



Overview of European copyright legislation and open content licenses

Author

Ignasi Labastida

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Author

Ignasi Labastida

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1. Introduction

This report provides a short introduction to current copyright legislation in Europe and open content licensing. In this digital information era, copyright is not only important for lawyers and professionals, but any person who creates a new work can decide how they want others to make use of it, for example, by allowing others to translate, add to or modify the work without first seeking specific permission to do so. These days, a work can be copied and disseminated widely at almost no cost. Educators and learners have access to millions of works via the internet but there is a need to understand, in the context of the current copyright legislation, how specific works can and cannot be used. To understand how open content can be used, one needs to first understand the legal framework upon which open licensing is built. Copyright is a set of exclusive rights that are granted to the creator of a work for a limited time. This limited time is the “copyright term”. Currently, the copyright term in Europe is the lifetime of the creator plus 70 years.¹ The creator becomes the “author” and has the exclusive right to decide how his/her work can be used, reproduced, distributed, displayed and transformed. However, all copyright laws include some limitations to those exclusive rights in order to maintain some balance with other rights such as the freedom of speech or the right to information. Those limitations or exceptions to authors' rights, such as limitations related to education activities, allow users to use a copyrighted work without the express authorization from the copyright holder. One of the aims of this report is to provide an overview of the current exceptions and limitations for educational purposes in European copyright legislation. These limitations to authors' rights have implications as to how copyright works can be used in classrooms, virtual campuses or when excerpted, remixed or included as quotations in new original works. In general, academics are unsure how to deal with copyright when using copyrighted works in their academic activities (such as teaching or research)². Academics often feel that they can reuse any content if they pursue an educational use and they do not want to get any direct commercial profit. Nevertheless, European copyright legislation, in general, do not include such a wide limitation to authors' rights for educational purposes. In fact, many of the current legislation dictate very restrictive uses. It is also important to realize that these limitations for educational purposes are different from country to country. In 2001 the European Commission (EC) adopted a directive to harmonize the various exceptions³. However, every member state took a different approach when these recommendations were applied to national legislation. The directive included a list of copyright exceptions or limitations that each EU member state could provide, but as this was a list of recommendations and not mandates, each country was free to apply them as they saw fit, resulting in legislation on copyright exclusions and limitations that varies from country to country. In the directive there is only one mandatory exception to be included in all legislation however, it was not related to any educational purposes. The following section will address what the 2001 directive says about copyright exceptions for educational uses and how the different EU member states have implemented it. We will also review what another International agreement governing copyright, the Berne Convention⁴, signed by all the EU states, says about copyright exceptions for educational activities. This international agreement establishes a common copyright framework for all its signatories, including a set of general limitations to authors' rights, some of which are related to education. The final section of the report includes a review of open content licenses currently used

- 1 The copyright term was harmonized by the Council Directive 93/98/EEC of 29 October 1993 (text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0098:EN:NOT>). However each legislation has transitional periods that still applies in some cases.
- 2 J.C. Fernández-Molina, E. Muriel, J. Vives-Gracia, P. Riera & O. Martín. Copyright and e-learning: professors' level of knowledge about the new Spanish law. *Aslib Proceedings: New Information Perspectives*, 63(4), 2011, 340-353
- 3 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT>
- 4 Berne Convention for the Protection of Literary and Artistic Works: <http://www.wipo.int/treaties/en/ip/berne/index.html>

in Europe, especially the Creative Commons licenses, which is the set of licenses commonly used for Open Educational Resources. An open content license is a legal tool based in the current copyright framework that can be used to establish the terms of use of that content. This means that the author or creator of content can choose to give users some rights to use the content without asking for permission as required by the copyright default terms "All rights reserved". When an author gives permission for their content to be reproduced, distributed, displayed and transformed via an open license, it is called "open content"⁵. The legal text that establishes how this content can be used is referred to as an open content license.

5 <http://opendefinition.org/>

2. The European Copyright Framework

Before analyzing how different national legislators have implemented the European Directive on the harmonization of certain aspects of copyright and related rights in the information society, it is important to have a look at this text itself. The 2001/29/EC Directive was approved in 2001 by the European Parliament and the Commission. It established a set of copyright exceptions and limitations that may be included in copyright laws of EU member states. Among this set of recommendations, there was only one mandatory exception to be included by all EU member states, which, as previously mentioned, was not related to education⁶. The list of recommended exclusions and limitations related to education is worth analysis. They are included in the Article 5 of the Directive:

5.2 Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

5.3 Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(l) use in connection with the demonstration or repair of equipment;

5.5 The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

From Article 5 of the Directive we can see that the intention was that teachers and educators may use copyrighted content for educational purposes, such as reuse parts of other people's work, as long as proper

6 The mandatory limitation include any temporary act of reproduction, which is transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made, and which have no independent economic significance. Those temporary acts are exempted from the authors' reproduction right.

attribution to the original source is maintained. However, as we see in the next section, each European country has implemented the directive in a different way leading to a confusing mix of exceptions for educational purposes. A full copy of all European national legislations can be found on the World Intellectual Property Organization website⁷. Since the Berne Convention also covered copyright agreements among signatories, consideration of this agreement is also important when examining copyright in Europe. In article 10 of the Berne Convention there is the possible establishment of limitations for educational activities such as quotations or illustrations for teaching:

- (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
- (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the 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.
- (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon. It must be noted, however, that these are again recommendations, with each state ultimately able to decide the elements that appear in their national legislation. A closer examination of this issue follows.

⁷ <http://www.wipo.int/wipolex/en/>

3. Copyright exceptions and limitations in European legislations

Once the 2001/29/EC Directive was approved EU member states started implementing the Directive in their own copyright laws. The result of this implementation is a set of heterogeneous regulations, though the aim of the directive was to establish: "A harmonized legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors"⁸. The first point to be analyzed is how national legislators have understood educational purposes. In article 5.2.a there is a mention to "purpose of illustration for teaching" that has been implemented in different ways. In the different copyright laws we can find education, teaching, instruction, examinations all used as synonyms for 'educational purposes', however, there is no clear agreement that these terms are interchangeable⁹. It is also important to note that a vast variety of uses are included in copyright exceptions or limitation for educational purposes in the current European Copyright laws. Among them, the following acts of exploitation are allowed for educational purposes: photocopying, performance, reproduction, distribution, broadcast, making available online, translation, digitization¹⁰. Related to the kind of works that can be used for educational purposes under an exception or a limitation, we also find differences among the national legislation. In some cases, specific works, such as text books in Spain, are excluded from the exceptions, whereas other laws offer a general use regarding the type of work. Another difference we can find is related to the amount of a particular work that can be reused. For instance, there are restrictions on the number of copies, or the percentage of the original work that can be used¹¹. There are also some restrictions related to the institutions or users that are allowed to reuse a content for an educational purpose. Some national legislation restricts the beneficiaries of the educational limitations when establishing a list of entities as schools or universities or restrict them by using terms as "educational establishments". Another important point is to know how those exceptions overlap with library limitations. Many educators and learners access to resources from their libraries and in some cases, for educational purposes or for research, they are allowed to be reused under a copyright exception beyond a private use. We can also find that in some cases there are some remunerations or compensations to authors or copyright owners, and in other cases there are no such provisions. Some countries, like Belgium, France, Germany, Switzerland and the Netherlands, require a remuneration to authors whose works are used without authorization for educational purposes, while the remaining European Member States do not require such compensation. Regarding the kind of use of the work (for example, reproduction, distribution, public communication or transformation), we can also see some differences. Countries like Cyprus, Czech Republic, Estonia, Latvia, Liechtenstein, Poland, and Switzerland allow any use, including online uses and translations. Other countries, including Belgium, France, Germany, Italy, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, allow reproduction, distribution, public communication, or posting online. Another group of countries including, Austria, Bulgaria, Greece, Hungary, Lithuania, Slovenia, and Spain, restrict the use of the copyrighted works to face-to-face contexts only. And, finally, the Nordic countries (Finland, Denmark, Iceland, Norway, Sweden) have an extended collective licensing system that covers online uses. For a detailed overview of the implementation of the Directive in the different EU states, see Dr. Xalabarder's Study on Copyright Limitations and Exceptions

8 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT>

9 There is a summary of the national implementations available in the presentation by Prof. Raquel Xalabarder <http://opencourseware.eu/Workshop-Open-Content-licensing-in-Europe>

10 There is a summary of the national implementations available in the presentation by Prof. Raquel Xalabarder <http://opencourseware.eu/Workshop-Open-Content-licensing-in-Europe>

11 Usually there is not a definition of the term piece or small piece. See, for instance, the current Spanish law: <http://civil.udg.es/normacivil/estatal/reals/lpi.html> [Art. 32]

for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel¹² and her presentation during the open content licensing workshop held in Barcelona in October 2012¹³. Apart from the set of limitations established in any copyright law, sometimes there are further requirements to categorize the use of a protected work as a limitation or exception. The most commonly cited is the clause known as the “three-step-test” included in the Berne Convention¹⁴. This clause establishes that “any limitation or exception should be applied in certain special cases, that it does not conflict with a normal exploitation of the work and it does not unreasonably prejudice the legitimate interests of the author”. A similar provision was included in the Directive 2001/29/EC: “The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”¹⁵. Without these exceptions and limitations harmonized across legal jurisdictions, there is a lot of misunderstanding when reusing content in a broader scope, for instance at a pan-European level. It is difficult to understand how to include other people’s contents in educational resources when we want to share them internationally. For example, under Swiss law, students and teachers can reuse the entirety of a work for educational purposes, while in other countries, like Spain, they are only allowed to use small fragments of that work¹⁶.

12 Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, Raquel Xalabarder. Available on line:

http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393

13 <http://opencourseware.eu/Workshop-Open-Content-licensing-in-Europe>

14 It was included in the revision of the Berne Convention for the Protection of Literary and Artistic Works in Stockholm in 1967 and currently it is the article 9.2 of this text.

15 Art 5.5. of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT>

16 <http://www.mcu.es/archivoswebmcu/LegislacionConvenio/legislacion/ley%2023-2006.pdf>

4. Implementation and use of open content licenses in Europe

Open content licenses are currently used across Europe in many different sectors, including education¹⁷. The use of those licenses started with the introduction of free software¹⁸ that was adopted across many sectors. Schools and Universities, for instance, have embraced free software in many countries and, sometimes, they have become producers and developers of that software¹⁹. In general, free software licenses have not been adapted to European Copyright laws²⁰. Nonetheless, several court cases have demonstrated that this has not been a problem for the software's adoption and use²¹. After the introduction of free licenses for software during the 1980's, people started to reproduce those legal texts and apply them to any kind of work²² ushering in the emergence of the open content licenses²³. Among all of open content licenses, the most known and used²⁴ are the set of legal texts offered by Creative Commons²⁵. This US non-profit corporation created, a decade ago, a set of licenses with different degrees of openness. Nowadays Creative Commons licenses have become a *de facto standard* for open content²⁶. Several large repositories of shared knowledge and cultural works, such as Wikipedia, are licensed under a Creative Commons license²⁷. Almost every Open Courseware site uses a Creative Commons license, the most common being Attribution-NonCommercial-ShareAlike (BY-NC-SA)²⁸ license. This is most likely due to the fact that the first OCW site (OCW-MIT)²⁹ was licensed under a customized Creative Commons license based in the standard CC BY-NC-SA³⁰. A few years ago, the MIT changed the original license of its OCW site to the standard Attribution-NonCommercial-ShareAlike (CC BY-NC-SA) license³¹ when it included some modifications like the non-endorsement clause or a broader requirement for attribution. One of the most compelling reasons that Creative Commons licenses are widely used is that the legal texts have been ported to many jurisdictions, including European ones. The porting process includes not only a translation of the text, but the analyses of the suitability of the legal text to national legislation. Since the beginning, Creative Commons developed an international network of affiliates that have been working on the adaptation of the licenses to the needs of each jurisdiction³².

17 EADTU 25th ANNIVERSARY CONFERENCE 2012: The role of open and flexible education in European higher education systems for 2020: new models, new markets, new media. Proceedings available at http://www.eadtu.eu/images/stories/Docs/Conference_2012/proceedings2012.pdf

18 As being software that ensures that the end users have freedom in using, studying, sharing and modifying that software, following the Free Software Foundation definition.

19 The role of Spanish universities in the development, use and distribution of free software: RUSL: The Ranking of Universities using Free Software <http://sisobproject.wordpress.com/2012/06/04/the-role-of-spanish-universities-in-the-development-use-and-distribution-of-free-software-rusl-the-ranking-of-universities-using-free-software-hacen-uso-las-universidades-espanolas-del-soft/>

20 GPL, probably the most used free software license, has many translations but all of them are unofficial as it is stated in the preamble of the legal text: <http://www.gnu.org/licenses/translations.html>

21 <http://www.jipitec.eu/issues/jipitec-1-1-2010/2419/dippadm1268746871.43.pdf>

22 For instance in art works <http://gnuart.org/>

23 Lawrence Liang, Guide to Open Content Licenses, Piet Zwart Institute. Online version: http://www.theartgalleryofknoxville.com/ocl_v1.2.pdf

24 The Power of Open: over 400 million CC-licensed works, with increasing freedom <http://creativecommons.org/weblog/entry/28041>

25 <http://creativecommons.org>

26 See the glossary of terms at the end of the document.

27 Since June 2009, Wikipedia is under a CC BY-SA license, <http://creativecommons.org/weblog/entry/15411>

28 Unported version of CC BY-NC-SA <http://creativecommons.org/licenses/by-nc-sa/4.0/>

29 <http://ocw.mit.edu>

30 There is still available a Spanish translation to the first OCW MIT license at <http://mit.ocw.universia.net/legal-notice.htm>

31 http://wiki.creativecommons.org/Version_3#MIT

32 A complete list of the Affiliate Network is available here: <http://creativecommons.org/international>

The set of six Creative Commons licenses³³ was created in 2002 and the first European licenses appeared in 2004³⁴. The legal texts have been upgraded four times, with the newest version, 4.0, having been released in late 2013. The updates have tried to improve the texts, thus answering the different demands from users and creators such as include compulsory rights or a broader requirement of attribution beyond authorship, for example. Those upgrades have been reflected in the different ported versions, too. However the porting process of those new versions has occurred at different speeds in each jurisdiction, leading to an unharmonized situation. There was no obligation to port although it was advisable and each local team decided how to proceed in the porting processes. The main differences among versions are that 3.0 include a better approach to compulsory collective management of some rights, basically related to musicians. This current version also includes a non-endorsement clause required by many institutions³⁵. With 2.5 the scope of the attribution grew allowing the author to ask for credit to any part that is mentioned in the legal terms. And finally, with version 2.0 the number of licenses were reduced from the original eleven texts (version 1.0) to the current six licenses. Nowadays, in Europe, the following versions have been ported to the local jurisdiction:

Jurisdictions offering the 3.0 version:

- Austria
- Croatia
- Czech Republic
- Estonia
- France
- Germany
- Greece
- Ireland
- Italy
- Luxembourg
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- Serbia
- Spain
- Switzerland

33 <http://creativecommons.org/licenses>

34 <http://creativecommons.org/weblog/entry/5187>

35 The non-endorsement clause states that the users of the work or content cannot assert or imply that they are, or that the use of the Licensed Material is, connected with, or sponsored, endorsed, or granted official status by, the Licensor.

Jurisdictions offering the 2.5 version:

- Bulgaria
- Denmark
- Hungary
- Macedonia
- Malta
- Slovenia
- Sweden
- UK (Scotland)

Jurisdictions offering the 2.0 version:

- Belgium
- UK (England and Wales)

Jurisdictions offering the 1.0 version:

- Finland

Jurisdictions with CC local project but without licenses yet:

- Iceland
- Lithuania
- Russia
- Slovakia
- Ukraine

It must be also noted that some of those legal texts are multilingual if the jurisdiction has more than one official language. Creative Commons has always recognized the importance of having the licenses available in many languages in order to facilitate their use. The current situation of Creative Commons licenses allows their adoption in any OCW site in Europe and in any educational resource. It is also important to note that using the most common license in OCW sites (BY-NC-SA) permits the translation or adaptation of any content if the new created work is licensed under the same license or its equivalent in another jurisdiction. That means, for instance, that the contents from an Austrian OCW site can be used to create new contents for an Italian OCW site under the Italian version of the original Austrian license, or even use the equivalent unported license, applicable to any jurisdiction.

5. Conclusions

To conclude this report, we would like to repeat the complexity of the legal issues involving the creation and the use of content for educational purposes. As we have shown in the first part of the report, although there has been some attempts to harmonize copyright laws in Europe there is still a lot to do in that regard, especially in the context of copyright exceptions and limitations for educational purposes. Currently, European teachers or educators are allowed to reuse other people's content in different ways depending on where they are teaching. This situation brings a lot of problems, since a lot of reuse happens online and thus internationally. Moreover, some laws do not offer a clear explanation of the permitted uses in an educational environment, leading to many misinterpretations and misunderstandings. We would like to encourage OCW creators to apply an open license for their OCW content as much as possible in order to avoid any legal trouble. We know that sometimes it is also difficult to remix contents with different licenses. In order to facilitate easier modification and proper use of open licenses we will develop a set of guidelines in the framework of this European Project.

6. Glossary of Terms

Copyright

The exclusive right granted to an author for a certain period of time in order to exploit a work in any format.

Creative Commons:

An US non-profit organization that enables the sharing and use of creativity and knowledge through free legal tools <http://creativecommons.org>

Exception or Limitation

A provision included in a Copyright Law in order to maintain a balance between rights holders and users. Those provisions limit the exploitation rights for authors allowing the use of a work in certain cases and under some conditions without the authorization of the rights holders

Open content

Content that is licensed in order to allow users to reuse it beyond what is permitted by the law under an exception or limitation. It exists an "open definition" that states: "A piece of data or content is open if anyone is free to use, reuse, and redistribute it — subject only, at most, to the requirement to attribute and/or share-alike"³⁶.

Open content license

A license provided for use by the general public without no cost based on copyright law that grants enough rights from a work to users to qualify such work as open content.

OpenCourseware

OCW are course materials created at an educational institution and offered for free online under a public license.

Public License

A license provided for use by the general public without cost based on copyright law.

WIPO

World Intellectual Property Organization, also known as OMPI (acronym in French) WIPO is the global forum for Intellectual Property services, policy, information and cooperation. It is a self-funding agency of the United Nations, with 186 member states. <http://www.wipo.int/>

36 <http://opendefinition.org>