Emergency Remote Teaching: a study of copyright and data protection terms of popular online services (Part I)

Rossana Ducata (Université Catholique de Louvain). Giulia Priora (Scuola Superiore Sant’Anna), Chiara Angiolini (University of Trento), Alexandra Gianopoulou (Institute for Information Law (IViR), University of Amsterdam), Bernd Justin Jütte (University of Nottingham, School of Law), Guido Noto La Diega (University of Stirling), Leo Pascault (Sciences Po Paris), and Giulia Schneider (Scuola Superiore Sant’Anna) / May 27, 2020 / Leave a comment

Very few institutions were prepared for the transition to distance learning. Although most teachers would have been familiar with online learning platforms and communication services, the swift move to Emergency Remote Teaching (ERT) took most universities by surprise. Some universities were able to rely on pre-taught software, repurposed to instruct students, and provide their staff with appropriate training. Others left it to their teachers to identify software and IT services for delivery of teaching. In both scenarios, most teachers had little time to assess the suitability of the online tools in the requisite detail. As preliminary data are showing, the use of online videoconferencing and e-learning platforms under ERT circumstances raises several points of concern in terms of privacy and data protection (see here and here). 

This series of two blogposts intends to shed light on the critical aspects of and potential "creepy" factual control exercised by the platforms and services. This article is the first of the two blog posts. In this article, we examine the formulation of the copyright terms (i.e., terms of service and privacy policies) of selected online services used for ERT. Our aim is to verify whether sufficient and clear information is provided, in order to enable teachers to carry out teaching activities and interact with students without uncertainties as to the potential legal consequences of their use and concerns regarding the protection of their personal data.

To this end, we examined the terms and conditions of service, privacy policies and community guidelines (collectively "terms") of a sample of nine online services used by teachers at universities across Europe to deliver ERT. The selected services include dedicated software for managing teams and groups of students online, content-sharing platforms and social networks, and video-communication services repurposed or retrofitted to answer the needs of education. Some applications include several of these functionalities. Our analysis looks at the terms of use for the purpose of assessing which online services would qualify as online content-sharing service providers (OCSSPs) under Article 17 of the Directive 2019/790 (Digital Single Market) and Directive 2001/29 (InfoSoc Directive), respectively. Most services that are classified as OCSSPs would also fall into the definition of online content-sharing service providers under the Directive 2019/790.

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Copyright-relevant terms

The rules that govern the use of material protected by copyright on the online services examined are contained in terms, whose structure varies significantly. In examining these terms, we looked at three different aspects: control, liability and content moderation. The terms set by the services are considered against the background of the harmonized EU copyright rules mainly contained in Terms and Conditions of Use and Privacy Policies, which may also include a transferable and perpetual license (Discord), whereas it is standard that the license terminates after the user removes the content (YouTube, Facebook).

In relation to original and third-party content uploaded by teachers, we examined to what extent and for what purposes control over content is surrendered to the service. All terms state that the user retains ownership of uploaded material. Nonetheless, factual control is negotiated by means of licenses that vary greatly from one service to another. Most services require the user to agree to a license granting the licensor a right to perform acts in order to operate, enable and improve the service (Discord, Facebook, G Suite for Education, Jitsi, MoodleCloud, Microsoft Teams, Skype, YouTube), which may also include authorization for third-party contractors to enable interoperability (MoodleCloud).

Services that would qualify as online content-sharing service providers (CCSSPs) under Article 17 of the Directive 2019/790 (DSM Directive) tend in particular to extend their licenses to cover uses by third parties. For instance, Zoom’s terms grant rights to "access" and use content through the Service only. While Facebook recovers a transferable and sublicensable license to use as well as share the content with other service providers for the purpose of providing and improving the service. Some services significantly broaden the scope and duration of the license, either by sending authorization to use the user’s content for the purpose of promotion of the service (Microsoft Teams, Skype, YouTube) or by seeking a perpetual license (Discord), whereas it is standard that the license terminates after the user ceases to use the service or with the removal of the content (YouTube, Facebook).

All in all, the formulations of the licensing terms tend to be rather vague, if not imprecise. What, for example, are acts made "for the purpose of providing the service", when the service is essentially the making available of large amounts of protected subject matter? In addition, two online services (G-Suite for Education, Zoom) leave the regulation of the license legally implicit, thus making it uncertain what Google is authorized to do with the user’s content and what the limits are of Zoom’s clause which
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Our review of the terms of services used for ERT has raised a number of copyright concerns. First, although not unique to ERT scenarios, the extent to which the examined terms include broad licenses that go beyond what is necessary to ensure their operation is alarming. This is exacerbated by vague definitions of OCSSPs.

Conclusions

To minimize the risk of removal of lawful uploaded content, teachers should have recourse to an easily accessible complaint mechanism. However, not all services make such mechanisms available to their users (Microsoft Teams, Skype, MoodleCloud). This is especially problematic in ERT scenarios, as institutional repertoires are not easily accessible to students, and teachers rely more heavily on the exercise of limitations and exceptions to the exclusive rights of copyright for teaching purposes.

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