non-tangible disseminations or communications of copyrighted works to the public by wire or wireless means with the public not being present in the place where the communication originates: visualizing an online video in class, emailing reading materials and sharing an individual article through the school's closed network.

Most of the countries analysed permit acts of use involved in the visualization of materials that are freely available online in class. This activity may even be permitted in all of the 15 countries considering the interpretation given by the Court of Justice of the European Union ("CJEU") on the scope of application of the harmonised right of communication to the public. However, since EU case law is not clear-cut and straightforward, a cautious approach was adopted, and uses were analysed in light of existing national copyright exceptions. The application of national copyright exceptions only leads to contrasting results when a teacher screens an entire film on a DVD in class and when that same teacher shows an entire online video in class in two countries: Italy and the Netherlands.

The legal standing in sharing educational materials via email, the cloud, chatrooms, etc. is not entirely certain in some of the countries analysed, but the majority allows the use of such means of communication.

When it comes to sharing resources through online platforms, several of the countries analysed limit the potential beneficiaries of these type of uses, but only Spain and the United Kingdom expressly require such use to be made through a closed/secure electronic network, accessible only by the students and teachers of a given educational establishment.

				<p><b>A teacher wants to show and discuss a short video in class that is available on a free publicly-accessible online platform - is that legal?</b></p>																																	
		yes, free	yes, paid	no	?																																
Czech Republic Denmark Estonia Finland France Germany Italy Luxembourg Malta Netherlands Poland Portugal Romania Spain United Kingdom	●			●		<table border="1"> <thead> <tr> <th>Legal Basis</th> <th>Obstacles</th> <th>Notes</th> </tr> </thead> <tbody> <tr> <td>Sec. 31(1)(c); Sec. 82</td> <td>Act of Use</td> <td rowspan="11">                             A class in school (primary and secondary education) is not considered a public (see LG München I, 30.03.2004, 21 O 4799/04)                               Public communication includes showing a film [see Art. 15(2)]                              Public communication includes showing a film [see Art. 20(2)(b)]                         </td> </tr> <tr> <td>Sec. 19(2); Sec. 75(1)(2)</td> <td>Act of Use</td> </tr> <tr> <td>Art. L122-5(3°)(e)</td> <td>Extension of work</td> </tr> <tr> <td>Case Law</td> <td></td> </tr> <tr> <td>Art. 70(1)</td> <td>Extension of work</td> </tr> <tr> <td>Art. 10(2)</td> <td>Extension of work</td> </tr> <tr> <td>Art. 9(1)(h); Art. 21</td> <td></td> </tr> <tr> <td>Art. 16(1) Aw</td> <td>Extension of work</td> </tr> <tr> <td>Art. 27(1) and Art. 100</td> <td></td> </tr> <tr> <td>Art. 75(2)(f)</td> <td>Extension of work</td> </tr> <tr> <td>Art. 33(2)(d); Art. 112</td> <td></td> </tr> <tr> <td>Art. 32(3)</td> <td>Extension of work</td> </tr> <tr> <td>Sec. 34(2); Schedule 2 para. 5</td> <td></td> <td></td> </tr> </tbody> </table>	Legal Basis	Obstacles	Notes	Sec. 31(1)(c); Sec. 82	Act of Use	A class in school (primary and secondary education) is not considered a public (see LG München I, 30.03.2004, 21 O 4799/04)  Public communication includes showing a film [see Art. 15(2)] Public communication includes showing a film [see Art. 20(2)(b)]	Sec. 19(2); Sec. 75(1)(2)	Act of Use	Art. L122-5(3°)(e)	Extension of work	Case Law		Art. 70(1)	Extension of work	Art. 10(2)	Extension of work	Art. 9(1)(h); Art. 21		Art. 16(1) Aw	Extension of work	Art. 27(1) and Art. 100		Art. 75(2)(f)	Extension of work	Art. 33(2)(d); Art. 112		Art. 32(3)	Extension of work	Sec. 34(2); Schedule 2 para. 5		
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<b>Table 7</b>						<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.</p> <p><b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</p>																															

Viewing materials in class is one of the most relevant practices in contemporary education. More than 66% of educators regularly use/ read/ watch/ play digital works online, without downloading them, for educational purposes, and nearly 50% of educators regularly present/ read/ watch/ show/ play digital works (created by somebody else) in a classroom<sup>27</sup>.

In the EU, the right of communication to the public of copyrighted works, by wire or wireless means, is harmonised<sup>28</sup>. This means that the national laws of selected countries have to be interpreted in a uniform way, taking into account CJEU case law on public communication.

27 EC 2016 Study, Table 6, p. 60-61.

28 See art. 3 of the InfoSoc Directive.

The CJEU has developed four main criteria to assess whether an act of communication constitutes public communication under EU law<sup>29</sup>: 1) the person using a means of communication must intervene to give access to the protected work<sup>30</sup>, 2) the potential beneficiaries of the communication must constitute an indeterminate and fairly large number of recipients<sup>31</sup>, 3) the act of communication must reach a “new public”, meaning an audience consisting of persons not foreseen by the authors of the protected works<sup>32</sup>, and of lesser importance 4) the profit-making nature of the act of communication<sup>33</sup>.

According to these criteria, it appears that the educational use presented in this hypothetical legal scenario should be permitted in all the countries analysed. However, assessing each of these criteria is a complex exercise, and there is no CJEU case law dealing with a similar act of use by a similar type of user. Therefore, a cautious approach was adopted, and uses were analysed in light of existing national copyright exceptions and the national case law known to the author<sup>34</sup>.

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29 For a critical review of the criteria, see e.g. L.Guibault, J.P.Quintais, Copyright, technology and the exploitation of audiovisual works in the EU, IRIS Plus, 4/2014, p. 9-24, available at <https://www.ivir.nl/publicaties/download/1488> [assessed 12 April 2017].

30 See CJEU Case C-403/08 FA Premier League v. QC Leisure, 4 October 2011; CJEU Case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso, 15 March 2012; CJEU Case C-162/10 Phonographic Performance (Ireland), 15 March 2012.

31 See e.g. CJEU Case C-162/10 Phonographic Performance (Ireland), 15 March 2012, para. 35.

32 See CJEU C-306/05 Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, 7 December 2006. But in Case C-607/11 ITV Broadcasting/TV Catchup, 7 March 2013, the CJEU developed an alternative criterion: if the user provides “an independent, specific technical means of making available to the public” the protected work, a separate authorization will always be required and there is no need to analyse the requirement of a “new public”.

33 See CJEU C-306/05 Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, 7 December 2006, para. 44; see also CJEU Case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso, 15 March 2012, para. 97. In the SGAE the Court stated that the “pursuit of profit is not a necessary condition for the existence of a communication to the public” (see para. 44). Nevertheless, that was one of the main grounds for the Court to consider that playing broadcasted music, free of charge, in the waiting room of a dentist office, for the benefit of patients, did not constitute an act of public communication.

34 In those countries where the educational use is not allowed by national copyright exceptions, one can consider that legal uncertainty exists, taking into account the CJEU’s above-mentioned case law. Nonetheless, the author has not labelled those countries with legal uncertainty to be able to present the solutions offered by national copyright exceptions.

The resolution of this hypothetical case in those countries that have an umbrella solution covering different acts of communication to the public under the same copyright exception or limitation, irrespective of the technology used, naturally leads to the same results as in the scenario in which a teacher shows a film on a DVD he or she personally owns.

From among the countries that differentiate between educational performances, recitations and displays, on one hand, and acts of communication by wire or wireless means without the public being present in the place where the communication originates, on the other hand, only Italy and the Netherlands offer different solutions depending on whether the film is available online or is recorded on a DVD.

In Italy and in the Netherlands the rule excluding educational performances from the scope of the public performance right is not applicable to the visualization of an online video because the act of use involves a different right. This hypothetical scenario had, therefore, to be resolved under the general educational exception prevailing in those countries. Since these exceptions restrict the extent to which a work can be used in both countries, we concluded that teachers would be prevented from showing an entire online video in class, whereas as we saw it, if the video was recorded on a DVD, such use would be permitted.

				<p style="text-align: center;"><b>A teacher wants to send a single e-mail to all her students with excerpts of reading materials - is that legal?</b></p>			
				53%	7%	33%	7%
				yes, free	yes, paid	no	?
<p>Czech Republic</p> <p>Denmark</p> <p>Estonia</p> <p>Finland</p> <p>France</p> <p>Germany</p> <p>Italy</p> <p>Luxembourg</p> <p>Malta</p> <p>Netherlands</p> <p>Poland</p> <p>Portugal</p> <p>Romania</p> <p>Spain</p> <p>United Kingdom</p>	●						
	Legal Basis	Obstacles	Notes				
	Sec. 31(1)(c)	Act of use	The use may be allowed under an extended collective license [see Sec. 13(1)]				
	Sec. 19(2)	Act of use	The use may be allowed under an extended collective license [see Sec. 14(1)]				
	Art. L122-5(3°)(e)	Act of use	EC 2016 Study: legal uncertainty exists regarding transmission of materials to learners by email				
	Art. 52a (1) and (4)	Act of use	EC 2016 Study: transmission of materials to learners by email is not allowed				
	Art. 10(2)	Act of use	EC 2016 Study: allowed only under private use exception, if the communication is to a single person				
	Art. 9(1)(h)						
	Art. 27(2)						
	Art. 75(2)(f)						
	Art. 33(2)(d)						
Art. 32(3)	Act of use						
<p><b>Table 8</b></p>				<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.</p>			

Modern communication tools are part of the day-to-day activities of the educational community, with more than 45% of educators and more than 56% of learners reporting that they regularly send digital works via email, the cloud, chatrooms, etc. for educational purposes<sup>35</sup>. Unfortunately, a considerable number of the countries analysed does not exempt acts of use that would be necessary to send excerpts of works via email and other private tools, while in other countries the situation is still uncertain<sup>36</sup>.

35 EC 2016 Study, Table 6, p. 60-61.

36 See for Germany, Italy and the Netherlands EC 2016 Study, Country Fiches, p. 42-44, 117-119, 152-154.

					<h2 style="margin: 0;">A teacher wants to share an individual article with his students via the school's closed network - is that legal?</h2>		
					Legal Basis	Obstacles	Notes
Czech Republic	●				Sec. 31(1)(c)	Act of use	The use may be allowed under an extended collective license [see Sec. 13(1)]
Denmark			●		Sec. 19(2)		Act of use
Estonia	●				Art. L122-5(3 <sup>o</sup> )(e)	Extension of work	EC Study: making available to incribed learners through an intranet/closed network is not allowed
Finland			●		Art. 52a(1) and (4)	Act of use	
France			●		Art. 10(2)	Extension of work	
Germany	●				Art. 9(1)(h)	Extension of work	
Italy			●		Art. 16(1) and (2) Aw		Extension of work
Luxembourg	●				Art. 27(2)	Extension of work	
Malta			●		Art.75(2)(f)		Extension of work
Netherlands		●			Art. 33(2)(d)	Extension of work	
Poland	●				Art. 32(4)		Extension of work
Portugal			●		Sec. 36(2) to (5)	Extension of work	
Romania	●						
Spain		●					
United Kingdom			●				
<b>Table 9</b>	<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.</p> <p><b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</p>		

According to the survey of learners and educators commissioned by the European Union, only about 30% of educators and fewer than 25% of learners regularly post digital works on their educational institution’s intranet/online platform<sup>37</sup>. Nevertheless, the act of making protected works and other subject matter available for educational purposes is permitted in most of the countries analysed. As we can see in this table, it is the extent to which a work can be used, not the act of use itself, that ultimately constitutes the primary obstacle to this modern educational practice.

It is worth mentioning that, although several of the countries analysed limit the potential beneficiaries of these type of educational uses, only Spain and the United Kingdom expressly require such use to be made through a closed/secure electronic network, accessible only by the students and teachers of a given educational establishment.

<sup>37</sup> EC 2016 Study, Table 6, p. 60-61.

## IV. Creation of Educational Materials

In this section, three educational scenarios, involving the use of pre-existing works to create new educational resources, are analysed: quoting an entire poem in an educational resource, creating a teaching compilation, and translating parts of a book.

The act of quoting is extremely relevant for the creation of educational materials based on another person's protected work or some other subject matter, and as we saw in Table 1, it is permitted in all of the countries analysed. The only problem identified with quotations concerns the extent of use, which can be a limitation when short works are used such as in the scenario below. Compilations are only prohibited in Spain, but several countries demand the payment of compensation/remuneration. This may act as a deterrent dissuading teachers from creating sets of educational materials. Translations are not allowed in Denmark, Finland, Italy and Spain.

		67%	0%	27%	7%	<p><b>A teacher wants to quote an entire poem in an educational resource - is that legal?</b></p>		
		yes, free	yes, paid	no	?	Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)		
Denmark	●					Sec. 22		
Estonia	●					Sec. 19(1)		
Finland	●					Sec. 22		
France			●			Art. L122-5(3°)(a)	Extension of work	
Germany	●					Art. 51(2)		
Italy			●			Art. 70(1)	Extension of work	
Luxembourg			●			Art. 10(1)	Extension of work	
Malta	●					Art. 9(1)(k)		
Netherlands	●					Art.15a Aw		
Poland	●					Art. 29		
Portugal	●					Art.75(2)(g)		
Romania				●		Art. 33(1)(c)	Type of work	
Spain			●			Art. 32(1)	Extension of work	
United Kingdom	●					Sec. 30(1ZA)		
<b>Table 13</b>						<p><b>Extension of work:</b> the law limits the amount or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.</p> <p><b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.</p>		

The only difference between the results presented herein and the findings in Table 1 above dealing with quotations of artworks pertains to Romania. Even though the Romanian quotation exception only permits quotations of parts of works, this country does allow the use of single articles in educational resources. The national law of Romania contains a legal provision allowing the use of isolated articles in any sort of publication exclusively intended for teaching purposes.

The law refers to “articole izolate”, which may be understood as encompassing only articles from periodicals or, under a broader interpretation, as referring to any individual textual works. For this reason, Romania is designated as a country with legal uncertainty in this quotation scenario.



		53%	33%	7%	7%	<p><b>A teacher wants to compile a few chapters from novels for use in class - is that legal?</b></p>		
		yes, free	yes, paid	no	?	Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)(c)		5 years must have elapsed since the year the work was published
Denmark			●			Sec. 18		
Estonia	●					Sec. 19(2)		5 years must have elapsed since the year the work was published
Finland			●			Sec. 18		EC 2016 Study: legal uncertainty exists regarding making teaching anthologies
France				●		Art. L122-5(3°)(e)		
Germany			●			Art. 46		The author or rightholder must be informed in advance [see Sec. 46(3)]
Italy			●			Art. 70(2)		Reproduction includes compiling (see Art. 3)
Luxembourg	●					Art. 10(2)		EC 2016 Study: teaching anthologies are allowed
Malta	●					Art. 9(1)(h)		
Netherlands	●					Art.16(3) Aw		
Poland	●					Art. 27(1)		
Portugal			●			Art.75(2)(h); Art. 76(1)(c)		
Romania	●					Art. 33(1)(c)		
Spain				●			Act of use	
United Kingdom	●					Sec. 33		
<b>Table 14</b>						<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.</p>		

The making of compilations for educational purposes is exempted by all except one of the national laws analysed: Spain. Only to the extent that the use of copyrighted works and other subject matter in the compilation qualifies as a quotation can it be allowed in Spain.

In the other countries, compilations are allowed either under specific teaching compilation exceptions or under general educational exceptions. Denmark, Finland, Germany, Italy, Netherlands, Portugal, Romania<sup>38</sup> and the United Kingdom exempt teaching compilations through specific teaching compilation exceptions. However, a significant percentage of these legal provisions seem to have been designed to deal only with commercial publications for teaching, and not with the sort of non-commercial compilations teachers routinely do (e.g. the typical set of materials students receive before attending a new course), since they

<sup>38</sup> Romania permits uses of protected works in “publications”. Reference is made in art. 10(2) of the Berne Convention to “publications” and such reference has been interpreted to include teaching compilations. See Xalabarder, op.cit, pp.14-15.

do not differentiate between teacher-created materials and a publication intended for commercial use, and require payment of compensation/remuneration in both cases.

					<p><b>A teacher wants to translate a short part of a book for use in class - is that legal?</b></p>		
					<b>Legal Basis</b>	<b>Obstacles</b>	<b>Notes</b>
Czech Republic	●				Sec. 31(1)(c)		Use includes using in original or modified form (see Sec. 12)
Denmark			●			Act of use	
Estonia	●				Sec. 19(2)		Use includes translating [see Sec. 13(1)(4)]
Finland			●			Act of use	
France		●			Art. L122-5(3°)(e)		EC 2016 Study: adaptations are allowed
Germany	●				Art. 53(3); Art. 62(2)		
Italy			●			Act of use	
Luxembourg	●				Art. 10(2)		Reproduction includes translating (see Art. 3)
Malta	●				Art. 9(1)(h)		
Netherlands		●			Art.16(1) and (4) Aw		Reproduction includes translating (see Art. 13 Aw)
Poland	●				Art. 27(1)		
Portugal	●				Art.75(2)(f); Art. 71		
Romania	●				Art. 35(d)		
Spain			●			Act of use	
United Kingdom				●	Sec. 32		Allowed only if considered fair dealing
<b>Table 15</b>	<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.		

Around 45% of educators in the EU create new educational works by adapting existing digital works, according to a survey of learners and educators commissioned by the European Union<sup>39</sup>.

The act of translating a copyrighted work for educational purposes is covered by most of the national laws analysed herein. The Czech Republic and Estonia have broad “use” exceptions that allow the use of copyrighted works in original and translated form. In Luxembourg and the Netherlands, the right to translate is included under the reproduction right. In the United Kingdom, alterations of

<sup>39</sup> EC 2016 Study, Table 6, p. 60-61.

copyrighted works in the context of educational activities may only be considered in the context of the fair dealing provision. In France adaptations appear to be allowed according to the EC 2016 Study<sup>40</sup>, but it is not clear to the author what the legal basis for such uses is.

Denmark, Finland, Italy and Spain do not have legal provisions permitting translations or any other adaptations of protected works and other subject matter for educational purposes in their national laws.

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<sup>40</sup> According to the EC 2016 Study, educational adaptations are allowed in France. See EC 2016 Study, Country Fiches, p. 87-90.

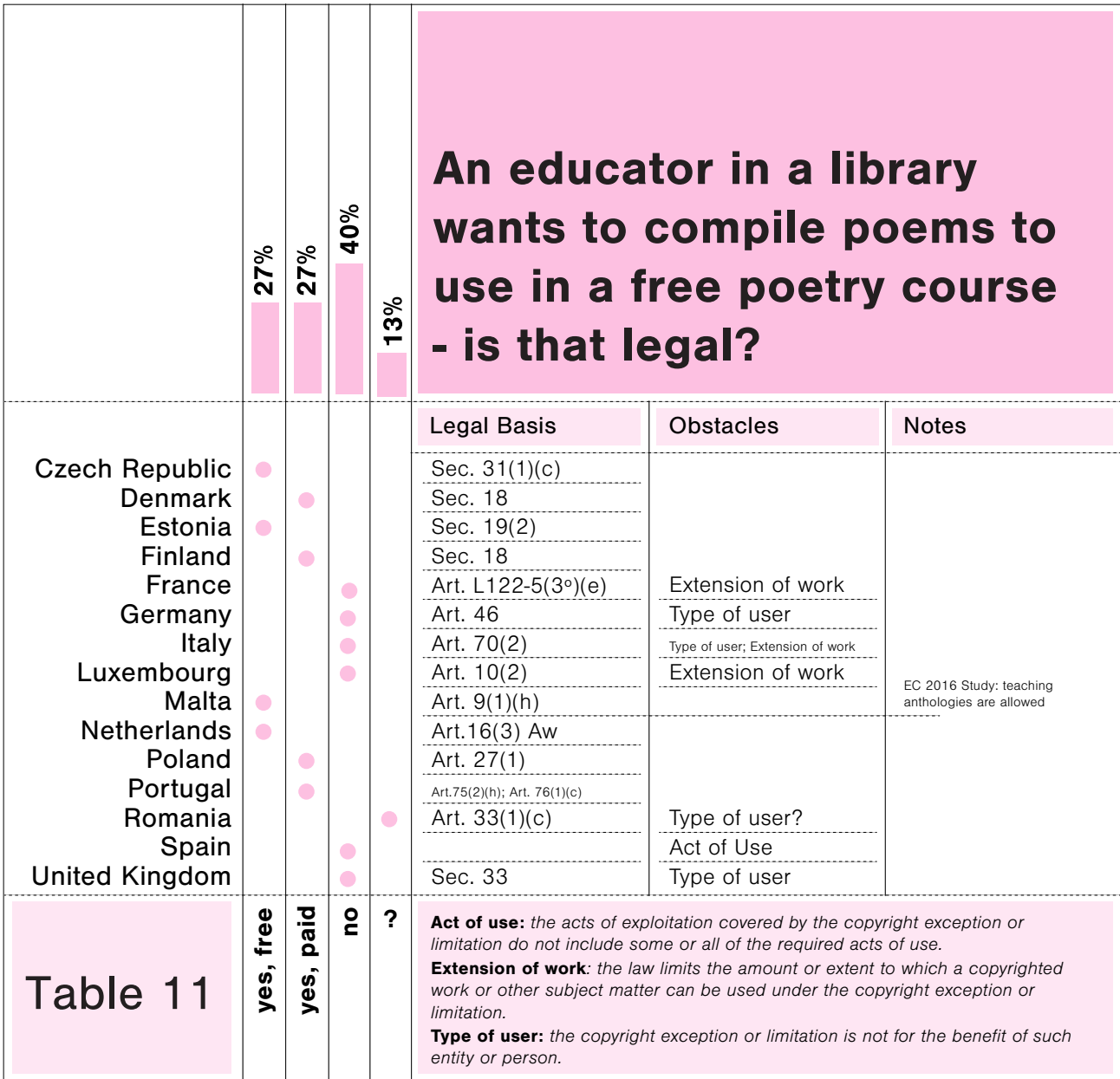
## V. Non-Formal Education

This last section revisits three everyday uses analysed in the previous sections, but in which the beneficiaries of use are not teachers and students in schools and other formal educational establishments. In these scenarios, the users are educators and learners in non-formal educational contexts: an educator in a museum who wants to make a digital copy of an art book, and an educator in a library who wants to make a compilation of poems, and an educator in a non-profit organization who wishes to show parts of a video during a free course.

These hypothetical scenarios show that, while most of the countries analysed do not discriminate against the person or entity running an educational activity, focusing solely on the educational purpose of use, a significant number of them only allows educational uses if they are made by schools or other formal educational establishments. This means that museums and other providers of non-commercial education in those countries need to ask for permission before using protected materials in their educational programmes.

		40%	13%	40%	7%	<p><b>An educator in a museum wants to scan pages from an art book to show to pupils attending an educational programme - is that legal?</b></p>		
		yes, free	yes, paid	no	?	Legal Basis	Obstacles	Notes
Czech Republic	●					Sec. 31(1)	Act of use	The use may be allowed under extended collective license [see Sec. 13(1)]
Denmark				●		Sec. 19(2) and (3)	Act of use	The use may be allowed under extended collective license [see Sec. 14(1)]
Estonia	●					Art. L122-5(3°)(e)	Type of user	
Finland				●		Art. 53(3)	Type of user	
France		●				Art. 70(1); Art. 15, 2nd para.	Type of user	
Germany				●		Art. 10(2)	Type of user	
Italy	●					Art. 9(1)(g) and (h)	Type of user	
Luxembourg	●					Art. 16(1) Aw; Art. 12(5) Aw	Type of user	
Malta	●					Art. 27(1)	Type of user?	
Netherlands			●			Art. 75(2)(f)	Type of user?	
Poland				●		Art. 33(1)(e) and (2)(d)	Type of user	
Portugal					●	Art. 32(3)	Type of user	
Romania	●					Sec. 36; Sec. 34(1)	Type of user	
Spain				●				
United Kingdom				●				
<b>Table 10</b>						<p><b>Act of use:</b> the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use.  <b>Type of user:</b> the copyright exception or limitation is not for the benefit of such entity or person.</p>		

This example is paradigmatic of the consequences of drafting an educational exception focusing on the type of person or institution doing the teaching, rather than on the educational purpose of use. An act that would be permitted in Germany, Poland, Portugal, Spain and the United Kingdom if the educator is providing education in an educational establishment is prohibited by the mere fact that the entity organising the educational activity is a museum.



As we saw in Table 11, compiling materials is permitted in several countries, namely for commercial purposes. Notwithstanding that, some countries only exempt compilations made for use in formal education. Germany, Italy, Romania and the United Kingdom have narrowed the scope of application of their exceptions and limitations that permit the making of compilations, by defining the purpose or the entities benefiting from the exception or limitation in ways that may exclude other would-be beneficiaries (e.g. "for instructional use in schools"). A library would, thus, be prevented in those countries from creating sets of copyrighted materials to use in its educational programmes.

					<p><b>An educator in a non-profit wants to show parts of a video from a DVD he owns in a free history class - is that legal?</b></p>				
					40%	13%	40%	7%	
					yes, free	yes, paid	no	?	
					Legal Basis	Obstacles	Notes		
Czech Republic	●				Sec. 31(1)(c); Sec. 82				
Denmark			●		Sec. 21	Type of work			
Estonia	●				Sec. 19(2); Sec. 75(1)(2)				
Finland			●		Sec. 21	Type of work			
France		●			Art. L122-5(3°)(e); Art. L211-3(3°)		Public communication includes showing a film [see Art. 15(2)(1)]		
Germany		●			Art. 52(1)				
Italy			●		Art. 15, 2.º para.	Type of user			
Luxembourg	●				Art. 10(2); Art. 46(9)				
Malta	●				Art. 9(1)(g); Art. 21				
Netherlands	●				Art. 12(5) Aw				
Poland			●		Art. 27(1); Art. 100	Type of user			
Portugal				●	Art.75(2)(f); Art. 189.º(1)(c)	Type of user?	Public communication includes showing a film [see Art. 15(2)]		
Romania	●				Art. 33(2)(d); Art. 112				
Spain			●		Art. 32(3)	Type of user			
United Kingdom			●		Sec. 34(2); Schedule 2, para. 5	Type of user			
<b>Table 12</b>					<b>yes, free</b>	<b>yes, paid</b>	<b>no</b>	<b>?</b>	<p><b>Type of user:</b> the copyright exception or limitation is not for the benefit of such entity or person.</p> <p><b>Type of work:</b> the copyright exception or limitation does not cover such category of protected work or other subject matter.</p>

As presented in Table 6, several national laws consider showing a film to an entire classroom to be legal because a group of students and teachers is different from a cinema audience. However, that generous treatment is not always transposed to non-formal educational contexts. Italy, Poland, Portugal, Spain and the United Kingdom prohibit an educator in a non-profit organization from showing a film for educational purposes, whereas if that person is a teacher in a formal establishment, that use would be permitted.

## Conclusion

This study's findings indicate that not all copyrighted works are treated equally in the context of education. Some educational exceptions exclude certain types of works and other subject matter from the scope of application of copyright exceptions: textbooks and academic books in France and Germany (see Table 2), dramatic works and cinematographic works in Denmark and Finland (see Tables 6, 7 and 15) and musical scores in France and Spain (see Table 4).

Other laws may not exclude the use of certain categories of works, but they do contain restrictions on the extent or degree to which a work can be used for educational purposes, thereby creating obstacles to the use of entire works (see Tables 1, 3, 4, 5, 6, 7, 9, 10 and 14), namely short works (e.g. single articles, short videos and short poems) and images (e.g. artworks, photographs and other visual works).

Finally, several legal provisions only permit educational uses of "published works", thus potentially excluding the use of works made available to the public by ephemeral or transient means that do not involve the making of copies of the work, such as performance, exhibition and broadcasting (see Table 3).

Section II of this study presented three educational uses of protected works and other subject matter involving non-tangible disseminations or communications of copyrighted works to the public in which communication originates from the same place and at the same time as the location of the public: a public performance of a piece of music in a classroom, a public performance of a dramatic work in a school event and the screening of a film in a classroom.



The legal analysis done to resolve these hypothetical cases shows that performances, recitations and displays of protected works and other subject matter are permitted in most of the countries analysed under general educational exceptions (see Tables 4, 5 and 6). However, extent restrictions in France, Luxembourg, Portugal and Spain, and the exclusion of certain types of works from the scope of the exception in Denmark, Finland, France and Spain prevent the performance of an entire piece of music and/or a dramatic work and/or the screening of an entire film in class.

Italy, Germany (through case law), the Netherlands, and the United Kingdom do not deem public performances, recitations or displays if they are made in the context of an educational activity. In other words, those activities are excluded from the scope of copyright protection, and educators and learners in these countries do not have to worry about the extent of use, the payment of compensation/remuneration, or compliance with the three-step test. It should be noted, however, that these national laws will not necessarily treat a performance in a classroom and a performance made in the context of a school event the same way, namely a school event in which parents are in the audience as shown in Table 5.

Section III features three educational uses of protected works and other subject matter involving non-tangible disseminations or communications of copyrighted works to the public by wire or wireless mean, with the public not being present in the place where communication originates: visualizing an online video in class, emailing reading materials and sharing an individual article through a school's closed network.

The study shows that most of the countries analysed permit the acts of use that are involved in the visualization of materials that are freely available online in class. This activity may even be permitted in all of the 15 countries, considering the interpretation given by the CJEU on the scope of application of the harmonised right of communication to the public. However, since EU case law is not clear-cut and straightforward, a cautious approach was adopted, and uses were analysed in light of existing national copyright exceptions. The application of national copyright exceptions only leads to contrasting results when a teacher shows an entire film on a DVD in class and when that same teacher shows an entire online video in class in two countries: Italy and the Netherlands (see Tables 6 and 7).

The legal standing in sharing educational materials via email, the cloud, chatrooms, etc. is not entirely certain in some of the countries analysed, but the majority allows the use of such means of communication (see Table 8). When it comes to sharing resources through online platforms, several of the countries analysed limit the potential beneficiaries of these type of uses, but only Spain and the United Kingdom expressly require such use to be made through a closed/secure electronic network, accessible only by the students and teachers of a given educational establishment (see Table 9).

In section IV, three acts of use that are essential for the creation of educational materials based on existing copyrighted works were analysed: quotations, translations and compilations.

The analysis performed shows that the act of quoting, which is extremely important for purposes of discussion, criticism and creation of educational materials based on another person's protected work or other subject matter, is permitted in all of the 15 selected countries. The only problem identified in four of the legal provisions analysed herein (France, Italy, Luxembourg and Romania) pertains to the extent of use, which may be a limitation when entire artworks (see Table 1) and short works (see Table 10 and 14) are used.

Compilations are only prohibited in Spain, but as Table 11 shows several countries (Denmark, Finland, Germany, Italy and Portugal) do not differentiate between teacher-created materials and a publication intended for commercial use, requiring the payment of compensation/remuneration in both cases, which can dissuade teachers from creating and distributing sets of teachings materials to their students.

Denmark, Finland, Italy and Spain are the only countries in the selected group that do not have legal provisions in their national laws permitting translations or any other adaptations of protected works and other subject matter for educational purposes. Educational translations are allowed in all the other countries (see Table 12).

Section V revisits three everyday uses analysed in previous sections, but in which the beneficiaries of use are not teachers and students in schools and other formal educational establishments. In these scenarios, the users are educators and learners in non-formal educational contexts: an educator in a museum who wants to make a digital copy of an art book, an educator in a library who wants to make a compilation of poems, and an educator in a non-profit organisation who wishes to show parts of a video during a free course.

The findings from the resolution of these hypothetical scenarios demonstrate that the majority of countries analysed do not discriminate against the person or entity running the educational activity, focusing solely on the educational purpose of use. Nevertheless, a significant number of countries only allows educational uses if they are made by schools and other formal educational establishments. These are Germany, Italy, Poland, Portugal, Romania, Spain and the United Kingdom. In these countries, museums, libraries and other providers of non-commercial education must therefore ask for permission before making certain uses of protected materials in their educational programmes.

In sum, the four main obstacles to traditional and modern ways of using protected works and other subject matter in an educational context were identified in the national laws of the 15 countries analysed:

- Act of use: the acts of exploitation covered by the copyright exception or limitation do not include some or all of the required acts of use;
- Type of user: the copyright exception or limitation is not for the benefit of such entity or person;
- Type of work: the copyright exception or limitation does not cover such category of protected work or other subject matter;
- Extension of work: the law limits the degree or extent to which a copyrighted work or other subject matter can be used under the copyright exception or limitation.

While the European Commission proposal does not restrict the types of works or other subject matter that can be used under the proposed exception for digital and cross-border teaching activities or the extent to which those works can be used, the proposed exception only covers certain acts of use and limits the type of users who can benefit from the exception. Indeed, the proposal only focuses on digitally supported education and it is for the benefit of a closed list of persons providing or receiving education in educational establishments.

More than half of the hypothetical scenarios considered in this study concern non-digital activities and four of these scenarios involve persons or entities not contemplated by the Commission's proposal (parents of students and pupils, museums, libraries and non-profit organisations). These scenarios show that, unless the Commission's proposal is substantially amended, several European countries will be stuck with narrow copyright exceptions that will continue to limit educational practices at various levels.

Surely, even if the scope of the Commission's proposed exception is extended to cover non-digital educational uses and uses made by other potential beneficiaries, several of the uses analysed herein will not be harmonised because EU law has not harmonised the entire spectrum of rights protected by copyright and related rights, namely the public performance right and the translation right. Notwithstanding that, a broad "use" formulation, like the one set forth in the current proposal, can lead to coverage of rights harmonised under EU law, as well as rights that have not yet been harmonised. This has happened in the past in countries that opted to implement the literal wording of the "prototypes"<sup>41</sup> embodied in the InfoSoc Directive<sup>42</sup>.

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41 The optional exceptions embedded in the InfoSoc "constitute prototypes for national law making rather than precisely circumscribed exceptions with no inherent flexibility" (Hugenholtz, P. B. and Senftleben, M., Fair Use in Europe: In Search of Flexibilities (4 November 2011), available at <http://ssrn.com/abstract=1959554> [assessed 12 April 2017], p. 14.

42 See Teresa Nobre, Freedom of Panorama in Portugal, and Teresa Nobre and Alari Ramno, Education in Estonia, Best Case Scenarios for Copyright: Freedom of Panorama, Parody, Education, and Quotation (ed. Teresa Nobre) (COMMUNIA August 2016), available at <http://www.communia-association.org/wp-content/uploads/2016/11/Best-Case-Scenarios-for-Copyright-brochure.pdf> [assessed 12 April 2017], p. 7-19 and 29-45.