

Guidelines to tackle copyright issues pertaining the virtual exchange of courses

Plan of action for the EFESE project

1. Introduction

The online exchange of learning material lies at the heart of the EFESE project. The ambition to facilitate such an exchange inevitably poses the issue of copyrights. In order to safeguard the feasibility of the exchange initiative, a sound approach to dealing with copyright protected course material is essential.

This document lays out a summary of our findings on the matter of copyrights and a plan of action. It has been carefully drafted after conducting legal research and a number of consultations with various stakeholders. The first phase of consultations took place between the managing partners during transnational partner meetings and one skype meeting. The initial blueprint which was set out was then presented to the Advisory Board during the meeting in Ljubljana in June 2016. After we had processed the received feedback, we presented an improved version to a broader audience of participants at the training event in Groningen (October 2016), which led to another round of feedback.

2. Copyrights on the course material

From the perspective of copyrights, the exchanged course material can be classified under one of the following three categories:

- material not protected by copyrights¹
- material protected by copyrights which are in possession of the course owner
- material protected by copyrights which are in possession of third parties (other authors and/or publishers)

We have focused our attention on the latter two categories, as they pose specific questions of intellectual property law. When conducting our research for the most feasible approach, we have always kept in mind the main characteristic of the project: its international character. Participants in the exchange initiative will be spread across institutions in a variety of countries. This is worrisome from a copyright legal perspective because copyright law is a field which largely lacks (EU) harmonisation. Especially with regard to the exceptions for educational use, every national legal system maintains its own criteria regarding the conditions of fair use and the allowed extent. Researching the legal situation in every involved country would be an overambitious (and not scalable) task to do for the exchange coordinator.

After conducting research and processing the feedback of stakeholders, we believe that we have managed to find a 'middle way' approach, which strives for a balance between the interests of the involved parties: the course owner, the receiving institutions and the exchange coordinator.

- a) Material protected by copyrights which are in possession of the course owner

¹ E.g. documents that lack 'originality'.

To a large extent, the uploaded course material will be created by the author specifically for the purposes of the course. Take as an example the course guide, the presentation slides, the assessment tests, etc. Furthermore, academic articles can also be the sole intellectual property of the course owner. We expect that this will only be the case when they have not been published: Experience shows that when publishing an article, the publisher demands the transfer of the exclusive *exploitation* rights, which would qualify such material under the last category (copyrights of third parties).

In cases where the course author is the sole owner of the copyrights on the material, the most feasible approach would be to request a partial, non-exclusive grant of exploitation rights for the other participating institutions in the exchange initiative. 'Partial' meaning that the granted exploitation rights will not exceed the narrowly defined case of educational use in the context of courses offered by the limited pool of receiving institutions. 'Non-exclusive' meaning that the author can share exploitation rights to other parties (e.g. to publish an article). The license conditions should not impose overly burdensome conditions on course authors, as this will provide disincentives.

To facilitate the approach depicted above, two license agreements must be conducted: one with the course author at the moment of course submission, and one with the receiving institution prior to downloading course material. The second license agreement is needed in order to pass on the conditions of use as agreed upon with the course owner. When choosing the virtual platform for the exchange of courses, the possibility to conduct these two license agreements must be seen as an important technical requirement. Sample texts for the two license agreements have been drafted and are included in the Annex to this document.

In the organised rounds of feedback, course authors expressed the wish to have greater control on the course material that they share. We agreed upon two possible measures which should bring improvements at this point. Both measures can be realised on the technical level, i.e. by implementation in the platform for virtual course exchange.

In the first place, authors should be able to track the use of their material. All download activity of other users on the exchange platform will be recorded and made visible to the course owner. By making this information accessible, authors will have better knowledge on the identity of the receiving institutions and the extent of use.

Furthermore, some course would like to have the possibility to adopt a more defensive approach to their courses by personally ensuring that they are used in the right context by receiving academic institutions. This need can be met by the introduction of an optional feature in the exchange platform, which allows authors to restrict access to their courses by means of a prior, case-by-case grant of approval. Authors who opt in for this mode will receive requests by other institutions to share the course materials. These requests must include a description of the particular use case of the materials at the home environment of the receiving institution. The institution can only proceed with downloading the material after the course author has explicitly agreed with the intended use. From a copyright legal perspective, the grant of approval by the author can be seen as a targeted license grant which allows the particular institution to make use of the protected material for the specific use case and under the agreed conditions.

b) Material covered by copyrights which are in possession of third parties

In some cases, the uploaded courses will contain material which belongs to third parties. Examples are articles written by other authors, chapters of a book etc. The dilemma how to tackle this category

of material is a major one. The standard approach, which is to ask students to buy the material on the market, is only suitable for courses that make use of a very limited number of sources (e.g. a whole book). However, due to usually high commercial prices, this approach would prove to be less feasible for courses that refer to a variety of academic articles and/or book chapters, which have been published in different sources.

When tackling the issue of third party copyrights, two important ‘moments’ of distribution must be taken into account: i) the act of uploading of the protected material to the exchange platform by the course owner and ii) the act of downloading of the protected material and use by other affiliated institutions.

i) Uploading third-party protected material

According to the carried out research, the act of uploading documents by the course author to an online platform does not necessarily constitute a distribution under copyright law, which is prohibited unless the prior consent of the copyright holder has been obtained. Normally, this would be case if the material is being distributed to an *open, undefined* group of users. If, on the other hand, the exchange platform is designed in a manner, in which access to the material is strictly limited to a controlled pool of (academic) institutions, then the act of uploading to this platform will most likely not amount to a forbidden distribution under copyright law.² To stay on the safe side, the platform should facilitate the possibility to monitor the access of users to protected resources and the extent of their use of the platform.

ii) Downloading third-party protected material and using it in an educational context

While the mere act of uploading the material to a closed environment does not necessarily entail a forbidden distribution, the subsequent acts of downloading the material and presenting it to groups of students most likely does. In principle, national copyright law allows the use of copyright protected documents for educational purposes. However, the extent of use and precise conditions may vary strongly. In the Netherlands, for instance, universities pay a ‘reasonable compensation’ for educational use (which is much lower than the commercial value). Determining the precise legal framework for every involved country in the project would be too burdensome, and it does not scale well. For this reason, we decided to choose an approach, in which we share the responsibility with the participating institutions.

When downloading the material, the receiving institution will be asked to first examine whether the protected documents can be obtained via resources that are available to the students at the home institution. Many universities have subscriptions for online platforms, where a large variety of journals can be found in an electronic form. If possible, this would be the preferable way to obtain course documents which are protected by third-party copyrights.

If the material is not available via one of the official channels described above, the platform can still make it available to receiving institutions, provided that they make sure they comply with national legislation on the fair use exceptions to copyrights. In this case, the receiving institution will be requested to determine the conditions and extent of possible use for educational purposes under national law before using the course at the home. Many universities have central guidelines in place which determine how to use copyright protected course material.

² On this point, more extensive research on the situation in different legal orders is required.

The depicted approach to downloading and using third-party material can be facilitated by a license agreement which is to be conducted between the exchange coordinator and the receiving institution at the moment of download. A draft text is included in the Annex to this document.

3. Conclusions

Many projects that work with the exchange of documents eventually stumble upon the issue of copyrights. Having a sound approach to this issue is essential to the feasibility of the exchange initiative. It is of importance to address the matter at an early stage, as the choices made will influence other decisions, such as upon the platform used for exchange.

Legal research and consultations with stakeholders have shown that a feasible approach to the copyright issue must strive for a balance between the involved interests: of the exchange coordinator, the course owner and the receiving institutions. The suggested copyright policy, which is reflected in the drafted license agreements, aims to do so. If the license agreements are incorporated into the platform used for exchange, this will allow the exchange coordinator to set and pass on the rules of exchange, while also endeavouring to promote respect for third-party copyrights. In order to enhance the control of the course owner on the offered material, the platform should also allow authors to monitor the extent of usage of the course by other institutions, and eventually allow the author to opt in for a stricter regime, where receiving institution first need to obtain the permission of the course author for every particular use case.

ANNEX: License agreements

I. License agreement to be concluded at the moment of course submission between the exchange coordinator and the course owner:

By uploading the materials to the exchange platform, the institution(s) and person(s) involved in the development of the course agree to grant a non-exclusive license for the exploitation of the uploaded course documents protected under copyright law by other institutions which participate in the course exchange initiative. This grant applies only to the extent that the respective copyrights are still in possession of the respective authors of the course, and to the extent that such a license grant is necessary for the use of the course for educational purposes at the receiving institution.

If, at any time, the course author does not agree with a particular use of the material by a specific institution, the author can request from the receiving institution to immediately suspend the use of the course (material).

The exchange coordinator shall provide the course owner with access to an online tool for monitoring the usage of the course documents.

The course owner may be contacted by the exchange coordinator in case the course is deemed to be of interest for the common curriculum which is developed in the context of a joint master in social security.

II. License agreement to be concluded at the moment downloading course documents between the exchange coordinator and the receiving institution:

By accepting this license agreement, the receiving institution acknowledges that (parts of) the course material may be protected under copyright law. To the extent that the course owner is the holder of the respective copyrights, an exploitation license is granted to the receiving institution, under the condition that the material is used for the sole purpose of providing educational activities at the home institution. The receiving institution endows to take all precautionary measures that may be deemed necessary to inform recipients of the course (students and other individuals) that the shared material cannot be further distributed under any circumstances.

If, at any time, the course author does not agree with a particular use of the material by the receiving institution, the receiving institution can be requested by the author to immediately suspend the use of the course (material).

With regard to material which is protected by third-party copyrights, which are not the (sole) possession of the course owner, the receiving institution obliges itself to undertake the following measures:

* try to obtain the protected material via one of the official channels of content distribution at the institution;

* if the above is not possible, to ascertain that the planned use of the protected material for educational purposes is permitted under national copyright law, and only proceed with the further use of the course (documents) after having made sure that (third party) copyrights are not breached.