

An education union guide to copy*rights* and copy*wrongs* in education and research

Module 1:

Advocating for fair use of
copyright protected
works for teaching, learning
and research



Education International
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Contents

1. Introduction.....	3
The toolkit.....	3
Module1: User Rights and why teacher unions care	3
2. Overall Recommendations	5
What can education unions do?.....	6
3. Copyright basics.....	7
4. Copyright exceptions and limitations for education and research purposes ..	10
What copyright exceptions and limitations are needed for education and research purposes?	11
Fair use, fair dealing and closed lists.....	11
Ensuring that education and research exceptions are adequate.....	12
Exceptions for persons with disabilities	15
Obstacles for educators and researchers to make fair use of exceptions.....	15
A checklist for education and research rights	17
Open Educational Resources and copyright exceptions.....	17
5. Licensing agreements	18
Important international copyright agreements.....	21
Towards a global treaty on education exceptions for education and research	22
Challenges at the international level.....	23
7. Union strategies.....	24
Copyright exceptions: Engage in legislative reforms	24
8. Final remarks.....	25
9. ANNEX.....	27
Checklist.....	27

1. Introduction

The toolkit

Copyright laws around the world are being changed to accommodate the digital environment. It is essential that education unions take an active role in copyright reforms to ensure that teachers and researchers are not deprived of their rights to use and build upon creative works for teaching, learning and research.

Teachers and researchers – as both users and creators of copyrighted educational materials -- have an important voice that needs to be part of the process. This module is part one of a two-part toolkit to help teachers, researchers and education unions to understand their interests and rights in copyright reform as users and owners of creative works and take action to defend these interest.

- **Module 1: User Rights. How copyright exceptions and limitations are needed to ensure fair access and use of works for teaching, learning and research.**
- **Module 2: Owner Rights. How copyright and employment contract rights need to ensure that educators and researchers maintain the ability to use, share and otherwise control the works they produce.**

This Module 1 focuses on the first set of issues – the user rights. It aims to:

- provide a brief introduction to copyright legislation and policies;
- illustrate examples of how copyright policy impacts teaching, researching and learning for educators and researchers as users and creators of works;
- provide policy recommendations that education unions can use to defend a balanced approach to copyright legislation.

Module1: User Rights and why teacher unions care

Increasingly, teachers, education support personnel (ESP), researchers and students are prevented from exercising their right to use creative works for teaching, learning and research due to restrictive copyright policies, bureaucratic burdens or expensive fees. This does not only have a negative impact on educators and researchers as **users** of works, but also curtails the options for those (e.g. teacher, researchers, authors) who rely on using parts of creative works to **create** educational and research materials. Education unions defend these user rights that are closely linked to the fulfilment of human rights and professional freedoms.



Fair access and use of works is central to teachers' professional and academic freedom

Educators and researchers need to have the autonomy to decide what materials to include in their teaching and research activities. Their choice should not be constrained by excessive publication prices, restrictive copyright policies, editorial priorities or censorship.

The 1997 UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel and the 1966 ILO/UNESCO Recommendation concerning the Status of Teachers address this as part of the academic and professional freedom of educators and researchers: "Since teachers are particularly qualified to judge the teaching aids and methods most suitable for their pupils, they should be given the essential role in the choice and the adaptation of teaching material". (VIII, 61)¹ Copyright exceptions and limitations play an important role here as they increase the choice of materials available for educators and researchers.

Fair access and use of works is a fundamental part of the right to education.

The importance of access to works for teaching and learning is an essential component of the right to education.² Also the United Nation's Sustainable Development Goal 4 (SDG4) Quality Education and the related UNESCO Framework for Action repeatedly remind governments of their obligation to fulfil this right and to provide teachers with access to "books, other learning materials and open educational resources"³ (p.33). Meeting this obligation requires ensuring that countries in addition to curated works provide for copyright exceptions and limitations that facilitate the use of copyrighted works for teaching, learning and research.

While educators benefit from access to fairly priced and locally relevant curated teaching materials they also need to be able to supplement and adapt these materials with, for instance, a copyright protected picture, piece of music or video to meet the needs of an increasingly diverse student population. Unfortunately, in many countries copyright legislation does not empower teachers, but creates barriers. How to challenge the latter is addressed in this toolkit.

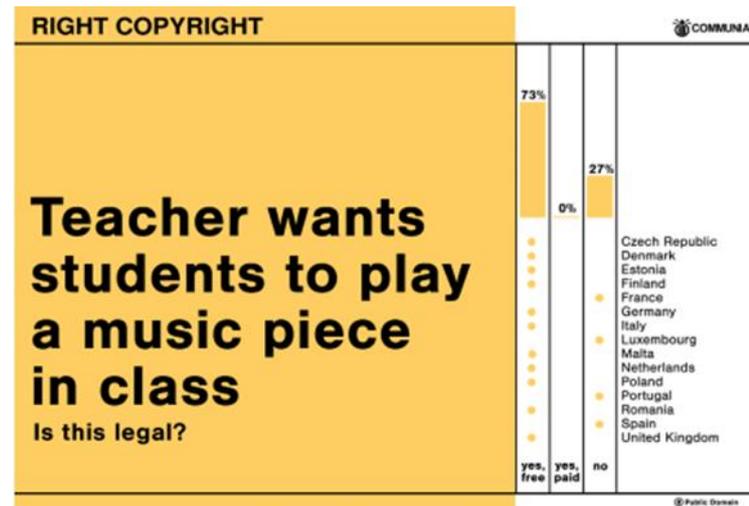


Figure 1 Reprinted from *Copyright and Education in Europe: 15 everyday cases in 15 countries*, by T. Nobre. 2017. Brussels:

¹ ILO & UNESCO (1966). Recommendation concerning the Status of Teachers. Retrieved from https://www.ilo.org/sector/Resources/sectoral-standards/WCMS_162034/lang--en/index.htm

² UNESCO & Right to Education Initiative (2019). Right to education handbook. Retrieved from <https://www.right-to-education.org/resource/right-education-handbook>

³ UNESCO (2015). Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000245656>

2. Overall Recommendations

“The discussion on copyright reform is not a question of licensing OR copyright exceptions OR open educational resources. We need all three in a good measure to build a fair information ecosystem.” Michael Geist, 2018

Copyright exceptions and limitations for education and research purposes ...

- safeguard fundamental user rights, are valuable for the creation of new works, promote the dissemination of knowledge and information and encourage competition and industry;
- should cover all educational and research activities, works, purposes, users, and settings while considering the principles of fair practice;

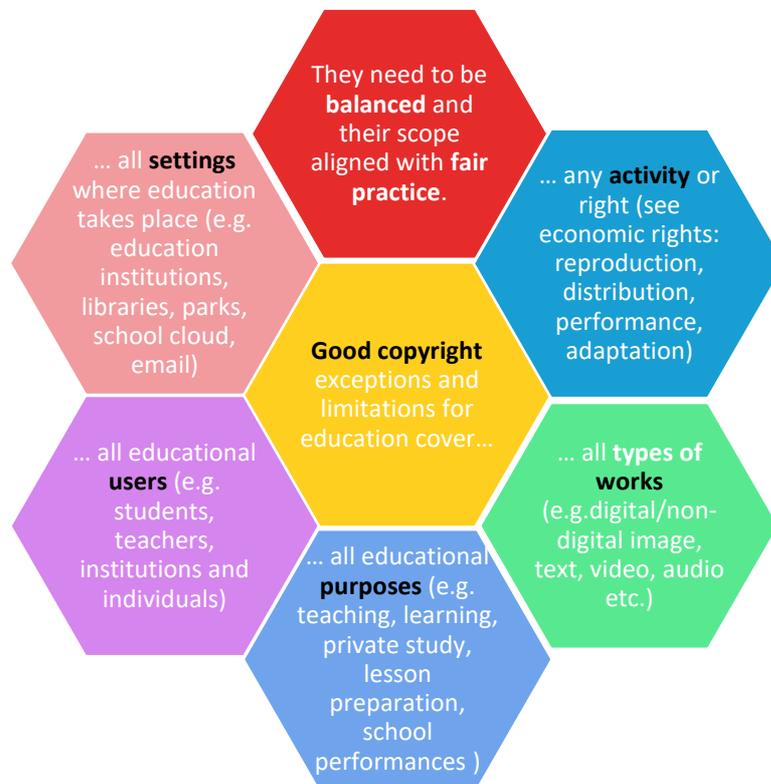


Figure 2 Components of copyright exceptions for education and research

- are important at the international level. Cross-border collaboration and exchange, including the exchange of open educational resources, requires international agreements and minimum rights for all educators and researchers no matter where they are in the world.

Licensing contracts ...

- should not be permitted to take priority over an educational exception, even if they are easily available in the market, but they can be negotiated for uses that go beyond the scope of the education exception;
- should not be permitted to override the terms and conditions of use set forth in an educational exception;
- should not be forced upon education institutions (e.g. mandatory collective licensing) but can be negotiated on a voluntary basis with education stakeholders who have access to affordable mediation and litigation;
- should have reasonable terms and conditions (e.g., data privacy, no copyright policing by schools, no administrative burdens).

Other important issues

- *Technological prevention measures* (TPM): Allow for the circumvention of digital locks and provide for devices capable of TPM circumvention for non-infringing purposes.
- *Liability and criminal charges*: Limit the liability of education institutions and education employees and protect them from claims for damages when the unlawful use of a work is performed in good faith.
- *Provisions for persons with disabilities*: Advocate for the ratification and implementation of the Marrakesh Treaty for the visually impaired at national level as well as promote normative work for persons with other disabilities at national and global level.
- *Copyright term*: Comply with international standards to not exceed the life of the author plus 50 years and ensure that the copyright term is not extended through trade agreements.
- *Government copyright*: Materials produced by the government through public funds should be freely available to the public immediately upon publication.

What can education unions do?

- Engage in national copyright reforms in order to ensure that the recommendations stated above are adequately addressed in your copyright system (**e.g. take a look at the checklist in ANNEX1 and see whether your country allows for all the things listed.**)
- Engage in international copyright reforms to ensure that cross-border uses of materials are legal (i.e. practical) and to support education unions from other countries with very weak and expensive copyright exceptions for education and research – global agreements lead to national level reforms (i.e. solidarity).
- Inform your members about copyright laws in your country and what they can and cannot do when using copyright protected works for teaching, learning or researching including for the creation, use and exchange of open educational resources from other countries.
- Advocate that teachers receive training on what needs to be considered for the use and creation of copyright protected works.



- Team up with other actors engaged in copyright reforms (e.g. libraries, museums, academia).

3. Copyright basics

Education unions advocate for a balanced approach to copyright policies that takes into account the interests of creators and users - their members are both. They create materials, but also rely on using and building upon creative works for quality teaching, learning and research.

What is copyright?

- **Copyright is the right to exclude another person from making a reproduction (i.e. copy) or other protected use (e.g. performance, translation) of a protected work without the permission of (and normally payment to) the right holder.**

Copyright is very broad. Its most important right is the right to exclude reproduction (i.e. copy). Reproduction in the digital age is omnipresent and teachers, for instance, constantly copy parts of a book, a poem, a chart or other digital works for teaching and learning purposes. But the rights go further – copyright can prevent a teacher from adapting a work (e.g. from a book to a play), distributing a work (e.g. in a classroom), performing a work (e.g. a song), communicating the work (e.g. by email or a web page) and translating a work (e.g. to a native language). In short, copyright can prevent the use of a work in almost any way imaginable.

What is copyright for?

- **It should encourage creativity, innovation and learning**

Copyright was created to ensure that new technologies – first, the printing press – did not deprive authors of the ability to market their works. By requiring permission to make and sell a copy, copyright creates markets for publishers and others to pay authors to reproduce their works. However, as further elaborated in this toolkit there is a general understanding that society needs a balanced approach to copyright and that we also need user rights (see further below). This means that it needs to be ensured that central public interest activities (e.g. education and research) can be undertaken without having to pay or ask for permission from the author. This is essential for the development of just, creative and innovative societies.

What is covered by copyright ?

- **Copyright covers every expression from the moment it is published**

Copyright is a legal protection granted to creators of 'works of the mind'. It includes written texts from books to blogs to emails. It also covers most other kinds of expression, including musical works, dramatic works, graphic art, photographs, movies and even computer software. Copyrighted works are all around us.



Who owns/gets a copyright?

→ **By default:** author/creator, heirs

→ **By transfer or license assigned to (see table below):** publisher, employer, collective management organisations⁴

Publisher	Employer	Collective management organisations
Creators may assign their copyright to publishing houses that require them to give up their copyright if they want their work to be published.	For the creation of works during working hours researchers and educators are, for instance, often required by contract to assign their copyright to the school or university.	Creators may be represented by collecting societies that then collect and redistribute the fees acquired when the materials are used. Collective management organisations act as intermediaries between creators and users of works (e.g. education institutions).

What rights does a copyright owner have?

Copyright Owner

The copyright owner/creator has exclusive **economic** and **moral** rights (see below) and these are protected by law.

Exclusive economic rights

- reproduction of a work (e.g. copy)
- adaptation of work (e.g. book into a film)
- distribution of work (e.g. to a class)
- performance of a work publicly (e.g. school play, poetry reading)
- communication to the public (e.g. school webpage, email to students)
- translation of a work (e.g. into native language, foreign language lessons)

Moral rights (cannot be waived in some countries)

- to be identified as the author (right of attribution)
- to object to derogatory treatment of a work (right of integrity)
- to determine when work is made public (right of disclosure)

⁴ Challenges for educators and researchers in relation to copyright ownership are further elaborated in Module 2 of this toolkit. Education unions often advocate that educators and researchers should retain copyright over the works they produce or at least have shared IP rights.



Why are user rights necessary?

Although copyright was created to incentivise authorship by creating markets for their works, at the extreme copyright could inhibit authorship by removing the ability to use the works of others. As teachers, we know well that to create a new work – like a textbook or worksheet – one must rely on the works of others. We rely on others for our research, ideas and to reproduce material to review and critique. If authors could prevent such reuses, then many new works could not be created. There are many others that need access to works to fulfil public purposes. Libraries need to make copies to preserve, disability rights advocates need to translate to provide access, researchers must be able to excerpt to learn and study. In the digital age the need for user rights are magnified. This is because so many digital processes – from Internet searches to streaming a video – technically relies on acts of machine reproduction. For education and research the issue is about what materials can be accessed and used for learning.

What are the limits of copyrights?

We refer to a “user right” as existing whenever there is no right to stop a user from a particular activity. This is the case for the following scenarios:

- **Material is not subject to copyright:** Copyright does not protect facts, concepts, principles and ideas - only the particular way an author expresses them. The inability to copyright the underlying fact or idea is one of the most important user rights. A geology textbook is protected by copyright but the facts in it (about sedimentation, magma, tectonic plates, etc.) are not. In some countries, materials produced by the government or texts of a legislative, administrative and legal nature and the official translations of such texts are excluded.
- **Material is no longer protected by copyright:** In most countries, a work’s copyright protection ends 50 or 70 years after the death of its creator, regardless of the citizenship of the author or where the work was originally published. International trade agreements increasingly lock in a longer copyright timeframe (e.g. [see a union response to proposed 70 year copyright term in the United States-Mexico-Canada Agreement \(USMCA\)](#)).
- **Material is subject to an open license.** In some cases, individual or institutional authors release their exclusive rights through what is called an “open license.” An open license refers to a license that allows free use by others, sometimes with conditions such as that the author needs to be named (i.e. attributed). Creative Commons licenses are one form of open license. Many countries have laws that all materials produced by the government through public funds should be freely available to the public immediately upon publication.
- **The intended use is protected by a limitation and exception:** Even where copyright might otherwise apply, the law may include a specific exception to or limitation of the exclusive right to serve public interests. Education and research are purposes for which exceptions and



limitations often apply as they are central public interest activities and closely linked to the fulfilment of human rights. The remainder of this Module will focus on such limitations and exceptions.

4. Copyright exceptions and limitations for education and research purposes

Without exceptions and limitations, copyright owners would have a complete monopoly over access and use of copyrighted materials in education institutions. Every use of a copyrighted work would be subject to permission by the owner (and/or payment). The problem is that many of the user rights in our laws have not been updated in many years and are no longer fit for purpose. A recent study found, for example, that over a quarter of EU countries lacked the right for a student to play copyrighted music in class. Many others lack a right to stream a video or share a pdf by email. To serve modern educational needs we need modern educational exceptions.

Copyright exceptions do not substitute for quality curated educational resources. But every teacher supplements their materials to make them better for their classes. Modern copyright exceptions can make supplementing material easier. As long as the use does not deprive the author of a substantial market for their work educators and researchers should be permitted to make illustrative uses of pictures, text snippets, pieces of music or videos that will help them explain a certain topic.

Definition

- Exceptions are cases defined by law where, within limits (i.e. parts of a work, limited number of copies), a work can be used without a permission request and, in some countries, without payment to the creator or copyright owner.
- Copyright exceptions and limitations safeguard fundamental user rights, are valuable for the creation of new works, promote the dissemination of knowledge and information as well as encourage competition and industry.
- They are used for educational and research activities, but may also be established for satire, criticism or libraries, archives and museums, among others.



What copyright exceptions and limitations are needed for education and research purposes?

The problem with many older copyright exceptions is that they often are restricted to

- certain works (e.g. only literary, not audio-visual)
- by certain users (e.g. only a teacher, and not a student)
- through certain activities (e.g. reproduction, but not communication or display)
- in certain settings (e.g. in a classroom, but not by distance-learning)
- for certain purposes (e.g. for teaching, but not for private study).

To be certain to cover all potentially beneficial uses of works in education and research, we need to have more open and flexible user rights. What this means is that a user right should be open to application to the full range of uses that have an educational or research purpose. A flexible test can be applied in order to address the author's interest in fair remuneration.

Fair use, fair dealing and closed lists

There are different approaches to copyright exceptions to guarantee user rights around the world. They can be broadly categorised into "fair dealing" and "fair use" and "closed list".

While there are differences in how countries frame their user rights, in fact all countries have exceptions with a similar structure. There is a protected purpose (e.g. education and research), a set of more or less open conditions for its application (e.g. what kind of work, user, activity, setting it applies to), and a balancing (or "proportionality") test that considers the interests of the user and the right holder.

Fair use and fair dealing predominantly exist in common law countries. Fair use and fair dealing are both general exceptions that apply the same flexible balancing test to determine what is "fair" to a range of different purposes such as criticism and review, quotation, news reporting, etc. Some fair use and fair dealing rights (e.g. U.S. fair use and Singapore fair dealing) are *open*. This means that they can be applied to any purpose (e.g. for teaching and learning) as long as the use (e.g. showing a video in class) itself is fair (i.e. considering the amount used and the effect on the author).

Other fair use and fair dealing rights (e.g. Uganda fair use and UK fair dealing) are *closed* in the sense that they apply only to a limited number of defined purposes. The more open the right is the more useful it is to teachers, researchers and others as time and technology changes.

Civil law countries often lack a general exception and instead have lists of specific exceptions that themselves may be more open (applicable to a broader range of works, purposes, etc.) or more closed. Again, the more open the right is the more useful it is to teachers, researchers and others as time and technology changes.



Ensuring that education and research exceptions are adequate

One way to assess your user rights environment is to analyse how *open* your exceptions are to educational and research uses. A fully open exception, which is the most useful in the modern digital environment, should apply to:

- 1) any type of activity,
- 2) with any type of work,
- 3) in all settings,
- 4) by any user,
- 5) for any education or research related purpose.

The figure below shows the five components of openness. All of these aspects of openness are important and will be described in more detail below.



Figure 3 Components of copyright exceptions for education and research

SETTINGS

Sometimes exceptions only apply for teaching and research in education institutions (e.g. schools, universities). However, **education does not only take place in classrooms but educators and researchers go on field trips**, visit libraries, museums or other non-commercial cultural heritage organisations.

This should also count for digital settings.

Education can benefit from the vast technological opportunities for online exchange and collaboration between schools, libraries, museums etc (e.g. working collaboratively in online fora, exchanging materials and emails). However, recently we see **increasing advocacy to restrict exceptions to the use of materials within a secured online network in one educational establishment** (see [ETUCE statement](#) on the EU copyright reform). Education communities collaborate across “digital school borders” and copyright law should not restrict this collaboration.

USERS

Similar to the educational settings it is important to ensure that all engaged in educational and research activities can benefit from the exception. An exception for teachers only, for instance, may exclude education support personnel, students and/or staff in libraries or cultural heritage organisations which play a valuable support role to formal education.

ACTIVITIES (protected rights)

As described above, copyright grants a bundle of exclusive rights to the copyright owner. The right to make a copy is the core and most well-known right. But the copyright holder has other rights which may inhibit useful activity in an education or research context. For example, copyright can prevent the communication or display of a work. Schools or universities might, for instance, share project results on a school website or teachers communicate with parents, external partners and students via email.

Some exceptions may only apply to permit a reproduction (e.g. copy of a work)– or even a certain kind of reproduction, such as a reprographic copy. Such limitations ignore the digital environment where a teacher may more likely share a link, stream a feed or download a pdf than make a hard copy. To be fully useful for modern education and research, user rights need to extend to all exclusive rights, including:

- reproduction of a work (e.g. copy parts of a book or painting for teaching and learning)
- adaptation of a work (e.g. sample different music pieces together for a music class)
- distribution of a work (e.g. distribute a poem to a class)
- performance of a work publicly (e.g. theatre play or poetry reading at a school event)

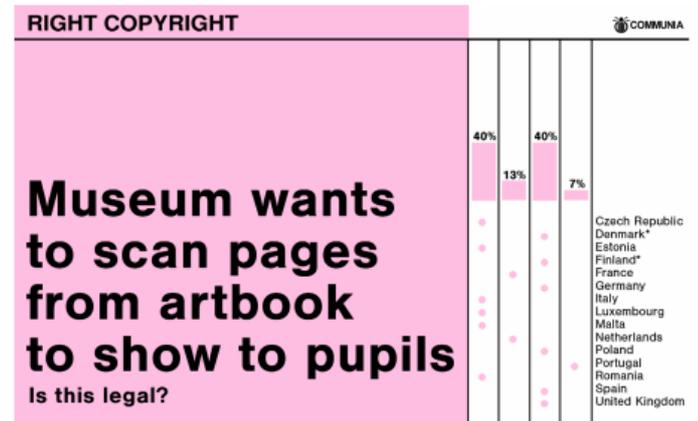


Figure 4 Reprinted from *Copyright and Education in Europe: 15 everyday cases in 15 countries*, by T. Nobre. 2017. Brussels: COMMUNIA.



- communication to the public (e.g. student radio, school websites)
- translation of a work (e.g. translate a story into another language in a language class)

Often lawmakers don't have a good idea of what educational institutions do and why copyright law might hinder them from their work. Seng (2017), for instance, found that the adaptation of literary dramatic works for the purpose of performing a play in school is not permitted by the majority of WIPO states⁵.

Types of WORKS

Digital as well as non-digital materials should be covered by the exception. Technological advances provide important opportunities for access to information, collaboration and exchange for research and education institutions. However, **many countries lag behind in adequately addressing the use of digital materials** in their domestic copyright frameworks (Seng, 2017)⁶. Consequently, education professionals are forced to work in legal grey zones when using digital tools and materials for teaching and research.

PURPOSES

Some exceptions limit educational and research rights to certain specific purposes, like for illustration (i.e. showing something) in a classroom. Restrictive purposes may limit fair access to works for the broad range of purposes that are needed. These include, for instance, **teaching, learning, studying, lesson preparation or researching** inside and outside of education premises.

For the **higher education sector**, researchers might rely on making use of modern **computational tools to extract and analyse data including through indexing and text and data-mining**. A mandatory exception for text and data mining is currently being negotiated as part of the EU copyright reform. Here open knowledge advocates argue that the right to read should also be the right to mine, meaning that also commercial businesses that pay subscription fees to journals should be allowed to use computational tools to analyse research in these data bases.

⁵ Daniel Seng (2017) Updates Study Additional Analysis of study on copyright limitations and exceptions for education activities. WIPO.

⁶ Ibid.

RECOMMENDATIONS:

- *Defend and broaden education exceptions to include all educational and research activities, works, purposes, users and settings while considering the principles of fair practice.*
- *Do not limit exceptions and limitations to individuals and/or institutions or specific works or activities, but organise them more broadly around educational and research activities or purposes.*

Exceptions for persons with disabilities

It is important to have copyright limitations and exceptions that **allow for the making** (e.g. transform a book into an audio book or braille) **and distribution** (e.g. share within and across countries) **of accessible format copies for persons with disabilities.**

An important international instrument for the visually impaired is the [Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled](#). This is also important for an education context where a lot of the works that educators and researchers use are in print form.

While international treaty law only requires exceptions for people with visual impairments, countries can *and should* apply exceptions for all disabilities. For example, it may require a copyright exception to caption an educational film for a student who is deaf.

RECOMMENDATIONS:

- *Promote exceptions and limitations for all persons with disabilities in your country's legislation.*
- *Advocate for the ratification and implementation of the Marrakesh Treaty.*
- *Advocate for an additional treaty for people with other disabilities.*

Obstacles for educators and researchers to make fair use of exceptions

Digital locks: Technological Prevention Measures (TPM)

While the internet has created increased access to information and exchange it has also led to increased piracy (i.e. illegal use of copyrighted materials). In response, right-holders have applied Technological Prevention Measures (i.e. digital locks that prevent access to copyrighted materials). Unfortunately, **these often prevent the legitimate use of materials for teaching and research purposes** (i.e. uses that fall under the educational exception to copyright). If a teacher uses software to circumvent the lock he or she can be faced with criminal charges. Seng (2017) showed that **60% of WIPO member states do not provide rights to circumvent TPMs for purposes, like research and education, protected by copyright user rights.** This is



concerning considering that a recent EU Commission study showed that the use of digital locks is the biggest obstacle by users of digital works in education (PPMI, 2016)⁷.

RECOMMENDATION: Allow for the circumvention of digital locks and provide for devices capable of TPM circumvention for non-infringing purposes.

Liability and criminal charges against educators

Seng's (2017) study showed that only four WIPO Member States (Australia, The Bahamas, Canada, U.S.) restrict or limit the copyright liability of educational institutions. Without such a safeguard, the education institution could be held legally responsible in case education professionals or students illegally use copyrighted material.⁸ This is **concerning considering the lack of legal clarity for the use of copyrighted work especially with regard to digital materials**. Just recently a case in Colombia demonstrated the risks -- a **Masters student who uploaded a Master's thesis to a study forum faced up to 8 years of prison until his conviction was overturned**⁹.

RECOMMENDATION: Limit the liability of education institutions and education employees and protect them from claims for damages when the unlawful use of a work is performed in good faith.

Cross-border issues

Education can benefit from the vast technological opportunities for online exchange and collaboration between schools, libraries, museums etc. (e.g. working collaboratively in online fora, exchanging materials and emails). But this is only possible if local laws permit the cross-border sharing of works.

The need for a harmonisation of copyright law across borders is increasingly recognised by education stakeholders, as well as governments. The current EU copyright reform will establish a mandatory exception for education and research purposes that will guarantee a minimum set of rights to every educator and researcher in all EU member states. Interestingly, the EU is one of the main actors preventing copyright reforms at the global level.

RECOMMENDATION: Promote cross-border copyright reforms for education and research to ensure equal rights for all and facilitate cross-border collaboration and exchange.

⁷ Public Policy and Management Institute (2016). Assessment of the impact of the European copyright framework on digitally supported education and training practices. Brussels: European Commission.

⁸ Daniel Seng (2017) Updates Study Additional Analysis of study on copyright limitations and exceptions for education activities. Geneva: WIPO.

⁹ Fundación Karisma (2017). Diego Gomez is declared innocent. Retrieved from <https://karisma.org.co/diego-gomez-is-declared-innocent/>



Complex licensing contracts

As further discussed in the next chapter, licensing agreements might create barriers for educators and researchers to make use of their rights to access works. It is, therefore, essential to defend education and research exceptions from contract and license agreements. This has also been a major fight in the EU where the current draft allows licenses to take priority over the exception. (See recommendations in chapter 5. Licensing agreements)

A checklist for education and research rights

As elaborated above, the ideal set of education and research rights would authorise all education and research uses of any work by any user as long as the use does not unduly prejudice the interests of the right holder. This is what we call a *general* education exception. In addition to a general exception, it may be useful to have specific exceptions making clear that particular common uses of works for researchers and for education are permitted.

The World Intellectual Property Organisation (WIPO) Standing Committee on Copyright and Related Rights (SCCR) has completed a 1000+ page study cataloguing education and research rights around the world. Education International has been working with legal researchers to analyse the study. In Annex 1 you can find a checklist that contains all of the different rights that laws around the world protect for education and research purposes. A perfect law would contain them all. You can use this checklist to evaluate your own copyright law and identify changes that would benefit your members.

Open Educational Resources and copyright exceptions

Many governments, foundations and education institutions are starting to require publicly funded educational resources to be “openly licensed” – that is, to grant licenses to the public to make any use of the work. Creative Commons licenses are one example of an open license.

Open Educational Resources (OER) are educational materials released under open licenses. In order to create OER, creators can reuse others’ openly licensed materials (e.g. pictures, audio, textbooks), and/or integrate works that fall under the domestic copyright exception and limitation for education and research purposes (i.e. integrate parts of a picture). Other educators and creators can freely copy, adapt, edit and reuse OER without permission or payment. They are public goods.

But to make OER, and to facilitate cross-border exchanges of OERs, there is a need for a minimum level of harmonised education exceptions. This is necessary to ensure that, for instance, a copy of an excerpt or image that is lawful in the creating country is also permitted in



an importing and using country. UNESCO recently recognised that exceptions and limitations for education and research play an important role in promoting the use of OER materials.¹⁰

5. Licensing agreements

Licenses are attractive when they are used to provide access to creative works **beyond** the scope of limitations and exceptions. Unfortunately, they are increasingly used to switch off educational exceptions and force educational institutions to pay for the same uses that are permitted by the exceptions. Hence they are denying schools and teachers the limited right to freely use creative works for teaching and learning in ways that do not harm the market for such works.

RECOMMENDATION: Licenses can be negotiated for access and use of works beyond the scope of the education exception, but they should not be permitted to take priority over or override/replace limitations and exceptions; a school or a teacher shall have the right to benefit from an educational exception even if commercial licenses, for the same uses, are available in the market.

Licenses are increasingly used to fully/partially replace exceptions and limitations with private agreements. This poses a number of challenges and restrictions for user rights:

- Rather than relying on a single piece of legislation (e.g. general copyright exemption), **educators are required to know the terms of the contracts for each different work** or material that is covered by the license.
- Educational institutions usually don't have the capacity **to negotiate fair contractual terms and conditions**.
- Educators may also be asked to fill out surveys to report to collective management organisations (see above) when they use copyrighted works. This is not practical and **adds bureaucratic burdens** on teachers.
- Licensing contract language can require education institutions to **monitor and share detailed micro-data of what content is being copied and by whom and when** – either through electronic monitoring of photocopiers or digital classroom support platforms (e.g. learning management systems (LMSs)). This surveillance is a threat to academic freedom and professional autonomy.
- **Financial burdens** are placed on education professionals and education systems by restricting free access to certain user rights.

¹⁰ Judith Blijden (2018). UNESCO recognises the importance of exceptions and limitations. Retrieved from <https://www.communia-association.org/2018/10/16/unesco-recognizes-importance-exceptions-limitations/>



- Often in these private licensing agreements education institutions are being forced by the license contract to enforce the licenses against teachers and students, when they should actually only inform about copyright laws.

Publishers and wealthier countries with the organisational infrastructure and appropriate education budgets might embrace licensing-based models. In other countries **the added bureaucracy and scarce resources often works to the detriment of the rights of users and sometimes even creators.**

No mandatory remuneration

RECOMMENDATION: Avoid compulsory remuneration for exceptions for educational and research purposes.

Some countries require payment for all educational uses of copyrighted materials. This means payment to the author for every use of works in a classroom - even just showing a picture to students - regardless of whether there is an exception or not. Compulsory remuneration provisions are a form of compulsory licensing. Basic uses of works that are within the scope of exceptions and limitations should be unremunerated.

No license priority

RECOMMENDATION: Licenses should not be permitted to take priority over limitations and exceptions.

Education exceptions and limitations are important user rights. Where they exist they should always be available to the users (e.g. educators, students, researchers) when they choose to use them. The availability of a commercial license should not negate this choice. That means that, even if the users could buy a license, because such license is available in the market, the users should not be forced to do it. In other words, the users should be able to continue to enjoy the rights of use granted by the existing education exceptions. Such exceptions should not become unavailable to the users just because there is an option to buy a license for the same uses that are covered by the exception. Otherwise, the education exceptions granted by law will gradually disappear and be replaced by commercial licenses.

No contractual overrides

RECOMMENDATION: Contracts should not be permitted to override limitations and exceptions.

It is essential to ensure that private agreements do not override the terms and conditions of use set forth by lawmakers. If the law allows the use of 10 pages of a book for educational purposes, but the licensing contract only allows the use of 5 pages, teachers should be able to continue to use the 10 pages. That means that, even if an education institution decides to negotiate a license, this license should never place conditions on schools or educators that they would otherwise not have to follow. **The exception should be prime, and should not be restricted by contracts.**



Mandatory licensing versus voluntary negotiation with stakeholders

License agreements should not be forced upon education institutions but can be negotiated on a voluntary basis (e.g. no mandatory remuneration, no compulsory collective licensing) in consultation with education stakeholders who have access to affordable mediation and litigation.

Reasonable terms and conditions

Recent research conducted by COMMUNIA also showed that license agreements can interfere with data privacy, can force schools to police copyright infringements (when they should only inform about copyright law) or report any use of works to commercial actors.¹¹ Hence, if a license-based model is chosen, the conditions need to be carefully negotiated. These are some important things to consider:

Recommendations:

- *Guarantee data privacy (i.e. confidentiality clauses or students' data privacy);*
- *Do not force education institutions to police copyright infringements (they should only inform);*
- *Do not put administrative burdens on teachers and education institutions (e.g. surveys, reporting).*

Secret contracts with public budgets

RECOMMENDATION: Contracts should not be kept secret but be available to the public.

Often with licensing contracts **the content of the contract is kept secret**. This is a major democratic deficit as it concerns public money, but the public has **no insights on what deals and prices were negotiated on behalf of the rightsholders and users and whether these deals are fair**.

11 Nobre, T. (2018) Educational Licences in Europe. COMMUNIA. (Retrieved from: http://www.communia-association.org/wp-content/uploads/2018/03/Educational_Licences_in_Europe_Final_Report.pdf)

6. Towards an International Treaty on Education and Research Activities

As in other areas of education, there is a substantial layer of international law on copyright, including multilateral treaties and trade agreements. The World Intellectual Property Organisation's Standing Committee on Copyright and Related Rights (SCCR) discusses exceptions and limitations for education, research, persons with disabilities, libraries, archives and museums. Education International has an observer status at this committee and regularly attends the committee meetings to represent the voice of teachers, education support personnel and researchers.

Important international copyright agreements

There is an existing international law architecture that promotes copyright limitations and exceptions for education and research to a limited extent.

Berne Convention

Article 10(2) of the Berne Convention – the oldest and most important copyright treaty dating to the 1880s – permits – but does not require – educational exceptions. It provides:

(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 utilisation, 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 utilisation is compatible with fair practice.

Marrakesh Treaty for persons with visual impairments

The most recent addition to International copyright law provides an example of how international copyright law can create mandatory duties to protect public interest uses in copyright law.

In June 2013, member states of the World Intellectual Property Organisation (WIPO) adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. [33 parties/countries](#) have ratified the treaty including the European Union. It requires signatories to have a limitation or exception to domestic copyright law that **allows for the making and distribution of accessible format copies for visually impaired people** (e.g. braille, audio). EI advocates for the implementation of the treaty as well as for the development of a future treaty that will address the needs of



people with other disabilities.¹² The Marrakesh Treaty also provides a model for a new treaty effort – for a Treaty on Education and Research Activities (TERA) (Annex 2).

Towards a global treaty on education exceptions for education and research

The Marrakech Treaty sought to solve a particular international problem – namely that copyright exceptions for people with disabilities differed between countries and as a result the enjoyment of human rights by persons with disabilities to learn and access information differed. In addition, lack of harmonisation in copyright exceptions posed barriers to cross border exchange in accessible formats. We face a similar situation for education and research today. Differing rights lead to inequitable access to learning materials and also block the cross border trade/exchange in materials. Accordingly, Education International is leading a campaign to adopt the Treaty on Educational and Research Activities (TERA) by the World Intellectual Property Organisation Standing Committee on Copyright and Related Rights.

What has happened so far at the SCCR in relation to education and research?

- Throughout the years there have been a variety of **proposals by WIPO member states and the WIPO secretariat to make progress** on exceptions and limitations for education, research and persons with disabilities (full list of proposals [here](#)).

The most important one is the **2012 mandate** which states the need to work toward “*an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms)*” for libraries, archives, museums, education, research, and persons with other disabilities ([WO/GA/41/14](#)).

- In November 2017, Daniel Seng presented the final results of the **WIPO commissioned study on [Copyright Limitations And Exceptions For Educational Activities](#)** at the SCCR 35. The research shows that copyright laws differ greatly among member states and many are not adapted to the use of digital works for education and research.
- In May 2018, the SCCR 36 adopted **[Draft Action Plans on Limitations and Exceptions Through SCCR/39](#)** which should work towards progress on exceptions and limitations for education, research and persons with disabilities as well as for libraries, archives and museums.

¹² EIFEL has developed a [guide for libraries](#) that could be of help (<http://www.eifl.net/resources/marrakesh-treaty-eifl-guide-libraries-english>).



Education International supports a global treaty

[Education International endorsed a global draft Treaty on Exceptions and Limitations for Educational and Research Activities \(TERA\)](#) at the 5th Global Congress on IP and the Public Interest in September 2018. The aim is now to get governments to support the treaty. The treaty can only be adopted after all member states agree. This can be a long process, but it is important as discussed below.

Why a global treaty?

- To promote the implementation of copyright exceptions and limitations at national level in order to ensure that teachers and education support personnel across the world have more equal rights to using and building upon creative works for teaching and learning.
- To facilitate cross-border collaboration and exchange as teachers and researchers around the world will have similar rights. As a result it will be easier for teachers and ESP to exchange educational materials, engage in online learning and teaching environments and exchange programmes.

What are the different components of the treaty?

While promoting a balanced approach and considering the principles of fair practice the treaty:

- establishes a global copyright law for education that sets minimum standards for national policy making, that is protected from contractual override and facilitates cross-border use;
- protects teachers, ESP and researchers from claims for damages and from criminal liability when the unlawful use of a work is performed in good faith;
- ensures that technological prevention measures (e.g. digital locks) do not prevent teachers, ESP and researchers from making lawful use of creative works;
- ensures fair use and access of works for research purposes (e.g., making private copies, making quotations, text and data mining).

Challenges at the international level

New rights are established without protecting exceptions and limitations

The SCCR currently discusses a **draft treaty on broadcasting**, for instance, which seeks to address the concerns of broadcasters concerning the piracy of broadcast signals. In an open letter, [Civil Society](#) criticised the draft treaty for a number of issues such as the suggested 50-year term of protection and post fixation that would go far beyond the term of copyright. While new exclusive rights for broadcasters are created, user rights are not adequately addressed. Educators and researchers need to be able to make fair use of broadcasted content for teaching and a new treaty needs to adequately address exceptions and limitations for education and research purposes. The current draft text is not balanced in this regard and bears the danger of significantly undermining user rights.



Increasingly longer copyright terms included in international trade deals

The copyright term is the timeframe in which copyrighted material falls under copyright protection. Upon expiration of this term the work enters in the public domain and is freely available. The life of the author plus 50 years is the standard set by agreements such as the World Trade Organisation's TRIPS Agreement and the Berne Convention. However, countries are increasingly adding and locking in longer copyright terms in international trade agreements that exceed the international standards of the Berne Convention. While there is no evidence that longer post-mortem terms have a positive impact on creation or reward the actual creator, many countries have extended the copyright term (e.g. in the EU it is 70 years after the death of the author and in Mexico it is 100 years). **This inflates the profits of a few large commercial rights holders while often leaving other works undiscovered and inaccessible.** It also adds financial burdens to the public budgets available to education institutions.

RECOMMENDATION: Comply with international standards so as not to exceed the life of the author plus 50 years.

7. Union strategies

Copyright exceptions: Engage in legislative reforms

Education unions are in a unique position to negotiate balanced copyright systems. They represent teachers, researchers and ESP who create works and at the same time depend on affordable access to materials created by others.

National level

Currently, many countries are reforming their copyright laws to adapt them to the new ways of collaborating, exchanging and accessing materials in the digital age.

- Ensure **you are at the table** when copyright legislation is reviewed or the scope of exceptions and limitations is negotiated ([union campaign examples](#)).
- Connect with local **like-minded copyright experts** (EI can help identifying some).
- Prepare **informative materials for your members** so they know their rights and have guidance on how to navigate through the often complex legislation ([union examples](#)).
- Advocate for teacher training **on copyright issues**.

International level

Together with libraries, archives and museums and other civil society actors, EI is promoting a balanced copyright system for education and research at the World Intellectual Property Organisation (WIPO). The objective is to agree on a minimum set of rights to access materials for educational purposes across the world (see [EI resolution](#)) as stipulated in our proposed treaty TERA. Paradoxically, the EU and other states with mandatory exceptions at home hinder



reforms promoted by countries in Latin America, Africa and Asia-Pacific. This hypocrisy must be challenged.

- Join us at WIPO in Geneva and ensure the union voice is heard ([2017](#))
- Contact government officials and share our demands

Regional level: The European Union has the only regional approach so far

The European Union (EU) is currently reforming its copyright law (Directive on Copyright in the Single Market). The outcomes will have a major impact on how copyright legislation is shaped at national level and also on how global copyright reform can be imagined. The for-profit lobby has successfully promoted policies that will divert more money to the already rich and lead to the blanket surveillance of citizens (e.g. upload filters that can also be used for political purposes). This will assert private actor control over how citizens share, communicate, learn and create knowledge and creative work, but also establish tools that can be abused for political purposes – all detrimental to freedom of expression and democratic dialogue. Once the Directive is adopted education unions will need to be involved in its implementation.

8. Final remarks

Fair access to and use of works for teaching, learning and research is a central part of quality education and research systems.

Education unions need to be consulted. Education unions have the best insight into the daily work of teachers and can share examples of how copyright might create barriers or facilitate the work of teachers, ESP and researchers. They need to be consulted when copyright laws or licensing agreements are negotiated where education budgets are spent and deals are negotiated that affect the daily work of education professionals.

Copyright is important. Education unions are not against copyright. They are in favour of a balanced copyright system that empowers teachers, ESP and researchers to provide quality research and education – a human right and central to the development of society. A balanced copyright system does not stand in contradiction to fair remuneration and support for creators – which teachers are themselves.

Exceptions and limitations are important. They create the careful balance between the rights of creators and users. They are necessary in addition to quality curated educational resources as teachers will always search for additional pictures, text snippets, pieces of music or videos that will help them explain a certain topic, provoke the most interesting reactions or get their students excited because they have chosen their favourite musician, cartoon character or artist.

Licenses are complementary but can never replace exceptions. Education unions are not against licenses. Education unions protect exceptions and limitations because of the reasons _____



named above and support the negotiation of licenses beyond the exceptions. The current challenge is that these licenses are often not fair.

Professional and academic freedom is key. It is essential that teachers and researchers are not constrained by excessive publication prices, restrictive copyright policies, editorial preferences or censorship. We need copyright exceptions in order to cater for diverse learning and research settings. Only this way we can ensure that **education as a human right** becomes a reality for all.

International copyright instruments are important. A world-wide exception would show that the global community truly commits to the importance of education. It would promote cross-border collaboration and exchange as well as initiate national level copyright reforms that are long overdue.

9. ANNEX

Checklist

1. GENERAL OPEN EXCEPTION.
 - a. EDUCATION. Does the law contain a general user right for education purposes that may apply to
 - i. any use of
 - ii. any work by
 - iii. any user
 - iv. including potentially a commercial use or user
 - v. subject to that use being fair to the author, including
 1. in the amount used and
 2. in relation to any effect on the market for the original work.
 - b. RESEARCH. Does the law contain a general user right for research purposes that may apply to
 - i. any use of
 - ii. any work by
 - iii. any user
 - iv. including potentially a commercial use or user
 - v. subject to that use being fair to the author, including
 1. in the amount used and
 2. in relation to any effect on the market for the original work.
2. SPECIFIC RIGHTS
 - a. EDUCATION: Does the law, either through operation of an open general exception or through specific exceptions, authorize each of the following activities for educational purposes:
 - i. make private copies in the course of
 1. teaching
 2. learning
 - ii. perform or otherwise communicate works in an educational context, including
 1. in student performances
 2. by way of illustration
 3. for comment, criticism, or review in the course of instruction
 4. in the course of online education;
 - iii. use in anthologies and other compilations, including
 1. images,
 2. short works
 3. excerpts of longer works
 - iv. translation of works when they are not readily available in languages required by users;

- v. reproducing and making available orphan works for which the right holder cannot be identified or located after reasonable inquiry;
 - vi. make and provide accessible format copies of works to teachers, students, or researchers with disabilities, including by import and export;
 - vii. import lawfully made copies of works;
- b. RESEARCH. Does the law, either through operation of an open general exception or through specific exceptions, authorize each of the following activities for research purposes:
 - i. make private copies in the course of research;
 - ii. use quotations and excerpts of a work for the purpose of
 - 1. illustration
 - 2. comment,
 - 3. criticism or review of ANY work (not only work quoted),
 - iii. translation of works for the purpose of research;
 - iv. reproducing and making available orphan works for which the right holder cannot be identified or located after reasonable inquiry;
 - v. use a work for computational or other uses that do not express or communicate the work to the public, such as for indexing and text and data-mining.
- 3. CONTRACTUAL OVERRIDE. Does the law protect the operation of user rights from contractual provisions that prohibit or restrict the exercise or enjoyment of limitations and exceptions, including for:
 - a. Educational purposes
 - b. Research purposes
- 4. CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES. Does the law permit the circumvention of technological protection measures in order to enable an otherwise lawful use of the work, including for:
 - a. Educational purposes
 - b. Research purposes
- 5. LIMITATION ON LIABILITY. Does the law protect good faith users against claims for
 - a. damages
 - b. criminal liability
 including for users acting in good faith for:
 - c. Educational purposes
 - d. Research purposes
- 6. SECONDARY LIABILITY. Are educational and research institutions protected from liability for the actions of their students and other users?
- 7. CROSS-BORDER USES: Does the law permit the local use of any work that was legally created under the law of the country in which it was created?