



# Educational Licences in Europe

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**COMMUNIA** 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.

## Executive Summary

The European Union is coming closer to approving a mandatory educational exception that may address some of the limitations copyright law places on everyday educational activities. However, the legal provision as it is currently framed would allow licenses that are easily available in the market to take precedence over the educational exception.

Allowing right holders to use private licensing arrangements to redefine the scope of users' rights granted by law is inadvisable. It ultimately weakens or totally undermines the public policy decision of regulating such uses through a public legal instrument. There is a minimum set of users' rights, including the right to use a protected work for educational purposes, that copyright laws should grant the same level of protection that is granted to right holders in order to guarantee a sound copyright system. Second, licenses undermine the legal framework exceptions endeavour to harmonize, substantially reducing the positive impact exerted by a mandatory provision applied uniformly by every Member State. Third and last, giving right holders the unilateral power to reshape the terms and conditions of educational uses will result in agreements that will favour those parties to the detriment of educational institutions.

This study demonstrates that educational licenses contain terms and conditions that are inherently disadvantageous to licensees, thus supporting the contention that subjugating educational rights to contractual arrangements is not advisable and is counterproductive.

This study has analysed ten collective agreements for educational uses in force in Finland, France and the United Kingdom pertaining to different compensation and licensing schemes for educational uses:

- the British agreements are voluntary collective licensing schemes for uses of protected works and other subject matter for purposes of instruction that prevail over national educational exceptions;
- the French agreements are voluntary collective licensing agreements that, on one hand, provide the compensation required by law for uses made under the educational exception, while, on the other hand, complement the exception by covering additional uses and works not foreseen by the educational exception; and
- the Finnish agreements are licenses granted by collective management organisations (“CMOs”) that apply an extended collective license (“ECL”) to educational uses.

These agreements were analysed to determine how they deal with the following issues: permitted and restricted uses, conditions of use, compliance and enforcement, and indemnification.

## **Grant of Rights**

This study proves that most of the British and French agreements discussed hereunder permit uses that fall under the scope of protection afforded by the national educational exceptions and educational uses that are not contemplated by those exceptions.

At the same time, however, some of those agreements purport to prevent or restrict (i) uses that are permitted under copyright exceptions or fair dealing provisions, and/or (ii) uses that fall outside the scope of protection of copyright (such as hyperlinking).

While some of those restrictive provisions expressly acknowledge that contractually restricted uses can be permitted by statute, others do not offer the same safeguards. The UK’s copyright legislation renders unenforceable contractual terms that purport to prevent or restrict acts that, by virtue of fair dealing or certain copyright exceptions (e.g. quotation exception), would not infringe copyright. That protection is not, however, granted to acts made under the educational exceptions analysed hereunder. The French copyright legislation does not contain any provisions on treating such contractual provisions as unenforceable or of having no effect. This means that educational establishments may be effectively prevented from engaging in acts permitted by law due to contractual restrictions.

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## Contractual Conditions

The agreements featured in this study foresee various types of conditions to the permitted uses: purposes of use; extent of the work and other quantitative limitations; physical limitations; technological limitations; time limits; source material; no market competition; and attribution.

This study shows that the French and British agreements impose contractual limitations that are not prescribed by the national educational exceptions forming the basis of such agreements. While the contract offers terms and conditions to licensees in some cases more favourable than the conditions prescribed by the law, in most cases those contractual conditions generally tend to restrict the range of educational uses that would otherwise be allowed thereunder.

Considering that the main aim of the French agreements is to procure legally-required compensation, using them to prescribe terms and conditions that are not founded in law is a questionable practice. Surely, one can argue that these limitations ensue from the remuneration negotiated by the parties. Still, it does not seem that the lawmaker intended to make all the terms and conditions of the uses permitted by law dependent on the outcome of negotiation between parties, but rather only the financial aspects of use.

In the UK where licenses override exceptions, imposing contractual conditions that are not set forth in the exceptions raises a number of questions, such as (a) whether an establishment can rely on an exception for uses that - due to contractual restrictions - are not covered by licenses but fall under the scope of such exception, or (b) whether an establishment can rely on an exception after a license is terminated by its licensor for violation of obligations not foreseen by law.

## Contractual Definitions

Another interesting finding is that the contractual limitations imposed in some agreements on uses falling under the national educational exceptions stem from how licenses define certain concepts relating to these exceptions.

For instance, under the InfoSoc Directive, educational uses are permitted for the sole purpose of illustration for teaching or scientific research to the extent justified by the non-commercial purpose to be achieved. Just as in the Directive, the national laws permit certain educational uses for the same purposes, while neither of them defines what should be considered to be a *non-commercial* purpose.

Notwithstanding this legal framework, several of these agreements lay down their own contractual definitions of open legal concepts such as in the following case: *Commercial Use means the use of any ERA Repertoire for any commercial or promotional purposes or for the purposes of monetary reward (whether by the Licensee, Relevant Educational Establishments, any Authorised User or third party) or in any way which generates profit.*

In this context determining which uses do and do not qualify as commercial uses should be a task for the lawmakers or the national courts, and ultimately for the Court of Justice of the European Union if the term *non-commercial* is judged to be an “autonomous concept of Union law” subject to the uniform interpretation of the court.

Naturally, if the licensee and the licensor have equal bargaining power, there is no offense if they reach an agreement over the interpretation of certain aspects of the law. However, in countries where precedence is given to licenses over exceptions, the position of licensees is weakened since they have to buy a license in order to keep using the works they are currently using under the educational exception. Thus, the practice of providing for contractual definitions of open concepts of law in licenses that override exceptions cannot be deemed to be a good practice.

Finally, one should not forget that private agreements entered into between right holders and governmental entities do not cover all would-be beneficiaries of educational exceptions. Furthermore, the widespread use of some contractual notions will influence how the court interprets these legal concepts in the future and that interpretation will be applicable to the entire spectrum of users.

## **Data Collection, Audits and Inspections of Premises**

All of the agreements analysed during this study contain contractual provisions to ensure compliance between the uses permitted by those agreements and their terms and conditions, including the licensee’s obligation to maintain records and/or report uses, and the licensor’s right to check compliance between the uses and the agreements (through inspections or audits of records by licensors, and/or through inspections of the premises of educational establishments). Only one agreement featured herein provides for provisions protecting the confidentiality of the information obtained by right holders.

It should be noted that even though the provisions to enforce intellectual property rights in national legislation may give right holders the means to enforce their rights, this is achievable only to the extent that such measures, procedures and remedies are necessary to permit effective action against an act of infringement of such rights. In turn, contractual provisions give them the right to obtain the same information from schools that the law permit them to get from alleged infringers, but without having to go through a civil or judicial proceeding and without having to provide schools with the same guarantees the law affords to alleged infringers concerning the protection of confidential information and personal data.

This study demonstrates that if they are given the chance to regulate educational uses via licensing agreements, right holders may exploit contractual means to obtain access to information to which they would not otherwise have access without any of the typical constraints established by confidentiality obligations.

## **Enforcement**

This study further shows that, under some of these agreements, schools and other educational institutions are faced with enforcement obligations that create administrative burdens and put pressure on their structures.

It is a common practice in commercial licensing to require licensees to ensure that their staff is aware of the terms and conditions of use of licensed material, and to take action against a breach by staff members of the licensing terms. The problem with educational licensing is that it covers uses made by a variety of users, including teachers and students. Requesting a school to ensure that an act of infringement by a student ceases, and for that school to prevent any recurrence thereof, puts an exceptionally high amount of pressure on it. It forces schools to police the educational community, on behalf of right holders, which is a role that schools should certainly not be asked to play.

While these obligations are foreseen in all British licenses analysed hereunder, they are not contemplated neither in French agreements nor in the Finnish licenses. These agreements take an entirely different stance on enforcement, only requiring that users are made aware of the terms of the license. Moreover, in France that obligation is assumed by the Ministries, and not by the schools themselves.

Considering that these obligations are not based on the legal provisions that embody the educational exceptions establishing the legal framework for these agreements, one should ask what will happen to an educational establishment if it fails to comply with this obligation and the licensor subsequently opts to terminate the pertinent license agreement.

## **Indemnification**

The last group of provisions presented in this study are licensing provisions contemplating the payment of damages, otherwise referred to as an indemnity, to the licensor for infringement claims brought against licensees for uses of licensed material.

An intriguing feature encountered in the British agreements analysed hereunder is that the indemnity clause is not applicable if the educational establishment is in material breach of any term of the licence. While it is logical to exclude a licensor's liability for infringement claims caused by an educational establishment transcending the bounds of the rights conferred by an agreement, it is unwarranted for the indemnity clause to be inapplicable in the event of an establishment's substantial breach of a license term unrelated to the copyright infringement claim.

The indemnification provisions in the French agreements also seem to favour right holders since the CMOs are not bound to pay all reasonable legal costs, expenses and damages awarded from, or incurred by, educational establishments, but merely the equivalent amount that would have been paid to the affected beneficiary if he/she had been a member of the copyright collection and distribution society in question.

## **Conclusion and Solutions**

Overall, the agreements covered by this study show that allowing contractual arrangements to override legal provisions protecting users' rights will perpetuate an unbalanced power structure in modern copyright systems, and will compel users to accept terms and conditions that (i) purport to restrict the scope of protection granted by copyright exceptions and limitations, by imposing conditions on the uses that are not contained in said exceptions, (ii) impose burdensome obligations on schools and institutions that do not derive from the law and (iii) grant rights to right holders that are not contemplated by law.



The preferable approach to the problems posed by these contractual arrangements would be to prevent licence priority, or to provide only for limited priority to those contractual arrangements that are already in place. Article 5(3)(n) of the InfoSoc Directive embodies an exception that, according to the Court of Justice of the European Union, cannot be overridden by a mere licensing offer but only by licensing agreements that exist. A similar approach would be the most sensible option for countries that want to provide an adequate framework for licensing.

It seems reasonable to expect that a legal framework that offers minimum users rights for purposes of education would stimulate contractual innovation, and eventually lead to licensing offers covering uses that are not foreseen in copyright exceptions or that could be prevented by the 3-step test, such as educational uses made on the open internet.

Regardless of whether policy makers opt to allow for giving priority to licenses or not, it is imperative to introduce a provision in copyright legislation across the European Union protecting the rights granted to users by copyright exceptions and limitations from contracts. A contractual provision, namely a provision contained in a licence authorising the acts permitted by the exception or limitation, should be rendered unenforceable or null and void or of no effect if it purports to restrict the scope of protection afforded by a copyright exception or limitation.

The public policy decision embodied in the conditions of use under copyright exceptions or limitations should not be removed or dismantled by private arrangements in any circumstance. Without giving proper legal treatment to contractual terms that seek to limit the application of copyright limitations and exceptions, a school or some other user will not be free to refuse a licence containing terms and conditions that are narrower or more restrictive than those offered by the law.

Furthermore, lawmakers should put in place mechanisms to ensure the fairness of licensing terms. A licence provision that gives right holders access to the personal information of students and teachers and confidential information belonging to schools, without imposing a confidentiality obligation and without seeking to limit the purposes of use of the information obtained by right holders, cannot be deemed reasonable or fair.

Schools and other educational establishments should be able to challenge with ease the terms of a licence that are thought to be unfair or unreasonable. Copyright laws across Europe should foresee affordable mediation and litigation to those institutions. In addition, if the agreements are constantly challenged or if they invariably contain terms and conditions that are unreasonable or unfair, policymakers should assess the need to submit the same to public regulation.

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# Introduction

In recent decades European Union lawmakers have worked to harmonise the copyright laws of EU Member States to protect the private interests of authors, performers and other beneficiaries of copyright and neighbouring rights. The legal provisions that protect public interests such as access to knowledge and education have not, however, been subject to the same efforts towards the convergence and harmonisation of laws<sup>1</sup>.

The EU is now discussing a proposal for a directive<sup>2</sup> that has the potential to harmonise national copyright laws across Europe for the benefit of users, namely users of protected works for educational purposes. Indeed, the European Commission proposed to introduce a mandatory exception or limitation<sup>3</sup> to copyright to allow for uses of copyrighted works and other subject matter in digital and cross-border teaching activities<sup>4</sup>. However, this proposal, if adopted, would allow licences that are easily available in the market to take precedence over the educational exception<sup>5,6</sup>.

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1 An exhaustive list of 21 exceptions and limitations to copyright is contained in Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"). Only one of those provisions - the exception for ephemeral copies - is mandatory. Member states can choose whether to implement the remaining 20 exceptions, including the exception for educational purposes.

2 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/TX/?uri=CELEX:52016PC0593> [accessed 18 March 2018] (hereinafter "Proposed Digital Single Market Directive").

3 "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 sake of simplicity.

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

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

6 This is not the proposal's sole fault. This proposal also imposes several restrictions on the use of protected materials for educational purposes. 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> [last accessed 8 March 2018].

Educators have a duty to use protected works and other subject matter for the purposes of teaching their students, and learners have a right to access and use such materials for the purposes of learning. This imperative towards society, on one hand, and this fundamental human right, on the other hand, should be strongly protected by copyright laws, and not exposed to the licensing risk related to what right holders are inclined to offer.

Allowing right holders to use private licensing arrangements to redefine the scope of users' rights granted by law is inadvisable, since it ultimately weakens or totally undermines the public policy decision of regulating such uses through a public legal instrument. There is a minimum set of users' rights, including the right to use a protected work for educational purposes, that copyright laws should grant the same level of protection that is granted to right holders in order to guarantee a sound copyright system. Second, licenses undermine the legal framework exceptions endeavour to harmonize, substantially reducing the positive impact exerted by a mandatory provision applied uniformly by every Member State. Third and last, giving right holders the unilateral power to reshape the terms and conditions of educational uses will result in agreements that will favour those parties to the detriment of educational institutions.

This study demonstrates that educational licences contain terms and conditions that are disadvantageous to licences, thus supporting the contention that subjugating educational rights to contractual arrangements is not advisable. It accomplishes this purpose by analysing 10 collective agreements for educational uses that are in force in Finland, France and the United Kingdom.

All the agreements under analysis were entered into between national collective management organizations (CMOs) and national governmental bodies on behalf of schools and institutions in those countries. The selected agreements pertain, however, to different compensation and licensing schemes for educational uses. Section I provides a summary of each of these schemes, as well as of the legal frameworks serving as a basis for the agreements.

Section II examines the extent of the licence granted by the agreements in order to ascertain whether the rights granted by the agreements covered by this study fall under the scope of protection afforded by the educational exception, or if they broaden or restrict the acts of use such exceptions contemplate.

Section III analyses the contractual terms and conditions for the uses permitted by the agreements. The agreements featured in this study foresee conditions of various types: purposes of use; extent of the work and other quantitative limitations; physical limitations; technological limitations; time limits; source material; no market competition; and attribution.

Section IV features the contractual provisions that are related to compliance between the permitted uses and the terms of the licences and enforcement of the terms of the licence. It includes an analysis of the provisions pertaining to data collection by right holders; audits of records by right holders; inspections of the premises of educational establishments by right holders; the obligation imposed on the educational establishments to ensure that all users comply with the terms of the licence; and the obligations imposed on governmental authorities to conduct awareness-raising actions and studies to promote copyright rules.

Section V presents the indemnification obligations incorporated in the agreements analysed in this study. These include the following: 1) contractual terms providing for the licensor's obligation to indemnify the licensee against copyright infringement claims concerning a use pursuant to the agreement and 2) provisions contemplating the licensee's obligation to indemnify the licensor for breach of the terms and conditions of the agreement.

Section VI presents possible policy and legal solutions to the problems posed by these contractual arrangements.

The author would like to thank Professor Lionel Bently for clarifying certain aspects of the UK's copyright law, Nathalie Lefever of the Foundation for Cultural Policy Research Cupore for analysing the licensing agreements and clarifying certain aspects of the Finnish copyright law, and Alexandra Giannopoulou for clarifying certain aspects of the French Law. The author would also like to extend special words of gratitude to Judith Blijden, from Kennisland, and Alek Tarkowski and Kasia Strycharz, from Centrum Cyfrowe, for providing comments to this report. A central element of this study was obtaining access to the agreements and relevant information pertaining to the same (e.g. fees paid by the governmental authorities, and number of schools and students covered by such fees). The author wishes to thank Perrine de Coetlogon, from the French Ministry of Education, Higher Education and Research, and Madeleine Pow-Jones, from the British Copyright Licensing Agency, for their support. Finally, the author would like to thank Alek Kalinauskas for editing this manuscript. All the errors in this study are solely of the author's making.

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# Methodology

This report presents the findings of a legal study into the terms and conditions of educational agreements in Finland, France and the United Kingdom, which are listed in Section I.

These agreements were selected taking into account their interaction with the national copyright exceptions and limitations. The aim of this study is to present terms and conditions contained in different compensation and licensing schemes for educational uses:

Country	Scheme
Finland	Licences granted by CMOs to apply an extended collective licence to educational uses
France	Collective agreement that (i) applies the educational exception and establishes compensation for right holders, which is required in national law for uses under such exception and (ii) complements the educational exception, allowing for additional uses and covering additional works
United Kingdom	Licences granted by CMOs for educational uses that prevail over the educational exception

Table 1. Licensing Schemes

Each term and condition of those agreements was juxtaposed with the respective law in order to ascertain if those terms and conditions are prescribed by law or are contrary to law. These are the versions of the laws used in this study:

Country	Law
Finland	Copyright Act (404/1961, amendments up to 608/2015) <sup>7</sup> (“Copyright Act”)
France	Code de la propriété intellectuelle (consolidated version, dated from 1 January 2018) <sup>8</sup> (“Intellectual Property Code”)
United Kingdom	Copyright, Designs and Patents Act 1988 (Chapter 48) (up to date with all the changes known to be in force on or before 05 March 2018) <sup>9</sup> (“CDPA”)

Table 2. National Laws

The author carried out the legal analysis in France and in the United Kingdom. Nathalie Lefever of the Foundation for Cultural Policy Research Cupore analysed the licensing agreements in Finland using a questionnaire provided by the author.

The author consulted with Professor Lionel Bently on the interpretation of a few English legal provisions, with Ms. Nathalie Lefever on the interpretation of certain Finnish provisions, and with Ms. Alexandra Giannopoulou on the interpretation of certain aspects of the French Law. Mr. Bently, Ms. Lefever and Ms. Giannopoulou did not, however, review the author’s legal analysis. All the errors in this study are attributable solely to the author.

No case law was analysed.

7 Available at <http://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf> [last accessed 8 March 2018].

8 Available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414&dateTexte=20180305> [last accessed 8 March 2018].

9 Available at <http://www.legislation.gov.uk/ukpga/1988/48/contents> [last accessed 8 March 2018].

# I. Legal Framework and Licensing Schemes

This study analyses 10 collective agreements for educational uses that are in force in Finland, France, and in the United Kingdom. The selected agreements pertain to different compensation and licensing schemes for educational uses.

## 1. United Kingdom: Licences that prevail over the educational exception

The British agreements analysed hereunder are voluntary collective licensing schemes for uses of protected works and other subject matter for purposes of instruction that prevail over national educational exceptions.

The Copyright, Designs and Patents Act 1988 (Chapter 48) (“CDPA”) includes, on the one hand, fair dealing provisions for the purpose of illustration for instruction, which cannot be overridden by contract<sup>10</sup>, and on the other hand exceptions that permit educational establishments to copy and use extracts of works and extracts of recordings of performances for purposes of instruction<sup>11</sup>, as well as to record broadcasts for educational purposes<sup>12</sup>, provided, however, that there are no licences available authorising such acts.

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<sup>10</sup> Sec. 32 and Paragraph 4 of Schedule 2 to the CDPA.

<sup>11</sup> Sec. 36 and Paragraph 6ZA of Schedule 2 to the CDPA.

<sup>12</sup> Sec. 35 and Paragraph 6 of Schedule 2 to the CDPA.

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According to the licence override rules, if a licence scheme is available for such activities and the educational establishment responsible for those activities knew or ought to have been aware of the fact that licences authorising the acts in question are available, the educational establishment must hold that licence and cannot rely on the exception.

The CDPA does not contain a general provision providing that licensing terms that limit or override the above-mentioned educational exceptions are unenforceable. Section 36(6) and Paragraph 6ZA(6) of Schedule 2 to the CDPA only prescribe that the terms of a licence granted to an educational establishment authorising acts permitted by these educational exceptions “are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted” by the exception.

The UK's copyright legislation contemplates a system for adjudicating disputes between licensors and licencees in the event of a failure to negotiate reasonable license terms. The Copyright Tribunal is empowered under Sec. 118 and Sec. 119 of the CDPA to settle such reasonable terms and, if necessary, award more favourable terms to the licensee than those that were presented in the original offer. The Copyright Tribunal only assesses the reasonableness (and not the fairness) of the terms and conditions of a licensing arrangement. The right holders are, in the event of a change of the licensing terms, free to withdraw from the licensing scheme. It is worth noting that the litigation and legal costs of challenging such licences are known to be rather high<sup>13</sup>.

For primary and secondary state-funded schools in England, the Department of Education finalises agreements with CMOs to purchase licences centrally<sup>14</sup>, and schools cannot opt-out of these licences<sup>15</sup>. Independent schools in England are not covered by the central agreement and so remain responsible for purchasing all necessary licences.

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13 See Picciotto, S., Copyright licensing: The Case of Higher Education Photocopying in the UK, available at <http://www.lancaster.ac.uk/staff/lwasp/licensing-eipr.pdf> [last accessed 8 March 2018], for a review of the case *Universities UK v CLA* [2002] E.M.L.R. 35.

14 The Department of Education provides licences from the following CMOs for all primary and secondary state-funded schools in England: 1. Copyright Licensing Agency, for print and digital copyright content in books, journals and magazines (“CLA Education Licence”); 2. Schools Printed Music Licence, for printed music; 3. Newspaper Licensing Agency, for newspapers and magazines (“NLA Schools Licence”); 4. Educational Recording Agency, for recording and use of radio and television programmes (“ERA Licence”); 5. Filmbank and Motion Picture Licensing Company, for showing of films; 6. Performing Right Society for Music and Phonographic Performance Ltd, for musical performances and playing recorded music; 7. The Mechanical Copyright Protection Society, for making CDs and DVDs containing copyright music; and 8. Christian Copyright Licensing International, for hymns and other Christian music. See <https://www.gov.uk/guidance/copyright-licences-information-for-schools> [last accessed 8 March 2018]. The author tried, albeit without success, to obtain information from CMOs concerning the total annual fees paid by the Department of Education for their respective licenses for the period from 1 April 2016 to 31 March 2017. Then, on 11 February 2018, the author filed a request for information with the Department of Education to obtain the same information. The requested information was withheld under section 43(2) of the Freedom of Information Act 2000, because it was found to be “commercially sensitive information”.

15 For the period 1 April 2016 to 31 March 2017, the total number of schools covered by the licenses bought by the Department of Education amounted to 21,917. There were 7,811,570 pupils in these schools. [Source: Department of Education, e-mail dated from 8 March 2018, in response to the request for information made by the author on 11 February 2018 (reference number 2018-0007697) under the Freedom of Information Act 2000].



The tables below present a summary of the British licences covered in this study:

<b>CLA Education Licence<sup>16</sup></b>	
Legal Framework	This licence is granted under the educational licensing scheme that the organization Copyright Licensing Agency Limited (“CLA”) operates for the purposes of Section 36 of the CDPA, which permit the copying and use of extracts of works by educational establishments.
Licensed Material	Print and digital content in books, journals and magazines
Licence Fee	Annual Licence fee per student <sup>17</sup> : Full time equivalent student aged 5 – 15: £1.92 Full time equivalent student aged 16 – 18: £4.65

Table 3. British Licences

<b>NLA Schools Licence<sup>18</sup></b>	
Legal Framework	This licence is granted under the educational licensing scheme that the organization CLA, acting as an agent for NLA Media Access Limited, operates for the purposes of Section 36 of the CDPA, which permit the copying and use of extracts of works by educational establishments.
Licensed Material	Articles from newspapers and newspaper websites
Licence Fee	Annual license fee per school <sup>19</sup> : No. pupils > 50: £26.27 No. pupils 50 – 750: £52.54 No. pupils > 750: £78.81

Table 4. British Licences II

16 Available at [https://www.cla.co.uk/sites/default/files/CLA\\_Education-Licence\\_old.pdf](https://www.cla.co.uk/sites/default/files/CLA_Education-Licence_old.pdf) [last accessed 7 March 2018].

17 See footnote 15.

18 Available at <https://www.cla.co.uk/sites/default/files/NLA-schools-licence%20-%20new%20brand.pdf> [last accessed 7 March 2018].

19 See footnote 15

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### Schools Printed Music Licence<sup>20</sup>

Legal Framework	This licence is granted under the educational licensing scheme that the organization CLA, acting as an agent for Printed Music Licensing Limited (acting as agent and/or licensee for various music publishers), operates for the purposes of Section 36 of the CDPA, which permit the copying and use of extracts of works by educational establishments.
Licensed Material	Printed music
Licence Fee	Annual license fee per school <sup>21</sup> : No. pupils <100: £50.45 No. pupils 100 – 199: £94.38 No. pupils 200 – 299: £125.84 No. pupils 300 – 399: £183.52 No. pupils 400 – 599: £230.71 No. pupils 600 – 799: £267.42 No. pupils 800 – 999: £314.61 No. pupils 1000 – 1499: £393.26 No. pupils >1500: £471.91

Table 5. British Licences III

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### ERA Licence Applicable from 10 March 2017<sup>22</sup>

Legal Framework	This licence is granted under the educational licensing scheme that the organization Educational Recording Agency (“ERA”), acting as agent for various CMOs and right holders, operates for the purposes of Section 35 and Paragraph 6 of Schedule 2 to the CDPA, which permit the recording of broadcasts by educational establishments.
Licensed Material	Radio and television programmes
Licence Fee	Annual licence fee per student <sup>23</sup> : Student in primary school: £0.45 Student in secondary school aged < 18: £0.75

Table 6. British Licences IV

<sup>20</sup> Available at [https://www.cla.co.uk/sites/default/files/8107\\_SPML\\_Standard\\_Terms\\_new%20brand.pdf](https://www.cla.co.uk/sites/default/files/8107_SPML_Standard_Terms_new%20brand.pdf) [last accessed 7 March 2018].

<sup>21</sup> See footnote 15.

<sup>22</sup> Available at <http://era.org.uk/the-licence/details-rates/terms-licence> [last accessed 7 March 2018].

<sup>23</sup> See footnote 15.

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## 2. France: Agreements that apply and complement the educational exception

The French agreements analysed hereunder are voluntary collective licensing agreements that, on one hand, secure the compensation required by law for uses made under the educational exceptions, and, on the other hand, complement the exceptions by covering additional uses and works not foreseen by the same.

Educational exceptions in France allow for the reproduction and public communication of extracts of works (excluding works specifically intended for education and music scores) and extracts of subject matter protected by neighbouring rights for the purpose of illustration in the context of teaching and research, subject to the payment of compensation to right holders, which should be negotiated on a flat-rate basis<sup>24</sup>.

The French copyright legislation does not treat contractual provisions (namely provisions contained in agreements that apply and complement the educational exceptions) that seek to limit or override the scope of protection of copyright exceptions and limitations as being unenforceable or of having no effect<sup>25</sup>. Only through the application of the French Civil Code - which foresees that any condition providing for an impossible thing, or contrary to public morals, or prohibited by law, is null and renders the underlying agreement on which it depends null<sup>26</sup> - could those contractual provisions be contested.

The French Ministry of Education, Higher Education and Research has entered into the three agreements under analysis on behalf of all of their departments and schools and institutions under their authority. These agreements are organised by types of work and foresee the payment of compensation to CMOs as required by the educational exceptions. In addition, they permit the use of certain works in their entirety, as well as certain uses of works excluded from the scope of the educational exception.

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24 Art. L122-5(3) and Article L211-3(3) of the Intellectual Property Code.

25 See Daniel Seng, WIPO Updated Study And Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities, 10 November 2017, SCCR/35/5Rev., available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_35/sccr\\_35\\_5.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_5.pdf) [accessed 8 March 2018], 9-11, enumerating the copyright laws from WIPO Member States that deal with contractual terms that seek to limit or even override the application of copyright limitations and exceptions for educational activities.

26 Art. 1172 of the French Civil Code.

The tables below present a summary of the French agreements covered under this study:

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**Memorandum of understanding on the use of books, published music works, periodical publications and visual art works for illustration of the teaching and research activities<sup>27</sup>**

CMOs	Le Centre Français d'Exploitation du Droit de Copie <sup>28</sup> ("CFC") La Société des Arts Visuels Associés <sup>29</sup> ("AVA") on behalf of various CMOs La Société des Éditeurs et Auteurs de Musique <sup>30</sup> ("SEAM")
Compensation	Fixed and lump sum in the years 2016-2019 (per year): 1 700 000 euros

Table 7. French Agreements I

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**Agreement on the use of audiovisual and cinematographic works for illustration of the teaching and research activities<sup>31</sup>**

CMOs	Société des Producteurs de Cinéma et de Télévision <sup>32</sup> ("PROCIREP") on behalf of various CMOs
Compensation	Fixed and lump sum in the year 2009 <sup>33</sup> : 150 000 euros

Table 8. French Agreements II

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**Agreement on the live interpretation of musical works, on the use of sound recordings of musical works and on the use of music videos for purposes of illustration of the teaching and research activities<sup>34</sup>**

CMOs	Société des auteurs, compositeurs et éditeurs de musique <sup>35</sup> ("SACEM") on behalf of various CMOs
Compensation	Fixed and lump sum in the year 2009 <sup>36</sup> : 150 000 euros

Table 9. French Agreements III

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27 "Protocole d'accord sur l'utilisation et la reproduction des livres, des œuvres musicales éditées, des publications périodiques et des œuvres des arts visuels à des fins d'illustration des activités d'enseignement et de recherche". Hereinafter referred to as "Memorandum of Understanding". Available at [http://www.education.gouv.fr/pid285/bulletin\\_officiel.html?cid\\_bo=106736](http://www.education.gouv.fr/pid285/bulletin_officiel.html?cid_bo=106736) [last accessed 7 March 2018].

28 French Centre for the Exploitation of the Reproduction Right.

29 Visual and Associated Arts Society.

30 Authors and Music Publishers Society of France.

31 "Accord sur l'utilisation des œuvres cinématographiques et audiovisuelles à des fins d'illustration des activités d'enseignement et de recherche". Hereinafter referred to as "Audiovisual Agreement". Available at <http://www.education.gouv.fr/cid50451/men-j0901120x.html> [last accessed 07.03.2018].

32 Film and Television Producers Society.

33 The parties agree to index this amount to the wage increase index in the arts, entertainment and recreation industry as from the 2010 tax year.

34 "Accord sur l'interprétation vivante d'œuvres musicales, l'utilisation d'enregistrements sonores d'œuvres musicales et l'utilisation de vidéo-musiques à des fins d'illustration des activités d'enseignement et de recherche". Hereinafter referred to as "Music Agreement". Available at <http://www.education.gouv.fr/cid50450/men-j0901121x.html> [last accessed 7 March 2018].

35 Authors, Composers and Publishers Society.

36 The parties agree to index this amount to the wage increase index in the arts, entertainment and recreation industry as from the 2010 tax year.

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### 3. Finland: Extended Collective Licences

The Finnish agreements analysed hereunder are agreements granted by CMOs in application of an extended collective licence (“ECL”) for educational uses.

Finnish copyright legislation does not include an educational exception. Instead, it stipulates that certain educational uses of protected works can be based on an ECL<sup>37</sup>. Such uses include the reproduction of a work by photocopying or corresponding means<sup>38</sup>, the reproduction of a work by means other than photocopying for use in educational activities or scientific research<sup>39</sup>, and the communication of a work to the public by means other than transmitting by radio or television for use in educational activities or scientific research<sup>40</sup>.

ECL rules contained in the Copyright Act allow for agreements made by CMOs that represent “numerous authors of works made in Finland”<sup>41</sup> to be effective also in relation to right holders who are not members of these CMOs. For an agreement to “extend” to right holders who are not members of such an organization, the CMO must obtain approval from the Ministry of Education and Culture<sup>42</sup>. Once that approval is obtained, the CMO is “deemed to represent authors of other works in the same field” and a “licencee who has obtained an extended collective licence by virtue of the aforementioned agreement, may, under the terms established by the agreement, use all works by authors in the same field”<sup>43</sup>.

The terms and conditions of educational uses are “established by the agreement” - they are not defined by Finnish copyright legislation, nor by the approval decision. Finnish law only provides for the rules that permit extending these agreements to right holders who are not represented by such CMOs. In turn, the approval decision only lays down terms to act as a guide for “practical licensing in general” by a CMO<sup>44</sup>. Notwithstanding the above, CMOs are required to submit an annual report to the Ministry of Education and Culture on their licensing activity. The specific purpose of this report is to outline the general conditions of licensing and the agreed tariff rates. At the request of the Ministry, CMOs may provide further information.

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37 Sec. 14 of the Copyright Act.

38 Sec. 13 of the Copyright Act.

39 Sec. 14(1) of the Copyright Act.

40 Ibidem.

41 Sec. 26(1) of the Copyright Act.

42 Ibidem.

43 Ibidem.

44 Sec. 26(2) of the Copyright Act.

The Finnish copyright legislation does not contemplate a system of adjudication of disputes between licensors and licencees in the event of a failure to negotiate license terms. The Finnish law also does not treat contractual provisions (namely provisions contained in ECL-based agreements) that seek to limit or override the scope of protection of copyright exceptions and limitations as being unenforceable or of having no effect<sup>45</sup>.

The National Agency for Education (previously known as National Board of Education) centrally acquires ECL for photocopying, digital copying for educational purposes and for using TV programmes for educational purposes on behalf of primary and secondary schools, including vocational secondary schools – other educational institutions (e.g. universities) remit payment on their own. Finnish municipalities buy ECL for the use of phonograms and music videos for educational purposes on behalf of the public schools belonging to a given municipality.

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<sup>45</sup> See Daniel Seng, WIPO Updated Study And Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities, 10 November 2017, SCCR/35/5Rev., available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_35/sccr\\_35\\_5.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_5.pdf) [last accessed 8 March 2018], 9-11, enumerating the copyright laws from WIPO Member States that deal with contractual terms that seek to limit or even override the application of copyright limitations and exceptions for educational activities.

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The tables below present a summary of the Finnish licences covered in this study:

**Agreement concerning the use of works for education and research (1.1.2017 to 31.12.2017)<sup>46</sup>**

Legal Framework	<p>The CMO Kopiosto was approved by the Ministry of Education and Culture, in application of Section 13 and Section 14(1) of the Finnish Copyright Act, to grant licenses for the copying and use of copyrighted works in education:</p> <ul style="list-style-type: none"> <li>- Decision number OKM/49/650/2016 concerning the right to copy by photocopying and similar methods</li> <li>- Decision number OKM/36/650/2016 concerning copying and other uses of works in digital form</li> </ul>
Licensed Material	Literary works, works of visual arts, works in graphic forms, photographs, catalogs and databases
Licence Fee	<p>Fees paid by the National Agency for Education in 2017, for photocopying and printing: 5 110 227 euros<sup>47</sup></p> <p>Fees paid by the National Agency for Education in 2017, for use of digital material: 3 596 600 euros<sup>48</sup></p>

Table 10. Finnish Licences I

<sup>46</sup> "Sopimus teosten opetus-ja tutkimuskäytöstä". Hereinafter referred to as "Kopiosto Copying License".

<sup>47</sup> The compensation includes a 20% discount for a central payer. The Finnish Agency for Education also pays a 10% VAT.

The compensation covers the following number of copies:

1. Vocational schools: 12 730 000 copies of books, journals and other materials (except music sheets); 0 copies of music sheets

2. For basic education institutes and institutes of upper secondary education: 92 310 000 copies of books, journals and other materials, and 6 440 000 copies of music sheets

3. For music schools: 360 000 copies of books, journals and other materials, and 1 640 000 copies of music sheets

The price per copy is of 5,04 cents for photocopies and printouts, and for copying music sheets, 17,14 cents per copy for music schools and 13,21 cents per copy for other educational institutions.

The compensation refers to uses by the following schools:

1. Vocational schools: 507 849 euros

2. Basic education institutes and institutes of upper secondary education: 4 364 324 euros

3. Music schools: 238 054 euros.

<sup>48</sup> The compensation includes a 20% discount for a central payer. The Finnish Agency for Education also pays a 10% VAT.

For digital copying and use for education, the price per page is 5,04 cents, and concerning music sheets, 17,14 cents per copy for music schools and 13,21 cents per copy for other educational institutions.

The compensation refers to uses by the following schools:

1. Vocational schools: 694 324 euros

2. Basic education institutes and institutes of upper secondary education: 2 876 487 euros

3. Music schools: 25 789 euros.

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**Agreement on the use of television and radio programs for education  
(01.01.2016 - 31.12.2016)<sup>49</sup>**

Legal Framework	The CMO Kopiosto was approved by the Ministry of Education and Culture, in application of Section 14(1) of the Finnish Copyright Act, to grant licenses for the use of television and radio programs in education: Decision number OKM/12/650/2017
Licensed Material	Radio and television programs
Licence Fee	Fees paid by the National Agency for Education in 2017 <sup>50</sup> : 4 075 670 euros <sup>51</sup>

Table 11. Finnish Licences II

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**Gramex license for municipalities<sup>52</sup>**

Legal Framework	The CMO Gramex was approved by the Ministry of Education and Culture, in application of Section 14(1) of the Finnish Copyright Act, to grant licenses for the use of phonograms and music videos for educational purposes and for scientific research: Decision number OKM/30/650/2016
Licensed Material	Phonograms and Music Videos
Licence Fee	In 2017, the fees for public performance of phonograms and music videos were: For less than 70 000 residents: 0,090€ per resident For 70 000 – 200 000 residents: 0,065€ per resident Over 200 000 residents: 0,032€ per resident With a minimum of 22,56€. In 2017, the fees for the reproduction of phonograms (optional part of the license) were 0,030€ per resident.

Table 12. Finnish Licences III

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49 "Sopimus television- ja radio-ohjelmien opetuskäytöstä". Hereinafter referred to as "Kopiosto Audiovisual License".

50 The version of the agreement analysed hereunder dates from 2016, since the 2017 version was not obtained on time. The two versions have not significant differences. Therefore we have decided to include here the 2017 annual fees paid by the Finnish Agency for Education for uses of radio and television programs for education.

51 The compensation includes a 20% discount for a central payer. The Finnish Agency for Education also pays a 10% VAT.

52 "Gramex kuntasopimus". Hereinafter referred to as "Gramex License".



## II. Grant of Rights

This section examines the extent of the licence granted by the agreements in order to understand whether the rights granted by the agreements covered by this study fall under the scope of protection of the educational exception, or if they broaden or restrict the acts of use permitted by these exceptions.

Most of the British and French agreements discussed hereunder permit uses that fall under the scope of protection afforded by the national educational exceptions and educational uses that are not contemplated by those exceptions. At the same time, however, some of those agreements purport to prevent or restrict (i) uses that are permitted under copyright exceptions or fair dealing provisions, and/or (ii) uses that fall outside the scope of protection of copyright (such as hyperlinking).

While some of those restrictive provisions expressly acknowledge that contractually restricted uses can be permitted by statute, others do not offer the same safeguards. The UK's copyright legislation renders unenforceable contractual terms that purport to prevent or restrict acts that, by virtue of fair dealing or certain copyright exceptions (e.g. quotation exception), would not infringe copyright. That protection is not, however, granted to acts made under the educational exceptions analysed hereunder. The French copyright legislation does not contain any provisions on treating such contractual provisions as unenforceable or of having no effect. This means that educational establishments may be effectively prevented from engaging in acts permitted by law due to contractual restrictions.

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## 1. Permitted Uses

Most of the agreements covered hereunder permit uses that fall under the scope of protection of the national educational exceptions as well as educational uses that are not covered by such exceptions.

### 1.1. United Kingdom

Under the national educational exceptions embodied in the UK's copyright legislation, which provide the legal framework for the agreements featured herein<sup>53</sup>, educational establishments may 1) copy extracts of works and extracts of recordings of performances<sup>54</sup>, 2) record broadcasts and copy such recordings<sup>55</sup>, and 3) communicate such copies and recordings to their pupils and staff<sup>56</sup>.

Some of the licensing agreements analysed in this study cover additional acts of use, such as the right to “distribute, or permit the distribution of, Paper Copies to Authorised Persons”<sup>57</sup> or the right to “make, or permit the making of, Arrangements<sup>58</sup> of Musical Works”<sup>59</sup>. The provision below additionally gives licensees the right to make various adaptations of the licenced material:

**Extracts of Licenced Material and other material generated by teaching staff or students may be **combined**, parts may be **blanked out**, relevant parts may be **selected**, or **adapted** as a pedagogic exercise only (subject to photographs and illustrations not being used separately from the original article in which they appeared).<sup>60</sup>**

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53 Sec. 35, Sec. 36 and Paragraph 6 and 6ZA of Schedule 2 to the CDPA.

54 Under Section 17(2) of the CDPA, copying a literary, dramatic, musical or artistic work means “reproducing the work in any material form”, including “storing the work in any medium by electronic means”.

55 Under Section 17(4) of the CDPA, copying of a film or broadcast includes “making a photograph of the whole or any substantial part of any image forming part of the film or broadcast”.

56 Under Section 20(2) of the CDPA, “communication to the public by electronic transmission includes (a) the broadcasting of the work, and (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them”.

57 Sec. 2.2. CLA Licence and Sec. 2.2. NLA Licence. A similar provision is contained in the Schools Printed Music Licence: “Distribute, and to permit the distribution of, Licenced Copies to School Members” - Sec. 2(c).

58 Arrangement means “an arrangement (as defined by the Copyright Designs and Patents Act 1988 (as amended)) of a Musical Work made for performance by a particular combination of instruments and/or voices and expressed in graphic form such as a score or a set of parts. The score or set of parts may be handwritten or entered into a music notation software programme (such as Sibelius or Finale) or a Digital Audio Workstation (such as Logic or Cubase)” - Glossary, Schools Printed Music Licence.

59 Sec. 2(b) Schools Printed Music Licence.

60 Sec. 6.8 NLA Licence. A similar provision is contained in the CLA Licence: “Extracts of Licenced Material and other material generated by teaching staff or students may be combined, parts may be blanked out, relevant parts may be selected, translated or adapted as a pedagogic exercise only and illustrations or photographs may be dis-embedded” - Sec. 6.8.

Surely, under fair dealing, educational establishments may adapt works for the sole purpose of illustration for instruction<sup>61</sup>. The extent to which a work can be used under these licensing provisions is, however, greater than what would be allowed under the fair dealing provision, or even under the national educational exceptions on which such agreements are based, as discussed in Section III below. Therefore, these licensing agreements effectively cover more adaptations than would otherwise be permitted under the UK's copyright legislation.

## 1.2 France

The educational exceptions in France allow the “representation”<sup>62</sup> and reproduction of extracts of works (excluding the use of works specifically intended for education and music scores) and extracts of subject matter protected by neighbouring rights for the sole purpose of illustration in the context of teaching and research, provided that such representation or reproduction is intended to be communicated to an audience composed mainly of pupils, students, teachers or researchers.

As mentioned before, the French agreements analysed hereunder not only apply the education exception but also complement the exception by covering additional uses not contemplated by the educational exception.

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61 Under Sec. 32 of the CDPA, “fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work provided that the dealing is (a) for a non-commercial purpose, (b) by a person giving or receiving instruction (or preparing for giving or receiving instruction), and (c) accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).”

62 According to Article L122-2 of the Intellectual Property Code, “representation is the communication of the work to the public by any process, including:

1° By public recitation, lyric performance, dramatic performance, public presentation, public screening and transmission of the broadcasted work in a public place;

2° By broadcasting.

Broadcasting refers to the broadcasting by any telecommunication process of sounds, images, documents, data and messages of any kind.

It is assimilated to a representation the emission of a work towards a satellite.”

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These additional uses include the right to use certain categories of works in their entirety:

Notwithstanding the provisions of Article L. 122-5(3)(e) of the Intellectual Property Code, which establishes the exclusive use of excerpts of works, this memorandum allows the reproduction and representation of works mentioned therewith **in their entirety**, by any means or process, for illustration of teaching and research:

- in case of short works (such as poems) and visual art works, for the uses established in this memorandum;
- within the scope of an in-person representation, to allow the study of the work, except for works designed for educational purposes and music scores.<sup>63</sup>

In addition, it is permitted in-classroom representation, to pupils and students, of **entire works** disseminated via radio, analogue or digital form, by means of a free audiovisual communication service, as well as temporary reproductions of such works exclusively intended for this purpose.<sup>64</sup>

This agreement permits in-classroom representation, to pupils or students, of **sound recordings**, as well as in-classroom representation of **musical works** by pupils or students.<sup>65</sup>

One of the French agreements also allows the right to use the categories of works that are excluded from the scope of the educational exception: works designed for educational purposes and music scores<sup>66</sup>.

<sup>63</sup> Art. 3.2.1 Memorandum of Understanding.

<sup>64</sup> Art. 2.3.1 Audiovisual Agreement.

<sup>65</sup> Art. 2.3.1 Music Agreement

<sup>66</sup> See Memorandum of Understanding.

Finally, the agreements allow certain acts of making available online without requiring such acts to be intended to be communicated to an audience composed mainly of pupils, students, teachers or researchers:

This memorandum allows the **making available online** of representations and reproductions of excerpts of works or, in their full form, visual art works mentioned therewith, featuring **audio and video recording of meetings, conferences and seminars** as described in Article 3.1.3.<sup>67</sup>

It is also covered by the agreement the **making available online of excerpts of works included in dissertations** covered by this agreement, i.e. in memoirs summarising a university research work and defended before a panel by a student, to obtain a certificate or a university degree.<sup>68</sup>

Those acts of use undoubtedly fall outside the scope of protection of the educational exceptions and, to that extent, they are considered additional uses. Nevertheless, in certain circumstances, the insertion of excerpts of works in dissertations could fall under the quotation exceptions set forth in the French copyright legislation, which allows for analysis and short quotations justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated<sup>69</sup>. The same could be said of the act of making available online on the open Internet of recordings of meetings, conferences and seminars, where excerpts of protected works are reproduced or represented.

## 1.3 Finland

Under Finnish copyright legislation the following educational uses can be based on an extended collective license (“ECL”): 1) reproduction of a work by photocopying or corresponding means<sup>70</sup>; 2) reproduction of a work by means other than photocopying for use in educational activities or scientific research<sup>71</sup>; and 3) communication of a work to the public by means other than transmitting by radio or television for use in educational activities or scientific research<sup>72</sup>.

67 Art. 3.2.2.3 Memorandum of Understanding.

68 Art. 2.3.4 Audiovisual Agreement. A similar provision is contained in the Music Agreement: “It is also covered by the agreement the making available online of excerpts of sound recordings included in dissertations covered by this agreement, i.e. in memoirs summarising a university research work and defended before a panel by a student, to obtain a certificate or a university degree”. The Memorandum of Understanding also foresees a similar use: “This memorandum allows the making available online of dissertations comprising excerpts of works or, in their full form, visual art works mentioned therewith, in the absence of any commercial use” - art. 3.2.2.2

69 See article L211-3(3) and article L122-5(3)(a) of the Intellectual Property Code.

70 Sec. 13 of the Copyright Act.

71 Sec. 14(1) of the Copyright Act.

72 Ibidem.

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Since the purpose of an ECL is to extend the effects of a license granted by a CMO to cover the use of works by right holders who are not members of that CMO, the scope of rights granted by such licenses cannot be wider than the scope of rights foreseen by the authorization obtained from the Ministry of Education and Culture (which, in turn, cannot allow more uses than prescribed by law). Additional uses may only be granted under separate licenses, which can only cover the use of works by right holders who are members of that CMO.

On the whole, the Finnish agreements analysed hereunder – as they are granted by CMOs for the purpose of applying an ECL - do not permit any additional uses on top of the ones prescribed by the respective approval decisions.

## 2. Restricted Uses

While most of the agreements hereunder foresee uses not contemplated in the respective educational exceptions, some also purport to restrict acts of use that are otherwise permitted by the copyright legislation of the countries under analysis.

### 2.1 United Kingdom

All of the licences from the United Kingdom list a number of restricted uses, which the beneficiaries of the licences shall not make in order to comply with the terms and conditions of the licensing agreements.

Some of these provisions expressly acknowledge that the contractually-restricted uses may be permitted by law, thus safeguarding uses made by educational establishments under law:

**Except as may be permitted by the Licence or by statute, the School shall not edit, amend, manipulate, add to or delete from Digital Copies nor shall it authorise the same, and no digital manipulation, morphing, colour or shade adjustment or otherwise may be made of Digital Copies or Digital Material under the Licence.<sup>73</sup>**

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<sup>73</sup> Sec. 6.1 NLA Licence. A similar provision is contained in the CLA Licence: "Except as may be permitted by the Licence or by statute, the Licensee shall not edit, amend, manipulate, add to or delete from Digital Copies nor shall it authorise the same, and no digital manipulation, morphing, colour or shade adjustment or otherwise may be made of Digital Copies or Digital Material under the Licence" - Sec. 6.1.

Other licences, however, do not provide for the same safeguards. For instance, in the ERA Licence, the list of restricted uses - which is incidentally longer than the list of permitted uses - describes acts of uses that could be permitted by statute (namely under the UK's fair dealing provision, or under other exceptions and limitations to copyright), without exempting such uses from the contractual restriction. This licensing agreement prescribes that it does not permit or authorise any "Dealing" with the licenced material, while providing the following definition of "Dealing":

For the specific purposes of this Agreement "Dealing" shall mean

- (a) any Commercial Use<sup>74</sup>;
- (b) **printing captured still pictures from ERA Recordings;**
- (c) the adaptation or manipulation of an ERA Recording or any ERA Repertoire;
- (d) **any copying, sale, distribution, redistribution, publication, public performance, communication to the public or other use of ERA Repertoire or ERA Recordings not expressly provided for by the ERA Licence;**
- (e) permitting anyone other than Authorised Users to have access to ERA Repertoire;
- (f) permitting ERA Repertoire to be electronically transmitted to any recipient other than an Authorised User;
- (g) removing, obscuring or modifying any copyright notices, digital on-screen logos, labels or tags which refer to ERA or the basis upon which an ERA Recording has been made;
- (h) Authorised Users copying, reproducing, downloading, posting, broadcasting, transmitting, communicating or making available to the public, or otherwise using ERA Repertoire in any way except for personal non-commercial educational use;
- (i) Authorised Users altering ERA Repertoire or creating any derivative work from any ERA Repertoire except for their own personal non-commercial educational use.<sup>75</sup>

<sup>74</sup> See Section III, Subsection 1.1 below for an analysis of this restriction.

<sup>75</sup> Sec. 3.2 ERA Licence.

It should be remembered that the ERA Licence is granted under the educational licensing scheme that ERA operates for the purposes of Section 35 and Paragraph 6 of Schedule 2 to the CDPA, which permit the recording of broadcasts and the copying of such recordings by educational establishments. Under Section 17(4) of the CDPA, *copying* of a film or broadcast includes “taking a photograph of the whole or any substantial part of any image forming part of the film or broadcast”. Nevertheless, under subsection (b) of the licensing provision shown above, the licence does not permit or authorise the act of “printing captured still pictures from ERA Recordings”.

According to the licence override rules contained in British copyright legislation, an educational establishment cannot rely on the exceptions, insofar as licences authorising the acts permitted by the exceptions are available. Considering that subsection (b) of the above-mentioned licensing provision does not authorise an act that is permitted by the exception, the educational establishments that benefit from the ERA Licence should, in the author’s understanding, be able to rely on the exception to engage in such acts without further problems.

The most problematic licensing provisions are ones that restrict uses permitted under other exceptions and limitations to copyright. For instance, under subsection (d) of the licensing provision presented above, the beneficiaries of the ERA licence cannot make any public performance of the ERA Repertoire or ERA Recordings. However, under Section 34(1) of the CDPA, “the performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment (a) by a teacher or pupil in the course of the activities of the establishment, or (b) at the establishment by any person for the purposes of instruction, is not a public performance for the purposes of infringement of copyright”. Furthermore, under Section 34(2) of the CDPA, “the playing or showing of a sound recording, film or broadcast before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright”.

Despite such a favourable legal framework, the educational establishments that benefit from the ERA Licence may, due to this contractual restriction, be prevented from holding public performances of the ERA Repertoire or of the ERA Recordings, because Section 34 does not contain a provision protecting the permitted acts from contract terms that purport to prevent or restrict the execution of any act which, by virtue of such section, would not infringe copyright.

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Another example of a licensing provision that restricts acts of use and is therefore deemed to be problematic, is the following one contemplated in the Schools Printed Music Licence:

While Licenced Copies may be used to assist performers when they perform as part of their School Activities within the scope of the Licence, the Licence does not authorise the general public performance right, broadcast right, making available right or recording of any music (including putting recordings on any website) **for which the Licensee must ensure that it has the appropriate licences in place before undertaking any of these activities.**<sup>76</sup>

The Schools Printed Music Licence is a licence granted under the educational licensing scheme that CLA, acting as an agent for Printed Music Licensing Limited, operates for the purposes of Section 36 of the CDPA, which permit the copying and use of extracts of works by educational establishments. This licence only covers printed music, and not the musical works themselves. Nevertheless, the recording of parts of a musical work is permitted by the educational exception embodied in Section 36. Thus, the licensing agreement should not require the educational establishments to have licences in place before making “the recording of any music”. If licences are available, the law prevents the establishments from relying on the exception; otherwise they should be free to making such uses under the exception.

Finally, there is another type of clause found in the UK’s licensing agreements which causes concern due to the fact that it purports to prevent or restrict the execution of acts falling outside the scope of copyright protection:

Digital Copies may not be placed on the publicly accessible internet or **be linked either directly or indirectly by hypertext links (or the like) to or from any external or third-party website.**<sup>77</sup>

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<sup>76</sup> Sec. 4.14 Schools Printed Music Licence.

<sup>77</sup> Sec. 6.2 CLA Licence and Sec. 6.2 NLA Licence.

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Hyperlinking to a copy of a protected work from a website may, in certain cases, be considered to violate the copyright owner's right to authorise or prohibit any communication to the public. Scholarship has become divided on whether hyperlinking constitutes an act of communication to the public, with some scholars defending the view that hyperlinks only provide information as to the location of a work and should not therefore fall under the notion of communication to the public, while other scholars conclude that hyperlinks offer works to the public in such a way that members of the public may access them at a place and time of their choosing<sup>78</sup>. On the other hand, the judicial interpretations on this issue have not yet settled. Therefore, using a contract to prevent an act that does not necessarily amount to a copyright infringement is objectionable in the author's view.

*A fortiori*, prohibiting hyperlinking from a copy of a protected work to a website is all the more unacceptable. Indeed, there is no doubt that inserting a link in a digital copy of a work to an external or third party website falls outside the scope of exclusive rights. Therefore, such act should not be, in any circumstance, subject to a contractual restriction.

## 2.2 France

Under French copyright legislation, the distribution right is not independent from the reproduction right. This means that the national educational exceptions cover the distribution of extracts of works (excluding the use of works specifically intended for education and music scores) and extracts of subject matter protected by neighbouring rights for the sole purpose of illustration in the context of teaching and research, provided that such distribution is intended for an audience composed mainly of pupils, students, teachers or researchers.

Nevertheless, the agreements on the use of audiovisual and cinematographic works, and on the use of sound recordings of musical works and music videos, starting from 2009, do not allow for the distribution of copies of works pursuant to those agreements to audiences covered by the educational exceptions:

The **distribution** to pupils, students or researchers, of entire or partial reproductions of the works covered here in is **not allowed**.<sup>79</sup>

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<sup>78</sup> For an overview of the discussion see e.g. Papadaki, E., "Hyperlinking, making available and copyright infringement: lessons from European national courts", in European Journal of Law and Technology, Vol 8, No 1, 2017, available at <http://ejlt.org/article/view/549> [last accessed 8 March 2018].

<sup>79</sup> Art. 2.2 Audiovisual Agreement. A similar provision is contained in the Music Agreement: "The distribution to pupils, students or researchers of entire or partial reproductions of a musical work or of a sound recording is not allowed." - art. 2.2.

In turn, the agreement on the use of books, published music works, periodical publications and visual art works, starting from 2016, only excludes the act of distribution of paper copies of works, insofar as they are authorised by reprographic agreements:

This memorandum does **not allow the distribution**, to authorised users, of paper reproductions of works **that are authorised by reprographic reproduction agreements**.<sup>80</sup>

It should be noted that, under article L122-5(3) of the Intellectual Property Code, the compensation owed to right holders for uses covered by the educational exceptions should be negotiated on a flat-rate basis without prejudice to the assignment of the reproduction right under article L122-10, which foresees that the publication of a work involves the assignment of the reprographic reproduction right to a CMO. Thus, the exclusion of the distribution right from the scope of an agreement that aims to secure said compensation is understandable when the copies being distributed are covered by separated reprographic reproduction agreements.

## 2.3 Finland

None of the provisions in the Finnish license agreements analysed here under restricts the acts of use that are permitted by national copyright exceptions or limitations.

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<sup>80</sup> Art. 3.4 Memorandum of Understanding.

## III. Conditions of Use

This section highlights the contractual conditions to which the uses permitted by the agreements under analysis are subject, including: purposes of use; extent of the work and other quantitative limitations; physical limitations; technological limitations; time limits; source material; no market competition; and attribution.

As shown in the previous section, most of the agreements discussed hereunder permit uses that fall under the scope of protection of the national educational exceptions, as well as educational uses that are not covered by such exceptions. The conditions to which the latter are subject are not the focus of this analysis, since the parties thereto should naturally be free to negotiate the terms and conditions of uses not protected by copyright exceptions and limitations. The focal point of this section are the limitations imposed on uses falling under the scope of protection of the educational exceptions, insofar as such limits are not provided by, or are contrary to those of, the EU educational exception and/or the national educational exceptions of the relevant countries.

Under art. 5.3(a) of the InfoSoc Directive, Member States may provide for exceptions or limitations to the rights harmonised by the Directive for uses “for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”.

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This exception is a "categorically worded prototype"<sup>81</sup> that does not restrict the beneficiaries, the types of activities or the categories of works covered by the exception. No physical, technological, quantitative or time limitations are found in the EU exception. The only conditions are that the activity in question must be "for the sole purpose of illustration for teaching or scientific research", it cannot be carried out for commercial purposes and the source must be stated.

None of the educational exceptions contained in the national legislations of Finland, France or the United Kingdom takes "full advantage of all policy space available"<sup>82</sup> under the EU educational exception. In other words, all of the laws analysed in this study narrow the scope of protection offered by the national exception in comparison to the EU prototype. The British and French agreements based on these national exceptions further restrict, with some exceptions, educational uses by imposing terms and conditions not foreseen in the national laws or by providing their own contractual definitions of concepts pertaining to the educational exceptions.

Considering that the main aim of the French agreements is to procure legally-required compensation, using them to prescribe terms and conditions that are not founded in law is a questionable practice. Surely, one can argue that these limitations ensue from the remuneration negotiated by the parties. Still, it does not seem that the lawmaker intended to make all the terms and conditions of the uses permitted by law dependent on the outcome of negotiation between parties, but rather only the financial aspects of use.

In the UK where licenses override exceptions, imposing contractual conditions that are not set forth in the exceptions raises a number of questions, such as (a) whether an establishment can rely on an exception for uses that - due to contractual restrictions - are not covered by licenses but fall under the scope of such exception, or (b) whether an establishment can rely on an exception after a license is terminated by its licensor for violation of obligations not foreseen by law.

Another interesting finding is that the contractual limitations imposed in some agreements on uses falling under the national educational exceptions stem from how licenses define certain concepts relating to these exceptions.

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81 Hugenholtz, P. B. and Senftleben, M., Fair Use in Europe: In Search of Flexibilities (4 November 2011), available at <http://ssrn.com/abstract=1959554> [last accessed 8 March 2018], 2.

82 Idem, Ibidem.

Naturally, if the licensee and the licensor have equal bargaining power, there is no offense if they reach an agreement over the interpretation of certain aspects of the law. However, in countries where precedence is given to licenses over exceptions, the position of licensees is weakened. If schools and the government are put in a position in which they have to buy a licence in order to keep using the works they are currently using under the educational exception, they will not have the same power as right holders to determine the interpretation of important conditions of use. Thus, the practice of providing for contractual definitions of open concepts of law in licenses that override exceptions cannot be deemed to be a good practice.

Finally, one should not forget that private agreements entered into between right holders and governmental entities do not cover all would-be beneficiaries of educational exceptions. Furthermore, the widespread use of some contractual notions will influence how the court interprets these legal concepts in the future and that interpretation will be applicable to the entire spectrum of users.

## 1. Purposes of Use

Under the InfoSoc Directive, educational uses are permitted for the sole purpose of illustration for teaching or scientific research to the extent justified by the non-commercial purpose to be achieved. *Illustration for teaching* and *non-commercial* are openly formulated concepts that could be considered “autonomous concepts of Union law”<sup>83</sup>.

Just as in the InfoSoc Directive, the copyright laws of the countries under analysis permit certain educational uses for the same purposes. These laws use analogous variations of the expressions “purpose of illustration for teaching or scientific research” and “non-commercial purpose”, but none defines what should be considered *illustration for teaching* or *non-commercial* purposes.

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<sup>83</sup> So far the CJEU has not pronounced any decisions 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 laid down by different optional exceptions foreseen in the InfoSoc Directive are “autonomous concepts of Union law”.

The term *illustration* originates in art. 10(2) of the Berne Convention, which allows “the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice”. The wording “by way of illustration... for teaching” was introduced in the Berne Convention in an attempt to respond to concerns about the extent of use, and not to narrow the definition of “educational purposes”<sup>84</sup>. It is, thus, understood that such term “cannot further restrict the original scope of ‘educational purposes’”<sup>85</sup> stated in the previous versions of such provision<sup>86</sup>.

Notwithstanding this legal framework, several of the agreements discussed hereunder provide for their own contractual definitions of illustration for teaching purposes as well as for definitions of commercial uses.

## 1.1. United Kingdom

Under Section 35 and Paragraph 6 of Schedule 2 to the CDPA, an educational establishment may record broadcasts for the educational purposes of that establishment provided that “the educational purposes are non-commercial”<sup>87</sup>. There is no statutory definition of non-commercial educational purpose, and British law does not offer any guidance on how to differentiate between commercial and non-commercial educational purposes.

Nonetheless, this study identified a contractual definition of commercial use in one of the British licences authorising the same acts as the educational exception:

**Commercial Use** means the use of any ERA Repertoire for any commercial or promotional purposes or for the purposes of monetary reward (whether by the Licencee, Relevant Educational Establishments, any Authorised User or third party) or in any way which generates profit.<sup>88</sup>

84 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) [last accessed 8 March 2018], 15.

85 *Idem*, *Ibidem*.

86 See art. 8 of the Berne Act and art. 10(2) of the Brussels Act.

87 Sec. 35 and Paragraph 6 of Schedule 2 of the CDPA.

88 Sec. 3(a) ERA Licence.

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This definition is not intent-based; in other words, it does not solely consider the primary purpose of use. Since no activity is completely disconnected from commercial activity, not even the educational activity of a not-for-profit educational establishment, it seems ill-advised to include such a definition in a licence stipulating that it is only allowed to override the educational exception insofar as the licence permits the same acts as the exception.

Determining which uses do and do not qualify as commercial uses, in this context, should be a task for lawmakers or the courts, or ultimately the Court of Justice of the European Union, if *non-commercial* is found to be an “autonomous concept of Union law”, subject to the uniform interpretation of the court.

Subjecting the acts permitted under this licence to such a broad definition of commercial uses will in practice shape the activities of the licencees who will refrain from making uses that would otherwise be permitted under the educational exception because they must hold a licence and cannot rely on the exception.

## 1.2. France

The educational exception provided in art. L122-5 of the Intellectual Property Code allows for the use of excerpts of works for purposes of “illustration of a teaching or research activity”. The French law does not, however, define what should be considered an “illustration of a teaching or research activity”.

Nevertheless, the three agreements entered into between the French Ministry of Education, Higher Education and Research and French CMOs to apply and complement the teaching exception and secure the compensation required by law, provide for a contractual definition of “illustration of a teaching or research activity”:

**Use for illustration purposes within the scope of teaching and research** means the use of an excerpt of a work or a work intended to clarify or support a discussion, a development, an argument within the scope of teacher courses, pupil and student works, or research works and within the scope of teacher and researcher training<sup>89</sup> sessions.<sup>90</sup>

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<sup>89</sup> “Teacher and researcher training means the initial and continuous training of teachers, research professors, educational staff and researchers, as long as they are duly enrolled in a training course, either attending it in person and/or via long-distance, and which is organized by the Ministry or any public institutions under its authority” - Art. 2 Memorandum of Understanding.  
<sup>90</sup> Art. 2 Memorandum of Understanding. A similar definition is contained in Art. 2.1 Music Agreement and in Art. 2.1 Audiovisual Agreement.



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This contractual definition does not seem to cover all the acts that are necessary to convey instruction or teaching, including training and exercises. To give an example, the performance of a music work by a music teacher or by her pupils during a music class for the purposes of teaching and learning how to play a song will be difficult to frame as a use of a work to clarify or support a discussion, development or argument.

If this delimitation of the purposes of uses permitted by the agreements was applicable only to that part of the uses that are not covered by the French educational exception, it would not be in the least problematic. However, this terminology is applied equally to educational uses falling under the exception and ones that do not.

It seems inappropriate to defer to a private agreement - whose main aim is to secure the compensation required by law for the educational uses permitted under the national copyright exception – for it to determine the interpretation of what constitutes an educational purpose. Again, it should be up to the EU and/or national legislator and courts to determine the scope of the educational activities covered by the exception.

Moreover, the terminology used by the French educational exception, and replicated by the agreements in question, derives from the concept of *illustration for teaching* contained in the EU educational exception. This means that, as noted before, it could be considered a concept of Union law and, thus, be subject to the uniform interpretation of the Court of Justice of the European Union.

### 1.3. Finland

Under Section 14(1) of the Finnish Copyright Act, a protected work may, by virtue of an extended collective licence, be reproduced and communicated to the public for use in educational activities or scientific research. The Copyright Act does not contain a definition of “educational activities” or “scientific research”. Similarly, the licenses analysed hereunder also lack an explicit definition of these concepts. Nevertheless, one of those agreements does contain something that can be considered an implicit definition of educational purposes:

Copies made under this license may be used to **highlight, bring attention to, or illustrate something that is to be taught.**<sup>91</sup>

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<sup>91</sup> 11§ Kopiosto Copyright License.

Since, under the ECL rules, the terms and conditions of the educational uses are determined in the ECL-based agreement, such a contractual definition cannot be treated as something that is unwarranted or undesirable in the eyes of the law. That does not mean, however, that its inclusion will not exert an unintended adverse impact on the judicial interpretation of a concept that is used in the context of other educational uses permitted by law.

## **2. Extent of the Work**

Some of the national exceptions, on which the agreements analysed hereunder are based, only allow educational uses of parts of a work. That is true of the French educational exception and of the British exceptions that permit educational establishments to copy and use extracts of works and recordings of performances for purposes of instruction<sup>92</sup>.

Most of the agreements hereunder permit uses that go beyond the scope of protection of the educational exceptions in terms of the proportion of a work that can be used. For instance, the French agreements allow for uses of entire works of visual arts, while the national exception only covers uses of “extracts of works”. Notwithstanding that, these agreements also provide for their own definitions of what constitutes an “extract of a work”, whereas the French law does not prescribe such delimitation.

### **2.1. United Kingdom**

The British licences featured herein are more favourable than the national exception in terms of the proportion of the work which may be used.

Under Section 36 of the CDPA, educational establishments may copy and use extracts of a work, provided that “not more than 5% of a work may be copied under this section by or on behalf of an educational establishment in any period of 12 months, and for these purposes a work which incorporates another work is to be treated as a single work”<sup>93</sup>.

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<sup>92</sup> Sec. 36 and Paragraph 6ZA of Schedule 2 of the CDPA.

<sup>93</sup> Sec. 36(5) of the CDPA.

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Two of the licences considered hereunder, which were granted under educational licensing schemes that the CMOs operate for the purposes of this Section 36, permit the licencees to use the greater of 5% of a work or some other limit:

The Licencee shall ensure that Licenced Copies **do not exceed either singly or in aggregate the greater of five (5) per cent** of any published edition, or:

- (i) in the case of a book, one complete chapter;
- (ii) in the case of an issue of a serial publication, or a set of conference proceedings, one whole article;
- (iii) in the case of an anthology of short stories or poems, one short story or poem not exceeding ten (10) pages in length;
- (iv) in the case of a published report of judicial proceedings, the entire report of a single case.<sup>94</sup>

The School shall ensure that Licenced Copies **do not exceed either singly or in aggregate the greater of five (5) per cent** of any newspaper or one article.<sup>95</sup>

This means that an educational establishment may in some cases under such licences be able to copy and use more than the 5% limit established by law.

## 2.2. France

The educational exception in France allows for the use of “extracts of works”<sup>96</sup>. The law does not however define what should be considered an extract of a work, nor does it contain any rule to determine if a specific proportion of a work qualifies as an extract of a work or not.

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<sup>94</sup>Sec. 5.2 CLA Licence.

<sup>95</sup>Sec. 5.2 NLA Licence.

<sup>96</sup>Art. L122-5 of the Intellectual Property Code.

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As mentioned before, the French agreements analysed hereunder, on the one hand, apply the educational exceptions and, on the other hand, complement the exceptions by covering additional uses not foreseen in the same. These additional uses, which are not covered by the national exceptions, include the right to use works of visual arts in their entirety, and the right to use certain categories of works (works designed for educational purposes and music scores) that are excluded from the scope of the exception.

In relation to additional uses, all terms and conditions that purport to restrict the proportion of a work are acceptable. However, these extent restrictions are found in agreements not only in relation to additional uses, but also to uses that are covered by the educational exception, which the agreements are supposed to regulate only in terms of the compensation due to right holders.

The most recent agreement entered into between the French Ministry of Education, Higher Education and Research and French CMOs is dated 2016. It contains two definitions of what constitutes an “extract of a work”, one that operates only in relation to those works that are not covered by the educational exception<sup>97</sup>, and another that is applicable to works falling under the scope of protection of the educational exception:

The **excerpt** refers to a part, a fragment of a work of a significant magnitude and irreplaceable for creation as a whole, except for works designed for educational purposes and published music works for which the excerpt is described in Article 4.2.1 of this memorandum.<sup>98</sup>

In the previous version of this agreement, the notion of extract was defined by reference to a number of pages<sup>99</sup>. The definition above was adopted in the 2014 version of this agreement, specifically for uses falling within the scope of the educational exception. While the definition is not foreseen by the law, it seems flexible enough to accommodate the various uses of extracts of works, and therefore it is not troublesome.

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<sup>97</sup> “For works not covered by the educational exception, the uses listed in this memorandum relate to excerpts described as follows: - for works designed for educational purposes published as books, the excerpt may not exceed 4 pages in a row, within the limit of 10% of the work’s pages, per teaching or research work;- for works designed for educational purposes published as periodical publications, the excerpt may not exceed 2 articles in the same issue, within the limit of 10% of pages regarding printed publications, per teaching or research work;- for published music works, the extract may not exceed three pages in a row, within the limit of 10% of the work in question (lyrics and/or music), per teaching or research work.” - Art. 4.2.1 Memorandum of Understanding.

<sup>98</sup> Art. 4.1.5 Memorandum of Understanding.

<sup>99</sup> See Introductory Note to the previous version of the Memorandum of Understanding dated from 01.11.2014, available at [http://www.education.gouv.fr/pid25535/bulletin\\_officiel.html?cid\\_bo=84937](http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=84937) [last accessed 26 February 2018].

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The definitions in the two other agreements analysed hereunder are more worrisome because these notions apply to uses falling under the exception:

**Excerpts** refers to portions of audiovisual or cinematographic works which length is limited to six minutes and could not in any case exceed one-tenth of the total duration of the entire work. In case several excerpts of the same audiovisual or cinematographic work are used, the total duration of these excerpts may not exceed 15 % of the total duration of the work.<sup>100</sup>

**Excerpts of works or sound recordings**, referred to in articles 2.3.2 to 2.3.5, refers to a partial use of a musical work or of a sound recording of a musical work, or of a music video, which length is limited to thirty seconds, and in any case less than one-tenth of the total duration of the entire work. In case several excerpts of the same work are used, the total duration of these excerpts may not exceed 15% of the total duration of the work.<sup>101</sup>

It should be noted that the contractual delimitation of what constitutes an extract of a work for the purposes of uses covered by the educational exception are not necessarily unfavourable to the licencees. The concept of an “extract of a work” is an open concept, and therefore it is subject to interpretation by national courts.

What causes concerns again is that these limits are defined in private agreements with right holders, and the impact that these contractual notions may have in future interpretations of the concept of “extract of a work” by the French courts. Moreover, it seems possible that - without the influence of such contractual practices - a court would treat the educational use of six minutes of a film the same way it would treat a similar educational use of seven minutes of the same film. Yet, because of these agreements, the schools and institutions under the authority of the French Minister of Education, Higher Education and Research will be discouraged from using that extra minute of the film that they would want to use to convey their teaching.

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<sup>100</sup> Art. 2.1 Audiovisual Agreement.  
<sup>101</sup> Art. 2.1 Music Agreement.

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## 2.3. Finland

As mentioned before, under ECL rules, the terms and conditions of educational uses are determined in an ECL-based agreement, not by law. Therefore, they fall outside the focus of this Section.

That being said, one of the Finnish agreements analysed hereunder contains the following limitation as to the extent to which a work can be copied:

### **Printed Publications**

Printed publications may be copied during a single term or period of teaching for the same teaching group from the same publication:

- by photocopying or similar method: up to 20 pages, but not more than half of the publication. A maximum of 10 pages can be copied from a publication containing sheet music.
- by scanning or a similar method: up to 15 pages, but not more than 15% of the publication.

### **Digital Works**

During the same class or teaching period and for the same teaching group, it is allowed to print and copy a maximum of 20 pages (corresponding to an A4 sheet size in print) of the same webpage.

However, a teacher may print a full-time teacher's guide or equivalent instruction manual for his or her workload.

### **Other conditions for copying**

Copying of an image, article or similar on a single page of the publication counts as copying of one page. Copying of a single still image on a website is also considered as copying of one page.

The permitted scope may not be exceeded when the copying occurs during the same term or period of teaching to the same students from the same material in several occasions.

During one term or period of teaching, the teacher can produce one copy per student of the teaching group, as well as a few copies for himself.<sup>102</sup>

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<sup>102</sup> 5§ Kopiosto Copying License.

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## 3. Quantitative Limitations

The English and Finnish licences featured in this study prescribe limitations as to the number of copies of a work (or extract of a work) the licencees are authorised to make. In the UK such a limit is not contemplated by any of the national educational exceptions.

### 3.1. United Kingdom

As shown in subsection 2 above, the UK licences featured herein are more favourable than the national exception in terms of the proportion of a work that may be used. This does not mean, however, that these agreements do not prescribe other quantitative limitations that are not foreseen by law.

In three of the licences analysed hereunder<sup>103</sup> we have found limitations as to the number of copies an educational establishment can make of extracts of works:

**The Licencee must limit the number of Licenced Copies to one Licenced Copy for each School Member in the lesson, class or group for which those Licenced Copies are intended.<sup>104</sup>**

British law does not contain any similar limitations, nor does it offer any guidance as to the number of copies an educational establishment can make. Provided that the copies are made for purposes of instruction for a non-commercial purpose, they should be permitted. If, for instance, a teacher needs to have two copies of an extract of a work to do an exercise in which pupils fill in the blanks in an incomplete copy of a text and then check a complete copy of the same text to see if the pieces of text inserted are correct, this should be allowed under the exception.

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<sup>103</sup> CLA Licence, Schools Printed Music Licence and NLA Licence.

<sup>104</sup> Sec. 4.3 Schools Printed Music Licence. A similar provision is contained in Sec. 5.1 CLA Licence and in Sec. 5.1 NLA Licence: "The number of Paper Copies of any one item of Licenced Material taken at any one time shall not exceed the number needed to ensure that there is one Paper Copy for each member of the teaching staff and each student in the class, lesson or course of study within the academic year for which the Paper Copies are intended. Where the Paper Copies are intended for a meeting of Authorised Persons, the number of Licenced Copies shall not exceed the numbers attending that meeting."

According to Section 36(6) and Paragraph 6ZA(6) of Schedule 2 to the CDPA, the terms of a licence granted to an educational establishment authorising acts permitted by these educational exceptions “are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted” by the exception. This means that licensing agreements cannot forbid an educational establishment from copying less than 5% of a work, which as we saw, does not happen.

However, Section 36 does not have any general provision preventing any licensing terms and conditions contrary to what the law prescribes or introducing additional limits on top of the ones established by law. This means that the terms of a licence that prevents a teacher from making and using more than one copy of an extract of a work per pupil are not prohibited by law, despite the fact that such a licence is only capable of overriding the law insofar as it authorises the same acts as the law.

## 3.2. France

The French agreements do not expressly specify any quantitative limits besides the restrictions to the proportion to which a work can be used.

## 3.3. Finland

Again, the ECL-based agreements featured in this study are given free reign to define the terms and conditions of educational uses, i.e. they encounter no restrictions. One of the agreements analysed hereunder prescribes the following limits as to the number of copies a teacher can produce:

During one term or period of teaching, the teacher can produce **one copy** per student of the teaching group, as well as **a few copies** for himself.<sup>105</sup>

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<sup>105</sup> 5§ Kopiosto Copying License.



## **4. Limited Venues**

The United Kingdom is the only country analysed herein that provides for restrictions as to the physical space in which certain uses permitted under the educational exceptions can be made. In spite of that, most of the agreements featured in this study, including agreements from France and Finland, contain terms and conditions that limit the venues where educational uses, namely the ones covered by the exceptions, may take place.

### **4.1. United Kingdom**

Under Section 35(1) and Paragraph 6(1) of Schedule 2 to the CDPA, a recording of a broadcast, or a copy of such a recording, can be made by or on behalf of an educational establishment for the educational purposes of that establishment. This legal provision does not contain any physical limitations, which means that the making of recordings under such exception may take place anywhere (including without limitation libraries, archives, museums or any other facilities) provided they are done by, or on behalf of, the establishment and for the educational purposes of that establishment.

The only physical restriction contained in this educational exception is with regards to places where the communication of such a recording, or a copy of such a recording, can be received. Under Section 35(3), such recordings can only be communicated by or on behalf of the educational establishment to its pupils or staff inside the premises of the establishment or through means of a secure electronic network accessible only by the establishment's pupils and staff, if that communication is received outside the premises of the establishment.

Notwithstanding the above, under the ERA licence, which is based on the above mentioned educational exception, the making of a recording of a broadcast, or a copy of such recording, to the extent that it comprises or includes categories of works and performances owned or controlled by the licensors, has to take place in one of the following locations:

**Any ERA Recordings shall be made either**

- (a) at the premises of the Educational Establishment by or under the direct supervision of a teacher or employee of the Licencee; or**
- (b) at the residence of a teacher employed by the Licencee by that teacher; or**
- (c) at the premises of a third party authorised by the Licencee to make ERA Recordings on behalf of the Licencee under written contractual terms and conditions which prevent the retention or use of any ERA Recordings by that third party or**
- (d) at the premises of any other third party under an agreement whereby ERA shall have expressly agreed that a specified third party may retain ERA Recordings for subsequent access to and use only by current Licencees under an ERA Licence<sup>106</sup>**

Similarly, the Schools Printed Music Licence, which is granted under the educational licensing scheme that the organization CLA operates for the purposes of Section 36 of the CDPA, which permit the copying and use of extracts of works by educational establishments, also introduces a restriction as to the locations where such copies can be made:

**[Licencee is granted the non-exclusive right] to make, or permit the making of, Licenced Copies, on the School Premises or via the Secure Network, or, subject to the terms hereof including without limitation the limitations and exclusions in Clause 4 below, on Local Music Service or Local Music Education Hub premises.<sup>107</sup>**

<sup>106</sup> Sec. 2.2 ERA Licence.

<sup>107</sup> Sec. 2(a) Schools Printed Music Licence.

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Like Section 35(1), Section 36(1) does not contain any physical limitations as to the places where copies of extracts of works can be made, provided they are done by or on behalf of the establishment and for purposes of instruction for a non-commercial purpose. The only physical restriction contained in this educational exception is with regards to the locations where the communication of such copies can be received: inside the premises of the establishment or through means of a secure electronic network accessible only by the establishment's pupils and staff<sup>108</sup>.

## 4.2. France

The educational exception in France does not contain any limitation as to the venues where the uses covered by the exception must be made. What is essential in the French provision is that the use is made “for the sole purpose of illustration in the context of teaching and research” and that the use is intended to be communicated “for a public composed mainly of pupils, students, teachers or researchers directly concerned by the act of teaching, training or the research activity requiring such use”.

Nevertheless, all of the agreements analysed hereunder contain definitions that imply that most face-to-face uses can only be made on the premises of the schools and institutions covered by the agreement. For instance, one of the agreements allows for the reproduction and public communication of excerpts of works and, in their full form, visual art works for in-person use<sup>109</sup>, providing for the following definition of “in-person use”:

**In-person use** means a use on the premises of an institution and at a given time by a given group of learners.<sup>110</sup>

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108 Sec. 36(3) of the CDPA.

109 Art. 3.1.1 Memorandum of Understanding.

110 Art. 2 Memorandum of Understanding.

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The other agreements allow in-classroom public communication of sound recordings and musical works<sup>111</sup>, and in-classroom public communication of excerpts of works<sup>112</sup>, providing for the following definition of a classroom:

**Classroom** means a group of pupils, or students gathered on an institution's premises to whom teaching is administered, which comprises, for illustration purposes, works covered by the agreement or excerpts of such works (a class of students at an educational institution, workshops or a higher education lecturing course).<sup>113</sup>

This does not mean that such agreements constrain all the uses foreseen by the same to a certain location. For instance, uses at meetings, conferences and seminars are not limited to the premises of the institutions covered by the agreement<sup>114</sup>. However, the core of the face-to-face uses falling under the educational exception, which are uses for purposes of illustration of teaching, do meet such contractual limits.

## 4.3 Finland

The Finnish agreements limit the venues where an educational use can be made solely when referring to public performance of recorded music and public communication of live TV broadcasts.

## 5. Limited Technologies

The agreements analysed hereunder also impose technological limitations on uses falling under the scope of protection of the respective national educational exceptions, which are not provided by, or are contrary to those of, such exceptions.

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111 Art. 2.3.1 Music Agreement.

112 Art. 2.3.1 Audiovisual Agreement.

113 Art. 2.1 Audiovisual Agreement and Art. 2.1 Music Agreement.

114 Art. 3.1.3 Memorandum of Understanding, Art. 2.3.3 Audiovisual Agreement and Art. 2.3.3 Music Agreement.

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## 5.1. United Kingdom

As we saw, the British exceptions permitting educational establishments to copy and use extracts of works and extracts of recordings of performances for purposes of instruction<sup>115</sup>, as well as to record broadcasts for educational purposes<sup>116</sup>, incorporate technological limitations with regards to the communication of such materials to pupils or staff, when such communication is received outside the premises of the establishment: in those cases, the law requires that the communication is made through means of a secure electronic network accessible only by the establishment's pupils and staff.

Apart from requiring the electronic network to be secure and to be accessible only to certain persons, Section 35(3) and 36(3) of the CDPA do not prescribe any other requirements, and no definition of "secure network" is contained in the UK's Copyright legislation.

All of the British licences analysed hereunder do, however, set minimum requirements to be met in order for a secure network to be qualified as such: persons who access the network must be approved by the educational establishments; the identity of such persons must be "authenticated at the time of login (and periodically thereafter) in a manner consistent with current best practice"; and the educational establishment must regulate the conduct of such persons:

**Secure Network:** a network (whether a standalone network or a virtual network within the Internet) which is only accessible to those Authorised Persons who are approved by the Licencee for access to the Secure Network, whose identity is authenticated at the time of login (and periodically thereafter) in a manner consistent with current best practice, and whose conduct is subject to regulation by the Licencee.<sup>117</sup>

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<sup>115</sup> Sec. 36 and Paragraph 6ZA of Schedule 2 of the CDPA.

<sup>116</sup> Sec. 35 and Paragraph 6 of Schedule 2 of the CDPA.

<sup>117</sup> Sec. 1.1 CLA Licence. A similar definition of secure network is provided in the NLA Licence (Sec. 1), in the ERA Licence (Sec. 1.1), as well as in the Schools Printed Music Licence (Glossary).

Requiring schools and other educational establishments to have security measures in place that are consistent with “current best practice” can sound reasonable, but it can also impose a burdensome obligation on institutions that do not have the technological resources to update their information systems continuously. In turn, subjecting the qualification of a network as secure to the obligation to regulate the conduct of users seems questionable, and it will create a greater administrative burden for educational establishments to shoulder.

In any case, the main cause of concern again is that an open concept of law is being defined by private agreements with right holders. If all the agreements adopt a similar understanding of what constitutes a secure network, and if the majority of schools and institutions in the UK are subject to those regulations, the contractual notion of “secure network” will end up influencing future interpretations of the legal concept by the English courts.

## 5.2. France

The educational exception in France does not contain any limitation as to the technologies applied when making a use covered by the exception. Nonetheless, the “licences” bought by the French Ministry of Education, Higher Education and Research on behalf of all its departments and schools and institutions under its authority introduce several technological restrictions to such uses.

The agreements that cover the uses of audiovisual and cinematographic works, and the uses of sound recordings of musical works and music videos, only permit an educational institution to make available online excerpts of such materials, which are included in educational or research works of pupils, students, teachers and researchers from an institution covered by the agreement, on the following networks:

- “on said institution’s intranet, specifically aimed at pupils, students, teachers or researchers enrolled in it and who are directly involved in these works”; or
- “on said institution’s extranet, specifically aimed at pupils, students, teachers or researchers enrolled for the purpose of a long-distance education programme and who are directly involved in these works”<sup>118</sup>.

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<sup>118</sup> Art. 2.3.4 Audiovisual Agreement and Art. 2.3.4 Music Agreement.

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The concepts of “intranet” and “extranet” are then defined in those agreements as follows:

**Intranet** means a computer network that is freely accessible exclusively for individual posts and provided to teachers, pupils, students or researchers within the premises of an institution.<sup>119</sup>

**Extranet** means a computer network of an educational or research institution that is freely accessible by teachers, researchers, pupils or students of that institution from remote computer stations, via external electronic communications networks, and whose access is protected by identification procedures (access code and password) which effectively limit its use to said audience.<sup>120</sup>

It should be noted that, while French copyright legislation does not allow the publication or dissemination of an excerpt of a work to a third party, it does not prevent the use of any technology to make the extracts of the works available for the sole purpose of illustration in the context of teaching and research, provided however that such communication is intended to be communicated to an audience composed mainly of pupils, students, teachers or researchers directly involved in the act of teaching, training or research activity requiring such communication.

Under the French educational exception, a teacher should thus be able to share with his or her students excerpts of works by email or file sharing services, such as Dropbox. However, under those agreements that is not permitted with regards to audiovisual works, cinematographic works, sound recordings of musical works and music videos.

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<sup>119</sup> Art. 2.1 Audiovisual Agreement and Art. 2.1 Music Agreement.

<sup>120</sup> Art. 2.1 Audiovisual Agreement and Art. 2.1 Music Agreement.

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If the materials being shared are excerpts of books, published music works, periodical publications and visual art works, then it is already possible to use email as the agreement covering such uses allows the act of making available excerpts of works and, in their full form, visual art works, by any means or process, by authorised users and for illustrative purposes within the scope of teaching and research, in the context of “dissemination via intranet”, as well as in the context of “digital dissemination”<sup>121</sup>, providing for broader definitions of “intranet” and “digital dissemination”:

**Intranet** means a computer network of an institution whose access is protected by identification procedures (access code and password) which limits its use to authorised users only and which may be accessible from remote computer stations, via external telecommunication networks, such as DWs (digital workspaces).<sup>122</sup>

**Digital dissemination** is mainly disseminations by means of electronic mail, a removable medium (particularly USB Flash Drive, CD-ROM, or other means), or within the scope of a videoconference, etc.<sup>123</sup>

Although this 2016 agreement may still restrict the technologies used when making uses covered by the educational exception, it does at least show an attempt to accommodate modern educational practices, which are unreasonably prohibited by the above-mentioned 2009 agreements.

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121 Art. 3.1.1 Memorandum of Understanding.

122 Art. 2 Memorandum of Understanding.

123 Art. 3.1.1 Memorandum of Understanding.



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## 5.3 Finland

Several uses permitted under the ECL-agreements covered by this study have technological constraints. Namely, certain digital uses can only be made through the secure networks administered by the educational establishments benefiting from such agreements. It should, however, be noted that the agreements analysed hereunder do not purport to provide for definitions of such technical means. Only one of those agreements provide for a definition of what constitutes a secure network. Even so, that definition is quite flexible and does not set any minimum requirements:

**Secure network**, an educational network, accessible only to registered users of the institutions, such as teachers and students.<sup>124</sup>

## 6. Time Limits

None of the copyright legislations analysed hereunder foresees time limits for the uses covered by the exceptions.

### 6.1. United Kingdom

The British licences expressly restrict the duration of uses permitted by licences to the term of those agreements: copies made during an academic year during which a licence is in force must be destroyed or deleted at the end of such year<sup>125</sup>. This limitation is understandable if one takes into account that licences are bought for one year, and allowing licencees to retain copies after a year elapses could discourage licencees from buying licences in the following year.

It should also be noted that most of these licences allow the licencees to retain copies for a subsequent academic year if they are needed in the following year, and further provided that they are reported or licenced as a new use<sup>126</sup>.

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<sup>124</sup> 2§ Kopiosto Copying License.

<sup>125</sup> Sec. 5.6, 6.9.2 and 6.9.3 CLA Licence, Sec. 5.6, 6.9.2 and 6.9.3 NLA Licence, Sec. 7.7 ERA Licence, and Sec. 4.10 Schools Printed Music Licence.

<sup>126</sup> Sec. 5.6, 6.9.2 and 6.9.3 CLA Licence, Sec. 5.6, 6.9.2 and 6.9.3 NLA Licence, Sec. 7.7 ERA Licence, and 4.15 Schools Printed Music Licence.

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## 6.2. France

The French agreements do not expressly specify any time limits.

## 6.3. Finland

Time limits were identified in various provisions of the Finnish agreements featured in this study, e.g.:

Radio and television programs can, within the limitations of 9§ (see above), be recorded, copied, used and publicly displayed free of charge **for the duration of a scientific research.**<sup>127</sup>

Copies created under this license may be shared among a teaching group by storing them in a sealed computer network only **during the course or learning activity, including the final exam.**<sup>128</sup>

As previously mentioned, these agreements are allowed, by law, to define the terms and conditions of educational uses. For that reason, they do not evince any objections.

## 7. Source Material

Some of the British licences covered by this study require for the source material used under the licences to be owned or subscribed by the school. The French agreements, and one of the Finnish licences, only require for the source material to be lawfully acquired, and allow the use of works legally obtained by teachers and students. The copyright legislation analysed hereunder at most requires that the work used under the exceptions must be lawfully published, without making any reference to the need of the would-be beneficiaries to own, subscribe, or have lawful access to, a copy of such published work.

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<sup>127</sup> 10§ Kopiosto Audiovisual Licence.

<sup>128</sup> 6§ Kopiosto Copying License.

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## 7.1. United Kingdom

All of the licences hereunder granted under an educational licence scheme operated by CLA restrain the source material used by the licencees for making the uses permitted by the licences.

According to the rules contained in the agreement covering the use of print and digital content in books, journals and magazines, and in the agreement covering the uses of articles from newspapers and newspaper websites, the educational establishment must own, or subscribe to, an original or a copy for which it has paid a copyright fee for any licenced material it copies, scans and uses:

With the exception of any part of Website Material that is ‘free-to-view’, **the Licencee must own or have subscribed, to, an original or a copy on which it has paid a copyright fee** (which shall include material supplied in either hardcopy or electronic form by a supplier licenced by CLA to provide such a service such as, but without limitation, document delivery and press cuttings suppliers) of any Licenced Material it copies, scans or uses under the terms of this Licence.<sup>129</sup>

It is not enough for the teachers or the students to own such licensed materials, or for them to borrow source material from a library. The school must own a copy of said materials.

In the agreement covering the uses of printed music, the school or the teacher must own a copy of the licensed material, and they cannot use source material borrowed from a library (other than the library owned by an educational establishment):

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<sup>129</sup> Sec. 5.5 CLA Licence. The NLA Licence contains a similar provision: “With the exception of any part of NLA Newspaper Websites that are ‘free-to-view’, or the NLA’s Newspapers for Schools - News Library Service the Licencee must own or have subscribed, to, an original or a copy on which it has paid a copyright fee (which shall include material supplied in either hardcopy or electronic form by a supplier licenced by Licensor to provide such a service such as, but without limitation, press cuttings suppliers) of any Licenced Material it copies, scans or uses under the terms of this Licence” - Sec. 5.5.

**At least one original Source Copy of the Printed Music Publication must be owned** by the member of staff or teacher (as referred to in Clause 4.1), School or, where appropriate arrangements are in place with the School's Local Music Service or Local Music Education Hub, by that Local Music Service or Local Music Education Hub. For the avoidance of doubt this Licence does not permit the copying of Printed Music Publications made available on hire or borrowed from a library, other than a library owned by the Licencee.<sup>130</sup>

## 7.2. France

The French agreements require that the works must be lawfully acquired, allowing the use of works acquired by any authorised users, and the use of works acquired via any service they can benefit from:

**The works used must have been lawfully acquired** by authorised users, whether resulting from a purchase, or from a donation or service that they can benefit from.<sup>131</sup>

## 7.3. Finland

One of the Finnish agreements analysed hereunder also contains a similar requirement to the ones identified in the French agreements:

A work embedded in a printed publication may be copied if the teacher, student or educational institution **owns the original printed publication or similar material being copied or has, otherwise, legally obtained the material.**<sup>132</sup>

<sup>130</sup> Sec. 4.2 Schools Printed Music Licence.

<sup>131</sup> Art. 4.1.2 Memorandum of Understanding. Similar provisions are found both in the Audiovisual Agreement ("The works used must have been compliantly acquired" - Art. 2.2) and in the Music Agreement ("The musical works or the sound recordings used must have been compliantly acquired" - Art. 2.2).

<sup>132</sup> 11§ Kopiosto Copying License.

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## 8. No Market Competition

Several of the English and Finish agreements featured in this study contain provisions restricting the making of copies under these agreements when such copies compete with or substitute the purchase of an original.

None of the copyright legislations of the countries considered herein specifically provides for such a condition; however, such an assessment could be conducted in countries that have incorporated the 3-step test<sup>133</sup> as a balancing test pertaining to the uses covered by the exceptions. Indeed, countries that apply the test to specific uses made under the exception will evaluate if the permitted use “enters into economic competition with the ways that right holders normally extract economic value from”<sup>134</sup> copyright and “thereby deprives them of significant or tangible commercial gains”<sup>135</sup>.

### 8.1. United Kingdom

All the licences hereunder, which were granted under an educational licence scheme operated by CLA, contain provisions that take into account the effect of the licenced use on the market:

The making of Licenced Copies **shall not directly or indirectly substitute for the purchase of original** Licenced Material or for the commissioning, reproduction, hire or any other use of an original artistic work within Licenced Material.<sup>136</sup>

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<sup>133</sup> According to the 3-step test (1) exceptions must be limited to “special cases”; (2) they must not conflict with a “normal exploitation” of the protected work; and (3) they must not “prejudice the legitimate interests of the right holder”.

<sup>134</sup> Report of the WTO Panel, 15 June 2000, WTO Document WT/DS160/R, para. 6.183.

<sup>135</sup> Ibidem.

<sup>136</sup> Sec. 5.5 CLA Licence and Sec. 5.5 NLA Licence. A similar provision is contained in the Schools Printed Music Licence: “The making of Licenced Copies shall not directly or indirectly substitute for the purchase of Printed Music Publications or for the commissioning, reproduction, hire or any other use of Printed Music Publications or underlying Musical Works or part thereof” - Sec.

4.2.

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Some of these licences further prescribe that licencees should use reasonable endeavours to certify if they own a digital version of the work before scanning materials to produce digital copies of the same:

Licencee **shall use reasonable endeavours** to identify whether it subscribes to a digital version of the work in question and, if so, **to use that digital version instead of creating a Digital Copy by scanning.**<sup>137</sup>

## 8.2. France

One of the French Agreements takes into account the market impact of the uses of music scores, which as mentioned before fall outside the scope of protection of the educational exception:

Uses mentioned in this memorandum **do not apply to music scores available only for renting** from interested publishers.<sup>138</sup>

## 8.3 Finland

One of the licenses from Finland contains the following provision, which requires an analysis of the effects exerted by the use of the copies made under such agreement on the market for learning materials or products:

Copies may not be used in activities that **compete with or replace** printed or electronically produced learning materials or products, for example by creating material databases for an educational use.<sup>139</sup>

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<sup>137</sup> Sec. 2.3 CLA Licence and Sec. 2.3 NLA Licence.

<sup>138</sup> Art. 4.1.1 Memorandum of Understanding.

<sup>139</sup> 4§ Kopiosto Copying License.

## 9. Attribution

Under art. 5.3(a) of the InfoSoc Directive, Member States may provide for exceptions or limitations to the rights harmonised by the Directive for uses “for the sole purpose of illustration for teaching or scientific research, *as long as the source, including the author’s name, is indicated, unless this turns out to be impossible* and to the extent justified by the non-commercial purpose to be achieved”.

The requirement to give attribution to the author of a work is a common thread in the Member States’ copyright legislation, and thus it is not surprising to see provisions concerning attribution in the agreements analysed hereunder. What is remarkable is the amount of information required by some of those agreements.

### 9.1. United Kingdom

Under Section 35(1)(b) and Section 36(1)(b) of the Copyright, Designs and Patents Act 1988 (Chapter 48, the recordings or copies made under such exceptions must be “accompanied by a *sufficient acknowledgement* (unless this would be impossible for reasons of practicality or otherwise)”. Notwithstanding, the ERA Licence, which permits the recording of radio and TV programs, demands the following:

Licencee agrees to ensure that all ERA Recordings made or acquired under an ERA Licence include sufficient acknowledgement of the service from which they were sourced (i) with each physical ERA Recording being marked with an **ERA Notice**<sup>139</sup> and the **name of the source**, the **date** upon which the recording was secured by or for an Educational Establishment and the **title of the programme or clip**; and (ii) within all ERA Recordings held in digital formats an **opening credit or webpage** which must also be viewed or listened to before access to the ERA Recording is permitted including an **ERA Notice**, the **name of the service** from which the original ERA Recording was sourced; and the **name of the programme** or clip.<sup>141</sup>

<sup>140</sup> “ERA Notice” shall mean a clear, legible notice reading “This recording is to be used only for non-commercial educational purposes under the terms of an ERA Licence” - Sec. 1.1. ERA Licence.

<sup>141</sup> Sec. 6(a) ERA Licence.

This amount of information surpasses, by any criteria, the sufficient acknowledgment requirement contained in the educational exception. This may create an administrative burden and, ultimately, restrict the uses an educational establishment makes under a licence if it is not given an opportunity - provided by the national exception, as well as by the EU exception – to refrain from providing attribution if this turns out to be impossible (by reasons of practicality or otherwise).

It should be noted that, under the licences granted by CLA educational establishments are only required to use “reasonable endeavours”<sup>142</sup> to provide for a copyright notice as prescribed by the licence, which is definitely more in line with the rule laid down by the educational exception.

## 9.2 France

The French agreements do not require more details than the attribution provisions contained in the national copyright legislation.

## 9.3 Finland

Some of the Finnish agreements, which by law can freely set their own terms and conditions, provide an extensive list of the items that should be mentioned when attributing the protected work or related subject matter:

Each recording should be marked with the following items:  
**identification** of the program, program **duration**, **time of the transmission** of the program, and **time until when the use is allowed**.<sup>143</sup>

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<sup>142</sup> See Sec. 6.5 CLA Licence and Sec. 6.5 NLA Licence: “The Licensee shall use reasonable endeavours to include, where practicable, in a prominent place in all Digital Copies (or have displayed before viewing) a copyright notice containing at least the identity of the author or creator of the literary or artistic work and the title of the work from which it is made; where material to be scanned, copied, accessed or used already contains a copyright notice placed by a Rightsholder on a document, the Licensee shall not be required to add a further notice to the document.”

<sup>143</sup> 6§ Kopiosto Audiovisual Agreement.



## IV. Compliance and Enforcement

This section features contractual provisions related to compliance between permitted uses and the terms of licences and enforcement of the terms of licences. It includes an analysis of provisions related to data collection by right holders; audits of records by right holders; inspections of premises of educational establishments by right holders; the obligation imposed on educational establishments to ensure that all users comply with the terms of the licence; and the obligations imposed on governmental authorities to conduct awareness-raising actions and studies to promote copyright rules.

None of these rights and obligations is foreseen in the educational exceptions embodied in the copyright laws of the countries covered in this study. The provisions related to enforcing the intellectual property rights in this legislation may, of course, provide right holders with a means to procure enforcement of their rights but only to the extent that such measures, procedures and remedies are necessary to permit effective action against an act of infringement of such rights.

This means that right holders need to produce reasonably available evidence to support their infringement claim (or a claim that their rights are about to be infringed) in order for them to be able, for instance, to request a judicial authority to order provisional measures to preserve the relevant information or to order an alleged infringer to disclose information related to the infringing use<sup>144</sup>. Moreover, any such procedures concerning the enforcement of intellectual property rights must, under the Enforcement Directive<sup>145</sup>, ensure the protection of confidential information and not hamper the protection of personal data<sup>146</sup>.

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<sup>144</sup> Art. 6(1) and 7(1) of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property right ("Enforcement Directive").

<sup>145</sup> Enforcement Directive.

<sup>146</sup> See art. 2(3)(a), art. 6(1), art. 7(1), Recital 2 and Recital 15 of the Enforcement Directive.

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The contractual provisions in the licensing agreements covered by this study provide right holders with a right to obtain the same information from schools that the law would allow them to get from alleged infringers, but without having to go through a civil or judicial proceeding, and without having to provide schools with the same guarantees the law provides to alleged infringers pertaining to protecting confidential information and personal data.

To be clear, prescribing reporting obligations and audits in licensing agreements is a common practice. What is less common is allowing licensors to inspect records and enter the premises of licencees at any time, as many times as they want, provided that they give reasonable notice. Finally, no licensee, in a fair and balanced negotiation, with the right legal advice, would enter into a licensing agreement providing licensors with such rights without guaranteeing the confidentiality of their information.

It is also common practice in commercial licensing to require licensees to ensure that their staff is aware of the terms and conditions of use of licensed material, and to take action against a breach by staff members of the licensing terms. The problem with educational licensing is that it covers uses made by a variety of users, including teachers and students. Requesting a school to ensure that an act of infringement by a student ceases, and for that school to prevent any recurrence thereof, puts an exceptionally high amount of pressure on it. It forces schools to police the educational community, on behalf of right holders, which is a role that schools should certainly not be asked to play.

While these obligations are foreseen in all British licenses analysed hereunder, they are not contemplated neither in French agreements nor in the Finnish licenses. These agreements take an entirely different stance on enforcement, only requiring that users are made aware of the terms of the license. Moreover, in France that obligation is assumed by the Ministries, and not by the schools themselves.

Since these obligations are not rooted in the legal provisions embodying the educational exceptions providing the legal framework for these agreements, but solely in the contractual arrangements between right holders and users, one should ponder what would happen to an educational establishment if it fails to comply with such an obligation, and the licensor opts to terminate the licence agreement.

Can the educational establishment rely on the exception after the termination of the licence for violation of such obligations?

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## 1. Data Collection, Audits and Premises Inspection

All of the agreements covered by this study contain contractual provisions to ensure compliance between the uses permitted by those agreements and the terms and conditions prescribed by the same. The obligation to maintain records and/or report uses made under the agreement is foreseen in most agreements. In addition, all of the agreements grant the right to licensors to check compliance between uses and the agreements: some prescribe that this should be done through inspections or audits of records; others specify that this involves entering the premises of educational establishments. Only one agreement featured herein provides for provisions protecting the confidentiality of the information obtained by right holders.

### 1.1. United Kingdom

All the licences hereunder, which were granted under an educational licence scheme operated by CLA, require the educational establishment to participate in data collection exercises, without specifying the type of information collected by right holders:

CLA may, no more than once in each year, require the Licencee to **participate in a data collection exercise** to identify the type of photocopying and scanning of Licenced Material and the use or re-use of Digital Material under the Licence which will assist CLA in distributing the Licence Fee to authors, artists and publishers.<sup>147</sup>

A similar provision is contained in the ERA Licence, which further stipulates that the educational establishment must maintain records of the uses made under the licence:

Licencee agrees to **maintain such further records and answer questionnaires or surveys** as ERA may reasonably require to report to its members concerning the level to which ERA Recordings are used for Educational Communication under this Agreement.<sup>148</sup>

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<sup>147</sup> Sec. 10 CLA Licence and Sec. 9 NLA Licence. A similar provision is contained in the Schools Printed Music Licence: "CLA may, no more than once in each year, require the Licencee to participate in a data collection exercise; the information obtained will assist CLA to identify what Licenced Copies are being made for the distribution of Licence Fees to music publishers and writers." - Sec. 6.1.

<sup>148</sup> Sec. 6(e) ERA Licence.

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In addition to requiring the educational establishments to participate in data collection exercises and maintain records of uses, the licences featured herein also allow right holders to inspect any such records to ensure compliance between uses and the terms of the licences:

Licencee agrees to permit ERA to have access to and to enable ERA to **inspect all records** that the Licencee and Relevant Educational Establishments are required to maintain under this ERA Licence **to ensure compliance** with its terms.<sup>149</sup>

While the contractual provision presented above does not specify if such inspection is made *in situ*, the three educational licences operated by CLA covered by this study clarify that inspections of records and procedures entail a right to enter the premises of an educational establishment at any time provided that reasonable notice is given:

CLA shall have the right on giving reasonable notice to the Licencee to **enter the Licencee's premises** to review the implementation of the Licence by the Licencee and their compliance with its terms and to inspect the procedures being used by it.<sup>150</sup>

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<sup>149</sup> Sec. 6(f) ERA Licence.

<sup>150</sup> Sec. 13.6 CLA Licence and Sec. 12.6 NLA Licence. A similar provision is contained in the Schools Printed Music Licence: "Given reasonable notice, the Licencee will allow CLA to enter the Licencee's premises to review the implementation of the Licence by the Licencee and its compliance with its terms and to inspect the procedures the Licencee uses when applying the Licence." - Sec. 5.5.

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## 1.2. France

The obligation to report all uses of works and excerpts of works to right holders is only foreseen in one of the French agreements:

To allow representatives of beneficiaries to redistribute to authors and publishers the compensation received due to implementing this memorandum, the Ministry commits to require institutions to **report all uses** of works or excerpts of works that are referred in this memorandum. The Ministry and the CPU are committed to take action before institutions to inform them of this report's binding nature and to encourage them to provide the required information.<sup>151</sup>

The other two "licences" bought by the French Ministry of Education, Higher Education and Research on behalf of all of the departments and schools and institutions under its authority merely stipulate that the CMO has the right to check compliance between uses and the terms of the agreement through auditing:

SACEM may **audit or assign an audit to check compliance** of the uses of musical works and sound recordings with the clauses of this agreement.<sup>152</sup>

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<sup>151</sup> Art. 5 Memorandum of Understanding.

<sup>152</sup> Art. 6 Music Agreement. A similar provision is contained in the Audiovisual Agreement: "PROCIREP may audit or assign an audit to check compliance of the uses of works covered by the agreement with the clauses of this agreement" - Art. 6.

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While those two agreements do not expressly determine that audits may be administered on the premises of schools and institutions under the authority of the French Ministry, the latest agreement signed by the Ministry implies that access to the documents held by institutions may be obtained on such premises, further requiring that such access does not disrupt the normal operation of these institutions and that the CMOs respect the confidentiality of the information they obtain:

The Ministry and the CPU commit to inform the heads of institutions that the CFC and AVA should be able to **access any document in order to ensure the quality of these reports**. This access is done, with the consent of the head of institution in question and in accordance with the provisions of law No. 78-17 of 6 January 1978, for a jointly defined limited period. The CFC and AVA commit not to disrupt the normal operation of the institution's departments and to **respect the confidentiality** of obtained information.<sup>153</sup>

### 1.3. Finland

Two of the licenses managed by the CMO Kopiosto contain contractual provisions whose apparent purpose is to ensure compliance between the uses permitted by those agreements and the terms and conditions prescribed by the same:

The license requires that municipal educational and audiovisual centres **keep records** of audio and video recordings, borrowings and sales, as well as potential rental activities and recordings on a server connected to the network of municipal educational institutions.<sup>154</sup>

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<sup>153</sup> Art. 5 Memorandum of Understanding.

<sup>154</sup> 11§ Kopiosto Audiovisual License

Kopiosto, or a party authorized by Kopiosto, has the **right to inspect the copies** made by the institution, as well as the **storage platforms and secured networks** used by the licensee, at a time agreed upon in advance.<sup>155</sup>

None of the provisions shown above clarifies if the purpose of those acts is to ensure compliance with the agreements. The aim of the first one may well differ from ensuring compliance, since the very same clause stipulates that the Ministry of Education and Culture will jointly conduct studies with CMOs on the recording and use of recordings by teachers and other staff. This would suggest that its objective may simply be to obtain data for the purpose of running these studies.

Nevertheless, it is worth noting that none of these agreements provides for the protection of confidential information. That is particularly worrisome when considering the latter provision because CMOs have the right to inspect a broad range of materials and devices that may be used to store the sensitive and personal information of teachers and students.

## 2. Enforcement

Requiring licencees to ensure that their staff is aware of the terms and conditions of use of licenced material and take action against a staff's breach of the terms of the licence is a common practice in commercial licensing. The problem with educational licensing is that it covers uses made by a variety of users, including teachers and students. Requesting a school or another educational establishment to ensure that an infringing activity by a student ceases, and prevent any recurrence, puts a lot of pressure on an establishment. It forces schools to police the educational community, on behalf of right holders, which is a role that schools should certainly not be asked to play.

While these obligations are foreseen in all British licenses analysed hereunder, they are not contemplated neither in French agreements nor in the Finnish licenses. These agreements take an entirely different stance on enforcement, only requiring that users are made aware of the terms of the license. Moreover, in France that obligation is assumed by the Ministries, and not by the schools themselves.

<sup>155</sup> 15§ Kopiosto Copying License.

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## 2.1. United Kingdom

As mentioned above, all the British licences featured in this study contain provisions dictating an educational establishment's responsibility for ensuring that authorised users comply with the licence terms and for taking action against any breach of these terms:

The Licencee shall ensure that all its staff (and particularly those with responsibility for reprographic and scanning equipment) are made aware of the terms and conditions of the Licence, including the exclusion of certain works and categories of work, and shall **take all reasonable action to ensure that all Authorised Persons comply with such terms and conditions.**<sup>156</sup>

One of the licensing agreements analysed hereunder goes even one step further, requiring educational establishments to take all reasonable steps to ensure that the rights granted are not abused by authorised users or any third party:

Licencee agrees to take all reasonable steps to ensure that Authorised Users are made aware of the terms and conditions for use of ERA Repertoire under this ERA Licence and that the **rights granted are not abused by Authorised Users or any third parties.**<sup>157</sup>

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<sup>156</sup> Sec. 9.1 CLA Licence and Sec. 8.1 NLA Licence. A somewhat similar provision is contained in the Schools Printed Music Licence: "The Licencee will explain the terms of this Licence to its staff, particularly those with responsibility for reprographic equipment, and will require them to comply with those terms" - Sec. 5.6.

<sup>157</sup> Sec. 5.4 ERA Licence.



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Moreover, according to this licence, in the event an educational establishment becomes aware of an abuse or breach of the terms and conditions for accessing the establishment's secure network, it shall also takes steps to terminate such activity and prevent any recurrence:

Licencee agrees upon becoming aware of either abuse or breach of the terms and conditions for access to any Relevant Network within which ERA Repertoire is held (whether in the form of ERA Recordings or otherwise), or any Authorised User abusing or breaching the terms and conditions for Secure Authentication or access to the Relevant Network of the Licencee, forthwith to **take all reasonable steps to ensure that such activity ceases and to prevent any recurrence and to inform ERA of the steps taken.**<sup>158</sup>

Considering that these obligations are not based on legal provisions embodying the educational exceptions that are overridden by these licences, but solely on contractual arrangements between right holders and users, one should ponder what would happen to an educational establishment if it fails to comply with such an obligation, and the licensor opts to terminate the licence agreement. Can the educational establishment rely on the exception after the termination of the licence for violation of such obligations?

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<sup>158</sup> Sec. 5.3 ERA Licence.

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## 2.2 France

The French agreements covered by this study do not take a similar stance on enforcement. Entities that sign agreements on behalf of educational institutions have an obligation to notify these institutions of the terms and conditions of the pertinent agreement, and conduct actions to promote copyright rules in those institutions, but they are not responsible for ensuring that these institutions comply with the rules or enforcing the licences. On the other hand, the agreements do not specifically stipulate the obligation of these educational institutions to make authorised users aware of the terms and conditions of agreements, nor do the agreements establish their responsibility for enforcing the licence terms against their staff, teachers and students:

The Ministries and the CPU - the latter regarding its member institutions - **shall inform the schools, educational and research institutions referred hereto about this agreement' contents and limitations.**

The Ministries and the CPU - the latter regarding its member institutions - commit to develop, in all institutions under their authority, **awareness-raising actions on the creation, the literary and artistic property and compliance to the latter.** These actions will be established in liaison with the copyright collection and distribution societies. They may take various forms depending on the relevant institution type and educational level.<sup>159</sup>

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<sup>159</sup> Art. 4 Audiovisual Agreement and Art. 4 Music Agreement.

The provision above is the one contained in the agreements on the use of audiovisual and cinematographic works, and on the use of sound recordings of musical works and music videos, dated 2009. The one below is foreseen in the agreement on the use of books, published music works, periodical publications and visual art works, dated 2016. The only difference between the two provisions is that the most recent one foresees the Ministry's obligation to develop communication materials to portray the terms and conditions of use under the agreement, and to further disseminate those materials on its websites:

In general, the Ministry, the CPU, CFC, AVA and SEAM act to **inform institutions, authors and publishers on the implementation** of this Memorandum of Understanding. The parties agree to jointly design and **conduct all actions they consider necessary for promoting copyright rules at institutions** as well as to take the institutions' teaching and research missions into account before CFC members. Together with the Ministry, the CFC, SEAM and AVA commit to **develop communication media aimed at presenting the conditions in which the protected works can be used** within the scope of this Memorandum of Understanding. The Ministry is committed to **disseminate this information on its multiple websites** (Eduscol, for example) and shall ensure it is relayed by academic websites. It commits to update information already available on its different websites.<sup>160</sup>

## 2.3. Finland

Just as in the French agreements, the Finnish licenses do not obligate a school or some other educational establishment to ensure that an infringing activity by a student ceases, nor do they have to prevent any recurrence.

The only enforcement-related condition found in just one of the agreements contemplates a requirement for the institutions that benefit from a license to provide the necessary administrative instructions to their users in order to make the terms of the license sufficiently known and practically enforced<sup>161</sup>.

<sup>160</sup> Art. 9.1 Memorandum of Understanding.  
<sup>161</sup> 23§ Kopiosto Audiovisual License.

## V. Indemnification

This section presents the indemnification obligations incorporated in the agreements analysed in this study. These include 1) contractual terms that provide for the obligation of the licensor to indemnify the licensee against copyright infringement claims concerning a use pursuant to the agreement, and 2) provisions that foresee the obligation of the licensee to indemnify the licensor for breach of the terms and conditions of the agreement.

### 1. Indemnification by Right Holders

As is standard in copyright licensing, almost all of the obligations in the agreements covered by this study are obligations imposed on the entities benefiting from the rights granted by such agreements. The only obligation imposed on CMOs in these agreements is the obligation to indemnify the Ministries and educational establishments against claims from a right holder alleging that educational establishments, acting pursuant to those agreements, have infringed copyright in any of the licenced material. Such obligation is not, however, set forth in every agreement analysed hereunder, meaning that in some cases the agreements do not impose any contractual obligations whatsoever on licensors.

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## 1.1. United Kingdom

Among the four licensing agreements originating in the UK, only one<sup>162</sup> fails to require the licensor to indemnify the licensee against any complaint made in writing that the licensee, acting in pursuance of such licence, has infringed copyright in the licenced material.

The clause below is an example of the type of indemnification obligations incorporated in British agreements contemplating the payment of all reasonable legal costs, expenses and damages awarded against or incurred by educational establishments:

In the case of any Qualifying Claim<sup>163</sup> **Licensor will indemnify the School in respect of all reasonable legal costs, expenses and damages** awarded against or incurred by the School including any ex-gratia payments made with the prior written consent of Licensor, provided the School has complied with the terms of this Licence and has given Licensor notice of any Qualifying Claim within ten (10) working days or, in the case of a Claim Form, within five (5) working days of the same having been received by the School.<sup>164</sup>

All of the indemnification clauses analysed hereunder require compliance with the terms and conditions of the agreement in order to obligate the licensor to indemnify the licensee for an infringement claim. Furthermore, two of the agreements expressly state that the “indemnity shall not apply if the Licensee is in material breach of *any term* of the Licence”<sup>165</sup>.

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<sup>162</sup> See ERA Licence.

<sup>163</sup> Qualifying Claim means “any complaint made in writing that the Licensee acting in pursuance of this Licence has infringed copyright and/or database right in Licenced Material or in the typographical arrangement of the published edition in which Licenced Material is contained” - Sec. 11.1. CLA Licence. A similar definition is provided by Sec. 10.1 NLA Licence.

<sup>164</sup> Sec. 11.1 CLA Licence. A similar provision is found in Sec. 10.2 NLA Licence. The Schools Printed Music Licence also provides for an indemnification obligation by the licensor, but further conditions the obligation to the CMO being permitted to take over all negotiations and/or responsibility for defending the copyright infringement claim: “Provided that CLA has been permitted to take over all negotiations and/or responsibility for defending such claim in accordance with clause 7.1 above unimpeded by the Licensee, CLA will indemnify the Licensee in respect of all reasonable legal costs and expenses approved by CLA prior to being incurred and damages awarded against the Licensee to the extent of an award of a court of competent jurisdiction or a settlement entered into with the prior written approval of CLA” - Sec. 7.2.

<sup>165</sup> Sec. 11.3.1 CLA Licence. A similar rule is contained in Sec. 10.3.1 of the NLA Licence.

While it is logical to exclude the licensor's liability for infringement claims caused by a use by an educational establishment that goes beyond the rights granted by the agreement, it is unwarranted to preclude an indemnity's application in the event of a substantial breach by such establishment of a licence term that is unrelated to the copyright infringement claim.

## **1.2 France**

All of the agreements entered into between the French Ministry of Education, Higher Education and Research and the national CMOs prescribe that the CMOs will indemnify the Ministry (and the educational institutions, too, according to the most recent agreement) against any claims relating to the use of a work falling within the scope of such agreements and in accordance with the same.

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However, such contractual obligation does not cover all reasonable legal costs, expenses and damages awarded against or incurred by educational establishments. Under these provisions, the CMOs only commit to refund an amount equal to the amount that would have been paid to the affected beneficiary if he/she was a member of said copyright collection and distribution society:

SACEM, duly mandated for this purpose by the other copyright collection and distribution societies, shall indemnify the Ministries against any claim made their members or by the members of said societies concerning a use pursuant to this agreement.

In the event that a claim relates to a work or other protected object that is not included in the repertoire of any copyright collection and distribution societies but that falls within the scope of this agreement, **SACEM commits to repay the Ministries, if said claim is justified, an amount equal to the amount that would have been paid to the affected beneficiary if he/she was a member of said copyright collection and distribution society.**

For each copyright collection and distribution society, any obligations arising from this article may not exceed the limits of the portfolio such society represents or is intended to represent.

These commitments are granted subject to and within the limits of the impact to freely pursue any prerogatives linked to any author's or his beneficiaries' moral rights.<sup>166</sup>

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<sup>166</sup> Art. 5 Music Agreement. A similar provision is contained in Art. 5 of the Audiovisual Agreement. The identification obligation contained in the Memorandum of Understanding is analogous, but extends the indemnity to the educational institutions: "The CFC, SEAM and AVA, each for their own portfolio as described in Article 2 above, shall indemnify the Ministry, the CPU and any institutions against any claims relating to the use of a work falling within the scope of this memorandum and in accordance therewith. Thus, if a claim concerns a work in the portfolio, as described in Article 2 above, of one of the copyright collection and distribution societies, notwithstanding the provisions of Article 4.2.2 above and provided the claim has grounds, the CFC, SEAM and AVA commit:- to directly refund the claimant with a sum equal to the amount which would have been paid to the beneficiary in question if he/she was one of the members of the copyright collection and distribution society in question;- in case of claimant refusal and non-compliance, to refund said sum to the Ministry, the latter being responsible to bear all costs to repay it to the claimant. These guarantees are granted subject to and within the limits of the effects of the free exercise by any author or his successors in title of the prerogatives attached to his moral rights." - Art. 8.

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## 1.3. Finland

None of the Finnish licences analysed hereunder prescribes indemnification obligations on licensors against copyright infringement claims concerning a use by a licensee pursuant to the agreement. That is justifiable since, according to the ECL rules contained in Finnish copyright legislation, those agreements produce effect also in relation to right holders who are not members of such CMOs, and the licences may thus use all works by authors in the same field<sup>167</sup>.

Under the Finnish rules, stipulations by the CMO concerning the distribution of remuneration among its members shall also apply to authors in the same field whom the organisation does not represent<sup>168</sup>. If, however, those stipulations do not provide for members to hold a right to individual remuneration, then the authors who are not represented by the CMO have the right to claim individual remuneration<sup>169</sup>.

One of the Finnish agreements featured herein foresees the CMO's obligation to pay compensation to authors who are not represented by the CMO:

If the right holder of a work who is not represented by Kopiosto, submits a justified compensation claim for compensation during the term of this agreement and otherwise covered by this agreement, Kopiosto agrees to pay compensation on behalf of the right holders represented by Kopiosto.<sup>170</sup>

## 2. Indemnification by the Educational Establishments

An indemnity covering breach of contract is customary in commercial licensing agreements. Nevertheless, such contractual obligation is not provided for in the agreements featured herein, except one from the United Kingdom.

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<sup>167</sup> Art. 26(1) of the Copyright Act.  
<sup>168</sup> Art. 26(4) of the Copyright Act.  
<sup>169</sup> Art. 26(5) of the Copyright Act.  
<sup>170</sup> 13§ Kopiosto Audiovisual Licence.



According to this British licence, educational establishments have to pay to the CMO the costs and expenses incurred in compliance and enforcement, if the licensee breaches the terms of the licence:

If a Licensee is in breach of the terms of this Agreement and ERA incurs **costs and expenses either in monitoring and discovering any breach of the terms or in enforcing the conditions**, the Licensee shall indemnify ERA in respect of any such costs and expenses so incurred.<sup>171</sup>

It is interesting to note that the same licence that prescribes for an indemnity by licensees for breach of contract is the only UK licence covered in this study that does not provide for an indemnification obligation by the licensor for copyright infringement claims brought by third parties against the licensees for uses of materials falling under the scope of the licence.

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<sup>171</sup> Sec. 7.8 ERA Licence.

## VI. Solutions

Overall, the agreements covered by this study show that allowing contractual arrangements to override legal provisions protecting users' rights will perpetuate an unbalanced power structure in modern copyright systems, and will compel users to accept terms and conditions that (i) purport to restrict the scope of protection granted by copyright exceptions and limitations, by imposing conditions on the uses that are not contained in said exceptions, (ii) impose burdensome obligations on schools and institutions that do not derive from the law and (iii) grant rights to right holders that are not contemplated by law.

The preferable approach to the problems posed by these contractual arrangements would be to prevent licence priority, or to provide only for limited priority to those contractual arrangements that are already in place. Article 5(3)(n) of the InfoSoc Directive embodies an exception that, according to the Court of Justice of the European Union, cannot be overridden by a mere licensing offer but only by licensing agreements that exist<sup>172</sup>. A similar approach would be the most sensible option for countries that want to provide an adequate framework for licensing.

It seems reasonable to expect that a legal framework that offers minimum users rights for purposes of education would stimulate contractual innovation, and eventually lead to licensing offers covering uses that are not foreseen in copyright exceptions or that could be prevented by the 3-step test, such as educational uses made on the open internet.

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<sup>172</sup> Court of Justice of the European Union, Case C-117/13 Technische Universität Darmstadt v Eugen Ulmer KG, 11 September 2014, available at <http://curia.europa.eu> (last accessed 12 March 2018).

Regardless of whether policy makers opt to allow for giving priority to licenses or not, it is imperative to introduce a provision in copyright legislation across the European Union protecting the rights granted to users by copyright exceptions and limitations from contracts. A contractual provision, namely a provision contained in a licence authorising the acts permitted by the exception or limitation, should be rendered unenforceable or null and void or of no effect if it purports to restrict the scope of protection afforded by a copyright exception or limitation.

The public policy decision embodied in the conditions of use under copyright exceptions or limitations should not be removed or dismantled by private arrangements in any circumstance. Without giving proper legal treatment to contractual terms that seek to limit the application of copyright limitations and exceptions, a school or some other user will not be free to refuse a licence containing terms and conditions that are narrower or more restrictive than those offered by the law.

Furthermore, lawmakers should put in place mechanisms to ensure the fairness of licensing terms. A licence provision that gives right holders access to the personal information of students and teachers and confidential information belonging to schools, without imposing a confidentiality obligation and without seeking to limit the purposes of use of the information obtained by right holders, cannot be deemed reasonable or fair.

Schools and other educational establishments should be able to challenge with ease the terms of a licence that are thought to be unfair or unreasonable. Copyright laws across Europe should foresee affordable mediation and litigation to those institutions. In addition, if the agreements are constantly challenged or if they invariably contain terms and conditions that are unreasonable or unfair, policymakers should assess the need to submit the same to public regulation.

# Conclusion

This study's findings indicate that subjecting educational rights to contractual arrangements is not advisable because these agreements strongly favour right holders to the detriment of educational institutions.

These findings result from the analysis of 10 collective agreements for educational uses in force in Finland, France and the United Kingdom pertaining to different compensation and licensing schemes for educational uses, as presented in Section I:

- the British agreements are voluntary collective licensing schemes for uses of protected works and other subject matter for purposes of instruction that prevail over national educational exceptions;
- the French agreements are voluntary collective licensing agreements that, on one hand, provide the compensation required by law for uses made under the educational exception, while, on the other hand, complement the exception by covering additional uses and works not foreseen by the educational exception; and
- the Finnish agreements are licenses granted by collective management organisations ("CMOs") that apply an extended collective license ("ECL") to educational uses.

These agreements were analysed to determine how they deal with the following issues: permitted and restricted uses, conditions of use, compliance and enforcement, and indemnification.

Section II of this study proves that most of the British and French agreements discussed hereunder permit uses that fall under the scope of protection afforded by the national educational exceptions and educational uses that are not contemplated by those exceptions. At the same time, however, some of those agreements purport to prevent or restrict (i) uses that are permitted under copyright exceptions or fair dealing provisions, and/or (ii) uses that fall outside the scope of protection of copyright (such as hyperlinking).

While some of those restrictive provisions expressly acknowledge that contractually restricted uses can be permitted by statute, others do not offer the same safeguards. The UK's copyright legislation renders unenforceable contractual terms that purport to prevent or restrict acts that, by virtue of fair dealing or certain copyright exceptions (e.g. quotation exception), would not infringe copyright. That protection is not, however, granted to acts made under the educational exceptions analysed hereunder. French copyright legislation does not contain any provisions on treating such contractual provisions as unenforceable or as having no effect. This means that educational establishments may, due to these contractual restrictions, be effectively prevented from engaging in acts permitted by law.

Section III shows that the agreements featured in this study foresee various types of conditions to the permitted uses: purposes of use; extent of work and other quantitative limitations; physical limitations; technological limitations; time limits; source material; no market competition; and attribution.

This study reveals that French and British agreements impose contractual limitations that are not foreseen in the national educational exceptions on which such agreements are based. While in some cases, such as the extension to which a work can be used under an agreement, the contract offers terms and conditions to licencees that are more favourable than the law does; in most cases that does not happen. In other words, those contractual conditions mostly restrict the range of educational uses which would otherwise be allowed under such exceptions.

Considering that the main aim of the French agreements is to secure the compensation required by law, using those arrangements to establish terms and conditions not prescribed by law is a questionable practice. Surely, one can argue that such limitations are a consequence of the remuneration negotiated by the parties. Still, it does not seem that the lawmaker intended to make all the terms and conditions of the uses permitted by law subject to negotiation by the parties, but rather only the financial aspects of use.

In the United Kingdom where licences override exceptions, imposing contractual conditions that are not set forth in the exceptions raises a number of questions, such as (a) whether an educational establishment can rely on the exception for uses which - due to contractual restrictions - are not covered by the licences, but fall inside the scope of the exception, or (b) whether an educational establishment can rely on the exception after the termination of the licence by the licensor for violation of obligations that are not foreseen by law.

The study's findings also show that there is also a tendency to provide for definitions of open concepts of the law in private agreements entered into by and between right holders and governmental entities.

Naturally, if the licensee and licensor have equal bargaining power, it is not offensive for them to reach an agreement on how to construe certain aspects of law. However, giving precedence to licences over exceptions weakens the position of the licences. If schools and governmental authorities are put in a position in which they have to buy a licence in order to keep using the works they are currently using under the educational exception, they will not have the same power as right holders to determine the interpretation of important conditions of use. Thus, the practice of incorporating contractual definitions of open concepts of law in licences that override exceptions cannot be considered to be a good practice.

Moreover, one should not lose from sight the fact that these private agreements entered into by and between right holders and governmental entities do not cover all would-be beneficiaries of the educational exceptions, and the widespread use of these contractual notions agreed by some will end up influencing future court interpretations of the legal concepts that will be applicable to the full range of users.

Section IV features contractual provisions related to compliance between permitted uses and the terms of licences and enforcement of the terms of licences.

All of the agreements analysed during this study contain contractual provisions to ensure compliance between the uses permitted by those agreements and their terms and conditions, including the licensee's obligation to maintain records and/or report uses, and the licensor's right to check compliance between the uses and the agreements (through inspections or audits of records by licensors, and/or through inspections of the premises of educational establishments). Only one agreement featured herein provides for provisions protecting the confidentiality of the information obtained by right holders.

It should be noted that even though the provisions to enforce intellectual property rights in national legislation may give right holders the means to enforce their rights, this is achievable only to the extent that such measures, procedures and remedies are necessary to permit effective action against an act of infringement of such rights. In turn, contractual provisions give them the right to obtain the same information from schools that the law permit them to get from alleged infringers, but without having to go through a civil or judicial proceeding and without having to provide schools with the same guarantees the law affords to alleged infringers concerning the protection of confidential information and personal data.

This study demonstrates that, when given a chance to regulate educational uses via licensing agreements, right holders may use this contractual vehicle to obtain access to information to which they would not otherwise have access, without being constrained by confidentiality obligations that are typical of such arrangements.

Furthermore, this study shows that, under some of these agreements, schools and other educational institutions are faced with enforcement obligations that create administrative burdens and put pressure on their structures.

It is a common practice in commercial licensing to require licensees to ensure that their staff is aware of the terms and conditions of use of licensed material, and to take action against a breach by staff members of the licensing terms. The problem with educational licensing is that it covers uses made by a variety of users, including teachers and students. Requesting a school to ensure that an act of infringement by a student ceases, and for that school to prevent any recurrence thereof, puts an exceptionally high amount of pressure on it. It forces schools to police the educational community, on behalf of right holders, which is a role that schools should certainly not be asked to play.

While these obligations are foreseen in all British licenses analysed hereunder, they are not contemplated neither in French agreements nor in the Finnish licenses. These agreements take an entirely different stance on enforcement, only requiring that users are made aware of the terms of the license. Moreover, in France that obligation is assumed by the Ministries, and not by the schools themselves.

Since these obligations are not rooted in the legal provisions embodying the educational exceptions providing the legal framework for these agreements, but solely in the contractual arrangements between right holders and users, one should ponder what would happen to an educational establishment if it fails to comply with such an obligation, and the licensor opts to terminate the licence agreement.

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Section V presents licensing provisions foreseeing indemnification obligations, namely the indemnity by the licensor, for infringement claims brought against the licencees for uses of licenced material.

An intriguing feature encountered in the British agreements analysed hereunder is that the indemnity does not apply if an educational establishment is in material breach of any term of the licence. While it is logical to preclude the licensor's liability for infringement claims caused by an educational establishment's use going beyond the rights granted by the agreement, it is not proper to foresee that the indemnity will not apply in the event of a substantial breach of a licence term by such establishment where this breach is unrelated to the copyright infringement claim.

The indemnification provisions in the French agreements also seem to favour right holders, since CMOs do not commit to pay all reasonable legal costs, expenses and damages awarded against or incurred by educational establishments, but only an amount equal to the amount that would have been paid to the affected beneficiary if he/she was a member of said copyright collection and distribution society.

Overall, the agreements covered by this study show that allowing contractual arrangements to override legal provisions protecting users' rights will perpetuate an unbalanced power structure in modern copyright systems, and will compel users to accept terms and conditions that (i) purport to restrict the scope of protection granted by copyright exceptions and limitations, by imposing conditions on the uses that are not contained in said exceptions, (ii) impose burdensome obligations on schools and institutions that do not derive from the law and (iii) grant rights to right holders that are not contemplated by law.

Section VI presents possible policy and legal solutions to the problems posed by these contractual arrangements.

The preferable approach to the problems posed by these contractual arrangements would be to prevent licence priority, or to provide only for limited priority to those contractual arrangements that are already in place. Article 5(3)(n) of the InfoSoc Directive embodies an exception that, according to the Court of Justice of the European Union, cannot be overridden by a mere licensing offer but only by licensing agreements that exist. A similar approach would be the most sensible option for countries that want to provide an adequate framework for licensing.



It seems reasonable to expect that a legal framework that offers minimum users rights for purposes of education would stimulate contractual innovation, and eventually lead to licensing offers covering uses that are not foreseen in copyright exceptions or that could be prevented by the 3-step test, such as educational uses made on the open internet.

Regardless of whether policy makers opt to allow for giving priority to licenses or not, it is imperative to introduce a provision in copyright legislation across the European Union protecting the rights granted to users by copyright exceptions and limitations from contracts. A contractual provision, namely a provision contained in a licence authorising the acts permitted by the exception or limitation, should be rendered unenforceable or null and void or of no effect if it purports to restrict the scope of protection afforded by a copyright exception or limitation.

The public policy decision embodied in the conditions of use under copyright exceptions or limitations should not be removed or dismantled by private arrangements in any circumstance. Without giving proper legal treatment to contractual terms that seek to limit the application of copyright limitations and exceptions, a school or some other user will not be free to refuse a licence containing terms and conditions that are narrower or more restrictive than those offered by the law.

Furthermore, lawmakers should put in place mechanisms to ensure the fairness of licensing terms. A licence provision that gives right holders access to the personal information of students and teachers and confidential information belonging to schools, without imposing a confidentiality obligation and without seeking to limit the purposes of use of the information obtained by right holders, cannot be deemed reasonable or fair.

Schools and other educational establishments should be able to challenge with ease the terms of a licence that are thought to be unfair or unreasonable. Copyright laws across Europe should foresee affordable mediation and litigation to those institutions. In addition, if the agreements are constantly challenged or if they invariably contain terms and conditions that are unreasonable or unfair, policymakers should assess the need to submit the same to public regulation.