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# Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online Services

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**Abstract**

The spread of COVID-19 forced educational institutions to transition to online education. This contribution analyzes, through the lens of copyright law, the terms and conditions of some selected online services used to deliver remote teaching. The study highlights the most problematic terms and their detrimental effects on remote teaching by focusing on copyright ownership, liability, and content moderation.

**Keywords:** Emergency Remote Teaching, copyright, COVID-19, exceptions & limitations, content moderation, platform liability.

## 1. Introduction

When COVID-19 started spreading globally and throughout Europe, most aspects of day-to-day life were severely disrupted. As governments scrambled to contain the spread of the virus, higher education institutions (HEIs) reacted by suspending face-to-face teaching and by sending millions of students to the safety of their home. In order to keep delivering quality education, teachers had to embrace Emergency Remote Teaching (ERT). ERT refers to the "temporary shift of instructional delivery to an alternate delivery mode due to crisis circumstances".[1] In this instance, teaching had to be moved online.

HEIs and teachers were thus faced with the critical choice of which service or mix of services to use in order to best carry out their mission remotely. The urgency of the situation left little time to exercise proper scrutiny in the identification of the services best suited to online teaching. In many instances, the transition was not accompanied by adequate institutional support. While some teachers were provided with relevant guidelines and training by their institutions, others were left to implement remote teaching by themselves. This created uncertainty and led to a high degree of heterogeneity in the choice of online teaching tools used.

The swift move to ERT has given rise to significant copyright-related concerns:[2] what was to happen to materials prepared by teachers once shared with their students through a particular

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[1] Charles Hodges et al, 'The Difference Between Emergency Remote Teaching and Online Learning' (*Educause Review*, 27 March 2020) <https://er.educause.edu/articles/2020/3/the-difference-between-emergency-remote-teaching-and-online-learning> accessed 1 June 2020.

[2] Other significant concerns relate to data protection, see for a brief analysis Rossana Ducato et al, 'Emergency Remote Teaching: a study of copyright and data protection policies of popular online services (Part II)' (Kluwer Copyright

online service? What were the risks teachers incurred when using third-parties' materials without permission? Could their students be exposed to similar risks? Those concerns are not radically new. The risks and uncertainty surrounding the use of materials for online teaching is well-known to copyright scholars and they have been addressed, albeit only partly, by the Copyright in the Digital Single Market Directive (C-DSM Directive).[3] The transition to ERT has exposed these problems to a wider audience and illustrated the necessity to address them promptly and effectively. There are perhaps two new elements. First, practically, infringements taking place in physical classrooms were unlikely to be discovered and actioned by rightsholders. Second, rightsholders can increasingly rely on automated systems to enforce their rights ("code is law")[4], leading to overprotection, especially when end-users cannot appeal the automated decision. The relevance of our analysis is underlined by the fact that ERT, initially intended as a temporary solution, is likely to become the "new normal": remote teaching and the tools used to deliver it are expected to be integrated into HEIs and teachers' instructional methods, resulting in a "blended learning" experience, well after face-to-face teaching resumes.[5]

The aim of this article is to disentangle the most prominent copyright issues involved in remote teaching. To this end, we reviewed the terms of use, service agreements, community guidelines, etc. (together "terms") of a selection of services. We examined and compared these terms to identify and highlight problematic issues and best practices. The study encompasses standard terms of nine online services (referred to hereafter as "online services"), as last accessed on 27 April 2020. The selected services (Discord, Facebook, G-Suite for Education,[6] Jitsi, Microsoft Teams, MoodleCloud, Skype, Zoom and YouTube) include dedicated software for managing groups of users, content-sharing platforms, social networks, and video conferencing services. To varying degrees, they afford teachers to emulate in-person teaching through live discussions and asynchronous interactions with students, the provision of digitized learning materials and the submission of assignments. Some were specifically designed with distance education in mind, while others have been repurposed or retrofitted to accommodate ERT.[7] Some are operated by institutional actors and rely on proprietary software, others on open-source software and only a few are accompanied by contractual terms individually negotiated by HEIs. The selection of services represents an initial sample, informed by our own experience, informal conversations with colleagues and preliminary observations of teachers' behaviors in the transition to ERT. Alongside its academic purpose, our analysis aims to assist HEIs and teachers in assessing the suitability of the services available to them to deliver remote teaching.

The study considers the currently harmonized EU copyright rules, and in particular the Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information

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Blog, 4 June 2020) <http://copyrightblog.kluweriplaw.com/2020/06/04/emergency-remote-teaching-a-study-of-copyright-and-data-protection-policies-of-popular-online-services-part-ii/?doing_wp_cron=1591780006.9291720390319824218750> accessed 9 June 2020.

[3] See Article 5 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC DSM Directive, OJ L 130, 17.5.2019, p. 92-125 (C-DSM Directive).

[4] See e.g. Lawrence Lessig, 'Intellectual Property and Code' (1996) 11(3) *Journal of Civil Rights and Economic Development* 6.

[5] Debbie Andalo, 'Could the lockdown change the way we teach forever?' (*The Guardian*, 14 May 2020) <https://www.theguardian.com/online-learning-revolution/2020/may/14/could-the-lockdown-change-the-way-we-teach-forever> accessed 11 June 2020.

[6] Note that our study encompasses both the G-Suite for Education (Online) Agreement for non-profit educational institutions and other non-profit entities, and the G-Suite (Free) Agreement applicable to individual teachers.

[7] Discord, a service originally intended for the gaming community, modified some of its features in the midst of the coronavirus pandemic to accommodate ERT. See 'How to use Discord for your classroom' (17 March 2020, Discord) <https://blog.discord.com/how-to-use-discord-for-your-classroom-8587bf78e6c4?gi=8adc6dedf0be> accessed 9 June 2020.

society (InfoSoc Directive).[8] It also takes into account the yet-to-be-transposed[9] C-DSM Directive, which introduces, among others, an exception for digital, cross-border teaching activities[10], as well as critical changes to the safe harbor provisions for online content sharing service providers (OCSSPs).[11]

The analysis is structured along three axes. First, we will focus on teachers' control over their own materials once they have shared them through online services, thus critically assessing which rights teachers retain in their works and which they surrender to the providers of the service and for what purposes. Second, we will examine the liability incurred by teachers for sharing third-party materials without prior authorization. Lastly, we will deal with copyright infringements with a focus on content moderation. In particular, we will explore contractual regulation of content removal, user accounts' termination, and complaint mechanisms available to teachers to make sure that essential teaching materials for instruction and illustration are permanently available to students.

## 2. User's control over uploaded content

Teachers and their students have a legitimate interest in maintaining a reasonable degree of control over materials they create and share via online services used for distance education. This interest lies in preventing third parties, especially for-profit entities, from repurposing user-generated content, especially for purposes that are unrelated to education. To understand who has control over original content shared on online services, one needs to tackle two distinct, albeit intertwined, questions. First, who formally owns the content that has been uploaded or otherwise shared? Second, which rights are licensed to service providers under the terms and conditions of the service?

All of the providers of the selected online services reassure their users that the copyright in their original content rests with them.[12] The reason for this is that formal ownership is increasingly less relevant, for what really matters is factual control over the content.[13] Control is typically negotiated

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[8] 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, OJ L 167, 22.6.2001, p. 10-19 (InfoSoc Directive).

[9] So far, France is the only country that hastransposed part of the Directive: *Loi* n° 2019-775 of 24 July 2019 "*tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse*" (implementing Article 15 of the C-DSM Directive on the new publishers' right). While national implementations are under way in some Member States (the deadline is set for June 7 2021), a useful tool to track the national implementations of the Directive has recently been released by Communia and is available at <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879> accessed 1 June 2020.

[10] C-DSM Directive, art. 5.

[11] C-DSM Directive, art. 17.

[12] MoodleCloud Terms of Service as last updated on 24 February 2020 <https://moodlecloud.com/app/terms> (MoodleCloud Terms), Clause 13.4; Zoom Terms of Service as last updated on 13 April 2020 <https://zoom.us/terms> (Zoom Terms), Clause 2.b; Microsoft Services Agreement as last updated on 1 July 2019 <https://www.microsoft.com/en-us/servicesagreement/> (Microsoft Terms), Clause 2; Meet.jit.si Terms of Service as last updated on 1 April 2020 <https://jitsi.org/meet-jit-si-terms-of-service/> (Jitsi Terms), Clause 4; YouTube Terms of Service as last updated on 22 July 2019 <https://www.youtube.com/static?gl=GB&template=terms> (YouTube Terms), Section "Your Content and Conduct – Rights You Grant"; G-Suite for Education (Online) Agreement as last updated in September 2018 <https://gsuite.google.com/terms/education_terms.html> (G-Suite for Education Terms), Clause 8.1; G-Suite (Free) Agreement <https://gsuite.google.com/terms/standard_terms_checkout.html> (G-Suite Terms), Clause 8.1; Facebook Terms of Service as last updated on 31 July 2019 <https://www.facebook.com/terms.php> (Facebook Terms), Clause 3.1; Discord Terms of Service as last updated on 19 October 2018 <https://discordapp.com/terms> (Discord Terms), Sections "Intellectual Property Rights" and "Your Content". All sources were last accessed on 27 April 2020.

[13] This was the theme of the 9th Annual Workshop of the International Society for the History and Theory of Intellectual Property (Toronto, 12-14 July 2017). See also Sharon Connelly, 'Authorship, ownership, and control:

and transferred by means of licenses. Our analysis reveals that licenses granted by users to service providers vary to a significant extent from one service to another, in terms of purpose, scope and overall transparency and clarity.

In terms of purpose, all service providers require their users to license their original content to them so that they can perform all acts necessary for the operation of the service, reflecting a common, unproblematic practice among online services.[14] Such acts typically include making copies of users' contents, uploading them to the service's servers, changing their format, streaming them to other users in response to playback requests, etc. The free and open-source software Jitsi is the only service among those analyzed that strictly limits the use of its users' contents to what is necessary for operating and enabling the service.[15] All other service providers ask for their users' permission to use their content for additional purposes.

Some providers include in their terms a license to use uploaded or shared content to improve their service.[16] The vagueness of such a purpose, especially when the service provided is broadly defined to encompass commercial features[17], makes it difficult to foresee how users' contents will effectively be used. Potentially problematic are also clauses whereby users are expected to license their content not only to the service provider, but to third parties as well. Here a distinction must be drawn between third parties that are other users of the service, and third parties that are its business contractors. Service providers that would qualify as OCSSPs under Art. 17 C-DSM Directive – typically, YouTube and Facebook – grant their users the right to access and use other users' content only through their service.[18] Since these sublicensees cannot access and use the content outside of the relevant service, such sublicensing practice is deemed unproblematic. Conversely, it is alarming when users' contents are licensed to third parties that are service providers themselves, in order to help deliver or improve the main service or supplement it with additional functionalities: some of the selected services grant licenses to third parties for purposes ranging from operating and improving the service[19] to protecting users and the service,[20] through to performing contractual obligations,[21] as well as research and development.[22] These licensing terms translate into teachers losing control over their content, which can be used by third-parties for purposes they could hardly foresee when they first started using the service for delivering education.

These licenses are qualified in a variety of ways, the most common being "worldwide", "royalty-free", "non-exclusive", "transferable", "sub-licensable", and "perpetual". The reference to perpetuity[23] is particularly problematic as perpetual licenses are in contrast with the limited duration

Balancing the economic and artistic issues raised by the Martha Graham copyright case' (2004) *Fordham Intellectual Property Media & Entertainment Law* Journal 15, 837.

[14] E.g. MoodleCloud Terms, Clause 9; Zoom Terms, Clause 7; Microsoft Terms, Clause 2.b; Jitsi Terms, Clause 4; YouTube Terms, Section "Your Content and Conduct – Licence to YouTube"; Facebook Terms, Clause 3.1; Discord Terms, Section "Your Content".

[15] Jitsi Terms, Clause 4.

[16] MoodleCloud Terms, Clause 4.2; Microsoft Terms, Clause 2.b; YouTube Terms, Section "Your Content and Conduct – Licence to YouTube"; Facebook Terms, Clause 3.1.

[17] For instance, users grant Facebook a license to use their content in order to provide them with a "personalized experience", which encompasses targeted ads.

[18] YouTube Terms, Section "Section "Your Content and Conduct – Licence to Other Users"; Facebook Terms, Clause 3.1; Microsoft Terms, Clause 2.a, Discord Terms, Section "Your Content".

[19] Jitsi Terms, Clause 4; Facebook Terms, Clause 3.1; YouTube Terms, Section "Your Content and Conduct – Licence to YouTube", Microsoft Terms, Clause 2.b.

[20] Microsoft Terms, Clause 2.b.

[21] MoodleCloud Terms, Clause 13.5.

[22] MoodleCloud Terms, Clause 4.4.c.

[23] Discord Terms, Section "Your Content".

of copyright protection. Other service providers do not clarify the duration of the license, with the positive exceptions of YouTube and Facebook, where the license terminates with the removal of the content by the user.[24]

The scope of these licenses can be more or less extensive, depending on the activities for which the authorization is granted. The most common activities that service providers are allowed to perform are – in descending order – use, copy or reproduce, distribute, display, retain for back-up, host, modify, translate, create derivative works, perform, transmit, adapt, publish, reformat. Less usual clauses include the authorization to disclose, communicate, share, and run users' content.[25] Jitsi benefits from the longest list of licensed activities,[26] while YouTube's terms only mention "use" as permitted activity, thus signaling a problematic practice, as the word "use" can encompass all the above-mentioned activities and more. Equally problematic are Microsoft Teams and Skype's terms as they merely provide examples of the activities that Microsoft can carry out with regards to its users' content,[27] thus suggesting that they may be able to do virtually anything they wish with their users' content. Therefore, whilst undisturbed ownership is a red herring, there is a genuine risk service providers acquire control over learning materials generated by HEIs and teachers.

## 3. Users' liability for copyright-infringing online learning materials

The risks teachers and, potentially, students may incur when sharing materials without the rightsholders' authorization are among the most pressing concerns HEIs and teachers have regarding ERT. The selected online services enable teachers to share learning materials, such as book chapters, articles, or educational videos, either through screen sharing features or asynchronous discussion boards, group pages, conversation channels, etc. This function, central to remote education, proves critical in scenarios where in-class teaching has been completely suspended and students have restricted access to physical repositories of learning resources, such as libraries. In-copyright materials that do not originate from HEIs, teachers or students will usually be owned by third parties. Although one could argue that remote teaching does not fundamentally differ from in-person classroom set-ups, in which teachers regularly share protected materials with their students, the mediation of an online service providers complicates the situation in a number of ways.

Under Art. 14 e-Commerce Directive, service providers that are hosting user-uploaded content are obliged to expeditiously remove or disable access to content infringing on third-parties' copyright, once they have gained knowledge of their unlawful nature.[28] Service providers usually gain such knowledge upon being notified by rightsholders. With the soon-to-be-implemented Art. 17 C-DSM Directive, the legal landscape is evolving toward increased *ex ante* control on the part of service providers over the behavior of their users. [29] Those service providers qualifying as OCSSPs

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[24] YouTube Terms, Section "Your Content and Conduct – Duration of Licence"; Facebook Terms, Clause 3.1.

[25] The first two can be found, respectively, in MoodleCloud Terms (clause 4.4) and Jitsi Term (clause 4), the last two are included in Facebook Terms (clause 3.1).

[26] Jitsi Terms, Clause 4.

[27] Microsoft Terms, Clause 2.b.

[28] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (e-Commerce Directive), artt. 12-14. For a detailed analysis see Oliver Englisch and Giulia Priora, 'Safe Harbour Protection for Online Video Platforms: A Time to Say Goodbye? Analysis of judgements by Italian and German courts on the liability of YouTube for copyright infringements' (2019) *MediaLaws* 2, 128-143.

[29] Particularly insightful is the French proposal to implement Art. 17 C-DSM Directive, analyzed in Julia Reda, 'France proposes upload filter law, "forgets" users' rights', <https://juliareda.eu/2019/12/french_uploadfilter_law/> accessed on 10 May 2020.

will soon have a compelling incentive to implement automated preemptive filtering systems[30] aimed at ensuring the unavailability of specific works for which the uploader did not obtain a license, and for which rightsholders have provided the OCSSP with a digital "fingerprint". Because of online services' potential for greater dissemination of protected works, rightsholders are significantly more watchful online, partly thanks to available tools to better monitor users' infringing activities (e.g. YouTube's Content ID).[31] If most infringing activities carried out in the relative privacy of a classroom would usually go unnoticed, they might be easily discovered when carried out online – by automated means or otherwise – thus exposing HEIs, teachers, and students to the risk of an infringement action.

One finding of our analysis is that teachers are deemed responsible for ensuring that materials they share with their students are not infringing on third-parties' copyright. Teaching activities rely, to a large extent, on the sharing of third-parties' protected materials. When it is not authorized by the rightsholders, the sharing of in-copyright materials via online services almost always encroaches on one or several third parties' exclusive rights under copyright law. More specifically, teachers who share materials with their students are most likely to infringe on rightsholders' exclusive right to reproduce and the ever-expanding right to communicate their works to the public.[32] In addition, teachers should be careful when modifying or adapting protected materials, as, depending on the applicable law, this can trigger rightsholders' right to adapt their work and the authors' moral right to have the integrity of their work preserved. Finally, some service providers extend teachers' liability to content shared by their students: within the analyzed sample half of the services impose such extended responsibility.[33] Teachers have to be aware of this "administrator" position that is forcefully bestowed upon them and of the risks and obligations associated thereto.

There is visible imbalance in the allocation of liability, with , on the one hand, teachers' broad liability and, on the other hand, the limited liability service providers set for themselves, with respect to their users' infringing activities. All of the selected service providers exclude liability for content shared by their users. Online services' eagerness to avoid any liability over their users' conduct leads to stringent provisions in certain cases, as some service providers enjoin their users to only upload or share contents for which they obtained prior authorization from the rightsholders. Emblematic cases are Moodle, which requires its users to obtain the prior authorization of the rightsholders and to be able to provide the documentation to prove it on request,[34] and Zoom, which asks its users to obtain a prior written license to use the uploaded materials.[35] Some services explicitly

[30] It is lively debated whether the C-DSM Directive provides an actual obligation to implement upload filters. Whilst arguably Art. 17 does not provide such an obligation strictly speaking, it nonetheless provides OCSSPs with strong incentives to make "best efforts to prevent (…) future uploads", which closely resembles an upload filter. See e.g. Gerald Spindler, 'Upload-Filter: Umsetzungsoptionen zu Art. 17 DSM-RL' (2020) *Computer und Recht* 36(1), 50; Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) *IIC*.

[31] See *sub* Section 4.

[32] See InfoSoc Directive, Artt. 2 and 3. On the incontrollable expansion of the concept of communication to the public see C-466/12 *Nils Svensson et al v Retriever Sverige AB* (2014) ECLI:EU:C:2014:76; C-160/15 *GS Media BV v Sanoma Media Netherlands BV et al* (2016) ECLI:EU:C:2016:644; C-527/15 *Stichting Brein v Wullems* (2017) CLI:EU:C:2017:300; C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV* (2017) ECLI:EU:C:2017:456; C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018) ECLI:EU:C:2018:634. For a focus on hyperlinking as communication to the public see Giancarlo Frosio, 'It's All Linked: How Communication to the Public Affects Internet Architecture' (2020) 37 Computer Law & Security Review 105410.

[33] MoodleCloud Terms, Clauses 1.3 and 10.3.b; Zoom Terms, Clause 17; Microsoft Terms, Clauses 1.c, 1.h and Section "Skype and GroupMe" Clause e.viii; G-Suite Terms, Clause 2.9.

[34] MoodleCloud Terms, Clause 10.2.f.

[35] E.g. Zoom Terms, Clause 13; Discord Terms, Section "Your Content".

require their users to warrant that they hold the right to grant them the licenses necessary for the functioning of their services.[36]

Service providers' desire to keep their hands clean – somehow ironic in a time of pandemic – raises important concerns. First, it sits uncomfortably with the set of obligations they must meet if they wish to limit their liability for their users' infringing activities under the e-Commerce Directive. If service providers wish to retain safe harbor protection, they cannot completely ignore infringing materials shared by their users. Because they have to act expeditiously to make the infringing content unavailable, once they have been notified of its existence, their liability starts where their ignorance of their users' infringing activities ends. Therefore, they can never fully exclude their liability for infringing materials shared on their service.[37] More critically, what service providers ask of their users, with regards to the sharing of third parties' in-copyright materials, disregards copyright exceptions meant to instantiate substantial breathing room for users of protected materials, and teachers in particular.

If, in principle, one has to obtain the rightsholder's authorization in order to use their work in a way that would otherwise infringe on their exclusive rights, copyright law – through its built-in exceptions and limitations – allows for non-authorized, permitted uses of protected works. Pursuant to Art. 5(3)(a) InfoSoc Directive, most EU Member States have implemented a so-called teaching exception.[38] According to Recital 42 InfoSoc Directive, this exception, which allows for the unauthorized use of copyrighted materials for the purpose of illustration for teaching, is also meant to apply to remote teaching.[39] Similarly, and in some jurisdictions, the use of protected works in the context of teaching may fall within the scope of a "fair dealing" defense. By requiring teachers to obtain prior authorization of rightsholders whose protected works they intend on sharing with their students, service providers plainly ignore the possibility of non-authorized but lawful uses. The balance that copyright law strikes between the equally legitimate interests of copyright owners and teachers must not be lost in the transition to remote teaching. Most online services' terms we reviewed are silent regarding copyright exceptions and limitations. The only exceptions are Facebook, Google's YouTube and G-Suite for Education, which invite users to consider and assess whether any copyright exception could apply to their uses of in-copyright materials.[40]

Art. 5 C-DSM Directive adds an additional layer to our analysis, as it "expands upon the teaching exception" under the InfoSoc Directive and introduces a mandatory exception permitting the use of copyright protected subject matter in digital, cross-border teaching activities[41]. In addition to

[36] Microsoft Terms, Clause 2.a; Jitsi Terms, Clause 4; Discord Terms, Sections "Intellectual Property Rights" and "Your Content".

[37] However, under the UK's Electronic Commerce (EC Directive) Regulations 2002, the provisions on mere conduit, caching, and hosting shall not "prevent a person agreeing different contractual terms" (reg 20(1)(a)) The scope of reg 20 is unclear and it has not been tested in courts yet. However, the Brussels Convention (C 189 of 28 July 1990) provides that international contracts cannot deprive consumers of "mandatory rights" operating in the consumer's country of domicile. Although there is no certainty as to what these mandatory rights are, it has been argued, in matters of choice of law, that "any attempt contractually to deprive consumers of rights conferred under (…) the EC Electronic Commerce Directive would be declared ineffective on this basis" (Ian J Lloyd, *Information Technology Law* (9th edn, OUP 2020) 405). Nonetheless, arguably the safe harbor provisions give rise to limitations of liability rather than mandatory rights, which militates for the possibility, in the UK, to introduce liability regimes that differ to the safe harbors.

[38] For an overview of national implementations, see <http://copyrightexceptions.eu/> accessed 11 June 2020.

[39] InfoSoc Directive, recital 42: the exception applies to "non-commercial educational and scientific research purposes, including distance learning".

[40] Facebook Help Center, 'Copyright' <https://www.facebook.com/help/1020633957973118> accessed 26 April 2020; YouTube About, 'What is Fair Use?' <https://www.youtube.com/about/copyright/fair-use/> accessed 25 April 2020; Google Legal Help, 'What is Fair Use?" <https://support.google.com/legal/answer/4558992?hl=en&ref_topic=4558877> accessed 26 April 2020.

[41] Ted Shapiro and Sunniva Hansson, 'The DSM Copyright Directive: EU Copyright Will Indeed Never Be the Same (2019) 41(7) *EIPR* 404, 406.

being tailored to online teaching, it also includes a "country of origin" rule, according to which the use of a protected works shall be deemed to occur solely in the Member State where the educational organization is established. Given the increasing international mobility of students, especially in the EU, this rule will prove especially useful in the context of remote teaching, in which students might be physically scattered across multiple Member States, while accessing the same online learning resources. Positively, unlike the exception under the InfoSoc Directive,[42] this new teaching exception is immune to contractual overrides,[43] Member States have the choice between a "pure" exception or a licensing carve-out,[44] which requires educational establishments to deliver teaching in a secure online environment.[45] This limits the number of online environments in which the exception will apply and might also force HEIs into expensive licensing agreements with publishers.

## 4. Content removal and termination of user's accounts

Teachers and students transitioning to ERT have an interest in ensuring that teaching activities can be delivered continuously and reliably. In this regard, materials teachers share must remain permanently available to their students. In addition, it is crucial that they, and their students, will not be barred from using the service or services of their choosing on grounds of alleged copyright infringement. Therefore, it is concerning that third-party's content shared by users without authorization – but falling under an exception or limitation to copyright – can be made unavailable by service providers, that can disable access to the allegedly infringing content, remove it, prevent it from getting shared,[46] and even sanction alleged infringements with the accounts' suspension and termination.

Pursuant to Artt. 12-14 e-Commerce Directive, most online service providers implement notice and takedown processes. Those processes are aimed at assisting copyright owners in curbing infringing activities on online services. In essence, takedown notices rely on rightsholders monitoring users' activity, looking for materials that infringe their exclusive rights. When a rightsholder wishes to put an end to specific infringing activities, they must notify the service provider, usually by filling in an online form. Once notified, the service provider has to act expeditiously to remove or block access to the infringing materials.[47] All online services examined implement formal notice and takedown mechanisms, with the sole exceptions of Moodle and Jitsi. Moodle gives users who share unauthorized materials seven days to take them down, under the threat of having their account terminated.[48] How Moodle is to be made aware of copyright

[42] InfoSoc Directive, Art. 9 and recital 45. See Marie-Christine Janssens, "The issue of exceptions" in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 317, esp. 341. On the limitations to contractual overridability under the InfoSoc Directive see Lucie Guibault, "Relationship between copyright and contract law", ivi, 534.

[43] C-DSM Directive, Art. 7(1): "(a)ny contractual provision contrary to the exceptions provided for in Article (…) 5 (…) shall be unenforceable".

[44] As critically noted by João Pedro Quintais, "The new copyright in the Digital Single Market Directive: a critical look" (2020) 42(1) *EIPR* 28, 31, the possibility for Member States to exclude the application of the exception if there are suitable licenses on the market "assumes such a provision is justified solely by a market failure rationale. This *neglects* the obvious *public interest dimension* and fundamental rights underpinning of the exception" (emphasis added).

[45] For a critique of the new online teaching exception, see Bernd Justin Jütte, 'Uneducating copyright: Member States can choose between "full legal certainty" and patchworked licensing schemes for digital and cross-border teaching' (2020) *EIPR* 41(11), 669-671.

[46] This last scenario is more specifically related to Art. 17 C-DSM Directive.

[47] E-Commerce Directive, Artt. 12-14.

[48] MoodleCloud Terms, Clauses 8(3) and 11(4).

infringement occurring on its service without a proper reporting mechanism remains unclear. As for Jitsi, its terms of service do not refer to any notice and takedown mechanisms.

Service providers cannot be obliged to monitor their own service through a generalized filtering system.[49] Therefore, rightsholders' ability to monitor user-uploaded content themselves depends largely on the nature of the service and the tools voluntarily provided by service providers to assist them. Practically, the actionability of specific instances of copyright infringement will depend on whether the platform is closed to third parties, including rightsholders, or whether it is opened to an unrestricted audience. A teacher delivering ERT on a closed environment like Teams enjoys far more "privacy" than a teacher uploading their lectures on YouTube, where the contents are accessible to all. If those two fictional educators were to share infringing materials – through Teams' screen sharing or chat features or by embedding the display of protected works in the recorded lectures – the one in the former scenario has a better chance of escaping rightsholders' scrutiny.

In addition, some service providers offer rights management tools to copyright owners. This is notably the case for YouTube, which provides its Content ID system to eligible rightsholders.[50] Content ID scans all videos uploaded on YouTube against a database of video and audio reference files, provided by rightsholders and identifying their protected works. If Content ID finds a "match", it gives copyright owners three options. They can either block access to the allegedly infringing video, monetize it (by running ads against it), or receive detailed viewership statistics.[51] Although only the first of these three options proves detrimental to remote teaching, one could argue that the repurposing of educational videos for pecuniary ends is problematic in principle. Although Facebook is currently the only other service provider to disclose the implementation of automated rights management tools,[52] there is no obligation to disclose the use of such tools and, regardless, there exist a risk that an increasing number of service providers will automated rights management tools in the future. This fear is partly induced by a stringent reading of Art. 17 C-DSM Directive enjoining OCSSPs to implement automated filtering systems if they intend to limit their liability for infringing materials shared by their users[53].

Automated systems can be criticized over their over-inclusiveness, a direct consequence of their short-sightedness, and the potential censorship that may result, including self-censorship on the part of users and, hence, chilling effects.[54] Indeed, there is a case currently pending before the CJEU and challenging Art. 17 C-DSM Directive because "preventive control mechanisms (that) undermine the essence of the right to freedom of expression and information".[55] An in-depth analysis of these legitimate concerns would exceed the scope of our analysis. Suffice it to say that these automated systems do not sit well with copyright exceptions and limitations,[56] including

[49] E-Commerce Directive, Art. 15; C-DSM Directive, Art. 17 may alter that state of affairs, at least for those online services qualifying as OCSSPs.

[50] YouTube Terms, Section "Your Content and Conduct – Uploading Content".

[51] YouTube Help, 'How Content ID works' <https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=9282364> accessed 26 April 2020.

[52] Facebook, 'Rights Manager' <https://rightsmanager.fb.com/> accessed 26 April 2020.

[53] See *sub* Section 3.

[54] See e.g. Stephen McLeod Blythe, "Copyright filters and AI fails: lessons from banning porn" (2020) 42(2) EIPR 119; Pamela Samuelson, "Regulating technology through copyright law: a comparative perspective" (2020) 42(4) EIPR 214; Christophe Geiger, Giancarlo Frosio, Elena Izyumenko, "Intermediary Liability and Fundamental Rights" in Giancarlo Frosio (ed.), *Oxford Handbook of Intermediary Liability* (OUP 2020) 138.

[55] C-401/19 *Poland v Parliament and Council* [2019] OJ C 270/21.

[56] However, see the optimistic, albeit rather isolated, view of Niva Elkin-Koren, 'Fair Use by Design' (2017) 64 *UCLA Law Review* 22.

teaching exceptions that would otherwise provide substantial breathing room to teachers.[57] The subtle assessment of whether the use of in-copyright materials falls under the scope of a teaching exception or an affirmative defense cannot be made easily, if at all, by an automated system. Therefore, rights managements tools such as Content ID or upload filters envisaged by the C-DSM Directive are not currently programmed to distinguish between plain infringing uses of copyrighted materials and unauthorized but lawful uses. There exists a real risk that content made available by teachers to their students be taken down or its access disabled even when the use of said content could be justified under a teaching exception or an affirmative defense.

However, teachers are not left powerless in case materials they shared are made unavailable by service providers on account of copyright infringement. Most online services analyzed implement counternotification, redress or complaint mechanisms, with the exception of Microsoft Teams and Skype. Microsoft, operating both services, only states that it "uses the processes set out in Title 17, United States Code, Section 512 to respond to notices of copyright infringement".[58] The cited provision set outs, amongst other things, an obligation for service providers to implement a counternotification process.[59] Given the critical importance for users of counternotification processes, not mentioning their existence expressly and in clear terms is problematic. Even more alarming is the case of Moodle that does not mention, even indirectly, any counternotification mechanism in its terms of service.

Complaint mechanisms are essential as they aim at safeguarding users against rightsholders and service providers' errors of judgement or, in the case of automated content moderation, false positives. Above all, they enable users to assert their interests in using third-parties' protected works without permission. This is of the utmost importance as copyright must be balanced with the right to education enshrined in the EU Charter of Fundamental Rights[60] and the European Convention on Human Rights.[61] Complaint mechanisms are the venue where such balancing acts can be carried out, especially if service providers rely on automated removal systems. Of all the services we reviewed, only YouTube and Facebook inform their users that they can submit a counternotification if they believe their unauthorized use of a third-party's protected work is protected by fair use, fair dealing or a statutory exception to copyright.[62]

More broadly, one could argue that the "take down first, see later" approach of service providers is disproportionately burdensome for users, especially considering that their content is unavailable the whole time they are trying to convince copyright owners and service providers that their use is legitimate, albeit unauthorized. In addition, the mere existence of counternotification processes does not, as such, guarantee that users' interests are properly safeguarded. Those processes must also be sufficiently user-friendly so that users do resort to them when their content is wrongfully taken down. The chilling effect on users of having to deal with cumbersome complaint

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[57] See this blogpost by the Engelberg Center on Innovation Law and Policy, titled 'How Explaining Copyright Broke the YouTube Copyright System', on how a recording of one of the center's public lectures, on musical works and substantial similarity analysis, got taken down by YouTube's Content ID, although the use of clips of musical recordings were shielded under fair use, available at <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown> accessed 27 April 2020.

[58] Microsoft, 'Notices of infringement' <https://www.microsoft.com/info/Cloud.html> accessed on 26 April 2020.

[59] 17 U.S.C. § 512.

[60] Charter of Fundamental Rights of the European Union, Art. 14.

[61] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocl n°11, Art. 2; See also InfoSoc Directive, recitals 3 and 31.

[62] Facebook Help Center, 'Copyright' <https://www.facebook.com/help/1020633957973118> accessed 26 April 2020; YouTube About, 'Submit a copyright counternotification' https://support.google.com/youtube/answer/2807684?hl=en> accessed 26 April 2020.

mechanisms, even though they are designed for their benefit, has been highlighted by some.[63] In addition, the Coronavirus pandemic saw some service providers rely more heavily on artificial intelligence, rather than human employees, to review counternotifications addressed by users.[64] This shift carries the significant risk that automated decision-making will take on an increasingly important role in reviewing users' counternotifications, even after works conditions are back to being safe for human workers. Given the subtle analysis necessary to decide on matters of permitted, but otherwise unauthorized uses of protected works, we believe this trend to be problematic. The General Data Protection Regulation (GDPR)[65] has strengthened the right to have a human being reviewing the automated decision; *de lege ferenda* similar provisions should be introduced in the national laws implementing the C-DSM Directive.

Furthermore, most service providers implement some variants of a "repeated infringer" policy, aimed at removing users whose behavior has been deemed infringing on one too many occasions. YouTube's "copyright strikes" system is the most prominent and most transparent example of such policies: when a video uploaded by a user is taken down, pursuant to a notice and takedown request, the user gets a "copyright strike"; after three strikes, their account is terminated, along with any channel associated to it. In addition, all videos uploaded by the impenitent user are removed and they cannot create a new channel.[66] In the same vein, Microsoft" may disable or terminate accounts of users who may be repeated infringers".[67] Zoom, G Suite for Education, Facebook, Jitsi and Discord all implement similar policies.[68]

As the provision in Microsoft's terms shows, what service providers mean by "repeated infringer" is rather indeterminate, leaving one wondering: how many times is too many times? In turn, this lack of clarity leads to chilling effects, resulting in self-censorship on the part of users. A teacher who already received one or several warnings or "strikes" might be wary of sharing more teaching materials, for fear of risking the termination of their account and, thereby, the removal of all materials they have shared with their students, including non-infringing ones. Because of this sword of Damocles hanging over their heads, teachers might prefer not to share third party's in-copyright works, even though such unauthorized use would fall within the scope of a statutory exception or an affirmative defense.[69] Under §512 of the DMCA, service providers are obliged to implement a "repeated infringer" policy if they intend to retain safe harbor protection. However, this obligation was not carried over in the e-Commerce Directive. This unasked-for leveling upward on the part of service providers is proving detrimental to remote teaching in EU countries. More broadly, it brings to the forefront the question of EU digital sovereignty, in the context of remote teaching

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[63] Engelberg Center on Innovation Law and Policy, 'How Explaining Copyright Broke the YouTube Copyright System', available at <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown> accessed 27 April 2020.

[64] E.g. YouTube Help, <https://support.google.com/youtube/answer/9777243?p=covid19_updates&visit_id=637274655938492857-3637256989&rd=1> accessed 26 April 2020.

[65] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Art. 22. See e.g. Guido Noto La Diega, "Against the Dehumanisation of Decision-Making. Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection, and Freedom of Information" (2018) 9(1) *JIPITEC* 3.

[66] YouTube Help, 'Copyright strike basics' <https://support.google.com/youtube/answer/2814000> accessed on 26 April 2020.

[67] Microsoft Terms, Section "Notices; Notices and procedure for making claims of intellectual property infringement".

[68] Zoom Terms, Clause 13; G-Suite Acceptable Use Policy, <https://gsuite.google.com/terms/use_policy.html> accessed on 21 May 2020; Facebook Terms, Clauses 3.2 and 4.2; Jitsi Terms, Clause 3; Discord Terms, Sections "Rules of conduct and usage" and "Copyright".

[69] Engelberg Center on Innovation Law and Policy, 'How Explaining Copyright Broke the YouTube Copyright System' <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown> accessed 27 April 2020.

and beyond. The fact the all the services we reviewed originate from the US is illustrative of that larger issue.

To end on an even more problematic note, takedown notices, rights management tools and "repeated infringer" policies are not the only channels through which materials shared by educators can be made unavailable, or their account terminated. Jitsi may, in its sole discretion, , suspend, alter or stop providing the service, for any or no reason, including breach of the terms or suspected misconduct (e.g. copyright infringement).[70] Similarly, Discord retains the right to remove users who engaged in copyright infringement from its service, "whether or not there is repeated infringement".[71] This arbitrary extra-layer of content moderation opens the doors to all sorts of potential abuse.

## 5. Conclusion

The sudden necessity to transition to ERT has not created radically new copyright issues, but it has rendered dealing with these issues critical, while illustrating current and future challenges for remote teaching. It is worth reflecting on these as remote education is likely to become the "new normal", as part of a longer-term "blended learning" provision. Indeed, and more often than not, solutions that were initially deployed in order to address a temporary crisis tend to linger well past the point when conditions for their adoption have gone back to normal. Among the most pressing concerns revealed by our analysis is the overbroad and vague licensing practices deployed by some online services providers with regard to the users' content. Users who wish to use an online service must agree to surrender a substantial degree of control to the provider and, in some instances, third parties contractually linked to them. Vaguely formulated licensing terms create legal uncertainty as they often fail to make clear to what particular uses and for which purposes those licenses apply. Furthermore, many services seem to suggest that users must fulfill strict conditions in order to upload third parties' materials in the first place; they should either own the rights to the in-copyright materials or have an express authorization to upload and share them. Those obligations negate the very purpose of copyright law's built-in exceptions and limitations, meant to provide substantial breathing room to teachers. Under these circumstances, teachers, even the most diligent ones, will perceive copyright as an obstacle to the delivery of online teaching.

In addition, teachers' online activities are subject to increased scrutiny on the part of rightsholders, sometimes assisted by automated systems whose implementation is now incentivized by the C-DSM Directive. Materials they have shared with their students can be made unavailable on grounds of alleged copyright infringement, and they can be barred from using the service they have chosen to deliver remote teaching. It is thus crucial that teachers can benefit from copyright's built-in exceptions and limitations to their fullest extent. The balance copyright law strikes between the legitimate interests of rightsholders, and those of users of in-copyright materials, such as teachers, must be ensured online. Very few of the online services we selected address in their terms that certain unauthorized uses are nonetheless permitted if they fall within the scope of a teaching exception or affirmative defense. Whilst notions of exceptions and limitations might already be unknown to most teachers, the restrictive and elusive language some service providers use in their terms is likely to create chilling effects impeding the online use of teaching materials. Under the current intermediary liability regime, service providers are strongly incentivized to apply swift notice-and-takedown mechanisms. Unsurprisingly, most of the terms we reviewed provide for such mechanisms. However, we find alarming that references to corresponding counternotice processes

[70] Jitsi Terms, Clause 3.
[71] Discord Terms, Section "Copyright".

are sometimes absent. When they exist, those processes might not prove user-friendly, and reinstating content wrongfully taken down might be a difficult and frustrating task.

In sum, our analysis underlines the importance to carefully consider which online service to use in the delivery of ERT and subsequent remote teaching. Most of the analyzed terms include problematic clauses that can make remote teaching more complicated than it should be, thus hindering freedom of expression, creativity, and the fundamental right to education. Ideally, also with a view to the anticipated transposition of Artt. 5 and 17 C-DSM Directive into national laws, HEIs will be well advised to look for institutional solutions enabling them to set their own terms to avoid liability and give teachers the confidence to teach with the broadest possible range of teaching materials.