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COPYRIGHT AND EDUCATIONAL USES: THE UNBEARABLE CASE OF ITALIAN LAW FROM A EUROPEAN AND COMPARATIVE PERSPECTIVE

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Abstract

This study focuses on the legal treatment of educational uses of copyrighted works under Italian law. Considering the very narrow room for free, unauthorized educational uses under Article 70 of the Italian Copyright Act, one would expect a large recourse to rights clearance mechanisms ensuring a wide and legitimate use of copyrighted works for educational purposes (especially when such works are communicated through digital networks and are used on e-learning platforms). Unfortunately, this is not the case in Italy, where neither stakeholders nor competent authorities have taken steps to create an effective system of licences for educational uses. A comparative analysis of exceptions and licensing mechanisms for educational uses in a few countries of continental Europe, northern Europe and of the United States reveals solutions and contractual patterns that show possible solutions for Italy to escape from the present stalemate. In nearly all jurisdictions considered in the study, collective bargaining and collective management constitute an essential element of the regulation of educational uses of copyrighted works and set up mechanisms and levels of economic compensation for authors, publishers and other categories of right-holders. In conclusion, the study suggests a reform of Italian law based on the examples of statutory licensing schemes created for educational uses by countries like Germany and France. Such reform would aim at legalizing a number of educational uses to the benefit of certain categories of beneficiaries through the recognition of remuneration rights in favour of copyright holders.

Keywords

Copyright exceptions, Educational uses, Italian Copyright Act, EU copyright law, Three-step test, Continental Europe, Northern Europe, Fair use, Rights clearance mechanisms, Individual and collective licensing, Statutory licences

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1. Introduction

With the advent of the information society, the modes of transmitting knowledge and the use of creative works for educational purposes have changed radically. It is now normal practice for an educational institution to use e-mail or other forms of electronic communication (e.g., Internet websites, Intranet pages, virtual forums, file transfer protocols, etc.) to transmit educational materials for students. Distance education, above all at a university level, is becoming more and more widespread, enabling students to learn (using text, musical, audiovisual and multimedia content) anywhere they like. Even the traditional classroom is no longer what it was, since teachers now have web-based instruments and methods of communication at their disposal, allowing for an illustrative and interactive classroom experience like never before. Let us think about viewing or listening to literary, musical, figurative and cinematographic extracts with the help of nothing but a laptop computer and a broadband Internet connection.

The above-mentioned activities, as beneficial as they may be in an educational environment, also raise delicate legal questions anytime the material used for educational purposes is protected by copyright, which may be owned by distinct categories of shareholders: the publisher of a literary work, a handbook or a scientific article; the authors, publishers and performers of musical compositions and the producers of recordings incorporating such works; the producers of cinematographic work and the broadcasters of television programs, etc. Copyright laws grant authors exclusive rights to authorize the reproduction, distribution and transmission to the public, translation, adaptation and elaboration of their creative works. In the transition from analog to digital technologies, copyright's scope became much wider than ever before, since copying is a technical necessity for any form of use, distribution, transmission or modification of digital content. Copyright extends now to temporary copying and, as the example of software explains very well, ends up covering the mere use of the protected work, which in the analog system was totally out of the copyright owner's control.

All legal systems, through different legislative techniques, establish copyright exceptions when the exemption of a certain class of uses from copyright's scope is deemed to benefit society for the pursuit of public policy goals. As required by international conventions, it is essential for the legitimacy of such exceptions that national lawmakers provide for specific conditions of use in order to guarantee that the pursuit of public policy does not reduce the incentive/reward function of copyright by excessively limiting its scope or by hindering the formation of new markets or business models. It might seem obvious to say that a system wishing to protect and foster freedom of education by using increasingly more effective methods and tools for teaching should remain in accordance with the protection of the rights of authors, along with the rights of the cultural industry as a whole. It is, therefore, desirable that the boundaries between *free* and *fared* educational uses of copyrighted work be identified with the highest degree of clarity and transparency.

This study explores the thin line of boundary between free and fared educational uses of copyrighted works under Italian law. As we will see, the Italian legal system constitutes a troublesome and almost isolated case in Europe. The law establishes an exception for quotations, summaries and small reproductions of copyrighted works that is also applicable in the field of education. The case law, however, has applied such exception very restrictively, and as things stand, this provision does not appear amenable to analogical interpretation, so as to cover digital educational uses and distance education. Considering such rigor and severity, a large recourse to licensing mechanisms and to a suitable contractual regulation of uses not covered by the narrow implementation of the existing educational exception would be expected. This has not happened, however. Thus far, neither stakeholders nor the competent public institutions have developed licensing mechanisms or (individual or collective) agreements, both of which would legitimize broader uses of protected materials, especially via digital networks and e-learning platforms. The present state of educational uses of copyrighted works creates an unbearable situation of uncertainty both for right-holders and for the

Italian (mostly public) educational system, which recently faced heavy cuts in government funding.[1] This financial stringency is getting worse: public schools and universities in Italy face increasing hurdles when buying expensive resources (e.g., access to scientific periodicals or books in electronic format or to CD and DVD collections of music and films), and the absence of clear rules about educational uses of copyrighted works severely limits the opportunity to conceive and implement innovative teaching methods and learning experiences.

This study examines the provisions of Italian copyright law regarding exceptions for educational use, considering, moreover, rules and limitations imposed by Directive 2001/29/EC (hereinafter "EUCD", i.e., European Union Copyright Directive)[2] and, at the international level, by the Berne Convention and other important agreements on artistic and literary property (see §2).[3] A comparative analysis of exceptions and licenses allowing educational uses of copyrighted works in other countries of the European Union and in the United States reveals solutions and contractual patterns (see §3) that the study draws upon in order to suggest concrete ways to escape from the present stalemate to Italian lawmakers and to stakeholders (see §4).

1 From a purely financial point of view, the recent legislative reform that re-organized the Italian university system, known as "Gelmini reform" (after the name of the former Minister of Education, University and Research) went in the same direction: see Law 30 December 2010, n. 240 ("Norme in materia di organizzazione delle università, di personale accademico e di reclutamento, nonché delega al Governo per incentivare la qualità e l'efficienza del sistema universitario"), Official Journal n. 10 of 14 January 2011 (Ordinary supplement), p. 1.

2 Directive 2001/29/EC of the European Parliament and of the Council, of May 22, 2001, on the harmonization of certain aspects of copyright and of rights related to copyright in the information society, OJ, L 167, 22 June 2001, pp. 10-19, available at http://eu-lex.europa.eu/"http://eu-lex.europa.eu.

3 Berne Convention for the protection of artistic and literary works (1886), available in English, in the "Treaties" section of the website of the World Intellectual Property Organization: http://wipo.int/"http://wipo.int.

2. Copyright and Educational Uses under Italian Law

Italy is among those countries of continental Europe that follow the model of the French *droit d'auteur* and recognize both the moral and economic rights of authors of literary and artistic works. Moral rights, such as the paternity right and the right to the integrity of the work, are deemed to constitute personality rights, since they are absolute and non-transferrable. Economic rights are very broadly conceived (see Article 12 of the Italian Copyright Act, hereinafter "ICA")[4] in consideration of the deep link established by the law between the author and the result of her creative work and of the consequent need to protect such work. This philosophical approach leads to the recognition of very strict and precise exceptions (see Article 65 ICA). The Italian legal system, like other European legal systems, does not have anything comparable to the doctrine of fair use developed by courts in the United States and then codified in the U.S. Copyright Act in 1976. U.S. law limits the subject matter of copyright in a pragmatic way by applying open and flexible evaluation criteria for the judicial definition of unauthorized uses (see infra, §3.1). On the contrary, Italian law strictly defines and limits the realm of free (i.e., unauthorized) uses, even in the field of education.

The ICA devotes a number of provisions to the intersection between copyright and educational uses. The use of copyrighted works for educational purposes is taken into consideration by Article 70, which also refers to uses for purposes of criticism or discussion and scientific research. Given its subject matter, this study will examine only the implementation of this provision for educational uses.[5]

Article 70, paragraph 1, provides that the summary, quotation and reproduction of pieces of copyrighted work and their communication to the public are free "if used for criticism or discussion, within the limits justified by these purposes and insofar as they do not conflict with the economic use of the work, and if used for the purposes of teaching or scientific research" when the use occurs "for illustrative and non-commercial purposes." [6]

In addition, the recently enacted provision of Article 70, paragraph 1-*bis*, allows for the free publication through the Internet of "low quality or degraded images and music for educational or scientific use and only in the case that this use is not-for-profit." [7]

As it will be shown, finally, provisions applicable to photocopying (Article 68) and to private copying of audio and audiovisual recordings (Article 71-*sexies*) are also relevant.

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4 Law 22 April 1941, n. 633 ("Protezione del diritto d'autore e di altri diritti connessi al suo esercizio").

5 Almost all the countries of the European Union apply the same copyright exceptions to acts undertaken for purposes of educational and scientific research. There are special cases, though, like that of German law, which grants fair uses for scientific research a less restrictive treatment in the communication to the public of published works and single extracts from newspapers or periodicals: see Article 52a of the German Copyright Act. For an in-depth analysis of this issue, see S. VEZZOSO, *E-learning e sistema delle eccezioni al diritto d'autore*, Quaderni del Dipartimento, Dipartimento di Scienze Giuridiche, Università di Trento, 2009, pp. 141-148.

6 Article 70, par. 3, ICA provides that the summary, quotation or reproduction must be followed by the mention of the title of the work, the names of the author, the publisher and, if it is a translation, of the translator, if such indications are shown on the work.

7 Article 70, par. 2, ICA allows for the reproduction of extracts of protected works in anthologies for educational use within the limits established for literary works, poetry, musical and cinematographic works under Article 22 of the Regulation for the enforcement of the Italian Copyright Act, approved by Royal Decree May 12, 1942, n. 1369 on condition that right owners receive fair compensation. The same provision provides that, in the absence of an agreement among the parties, such remuneration is determined according to criteria established by the President of the Council of Ministers, in accordance with the Minister of Education and with the Permanent Advisory Committee on Copyright Law: see D.P.C.M. February 22, 1988 on SIAE's website: http://siae.it/"http://siae.it.

2.1 Educational Uses for Illustrative and Non-Commercial Purposes

In 2003 Italy implemented the well-known EUCD. In the specific field of educational uses, this directive granted EU Member States a large discretion to dispose exceptions or limitations on the rights of reproduction and communication to the public that articles 2 and 3 of the same directive harmonized at the EU level.

Article 5(3)(a) EUCD allows Member States to provide for exceptions or limitations to the above-mentioned rights if the use of the copyrighted work occurs "for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved."[8]

When transposing Article 5(3)(a) into national law, Italian lawmakers did not show any particular interest in and commitment to adapting the exception for educational uses to the information society, as the spirit of the directive and the enforcement of the principles of freedom of expression and freedom of teaching embodied in the Italian Constitution (cf. articles 21 and 33, respectively) would have required. Rather, Italian law just copied the wording of Article 5(3)(a), adding mention of the illustrative and non-commercial purposes that the educational uses mentioned under Article 70 ICA must have in order to be legitimate.[9] As a result of the entry into force of the act which implemented the EUCD (Legislative Decree no. 68/2003), therefore, the summary, quotation or reproduction of excerpts of copyrighted work are allowed within the limits justified by the purposes of criticism, discussion *and teaching* on condition that such activities have illustrative and non-commercial purposes and do not compete with the economic exploitation of the copyrighted work.

2.1.1 Article 70 ICA and exceptions at the EU and international levels

Because of the legislative amendment of 2003, the exception under Article 70 ICA became even more rigid and restrictive than it had been previously. The actual Italian provision sought to conform to the wording of Article 5(3)(a) and, moreover, of Article 5(5) EUCD, which introduced the so-called three-step test into EU law.[10] Actually, the wording of the directive, which was strongly influenced by the international approach to educational exceptions, shows that there was no reason to make Article 70 ICA so restrictive. Instead, this provision should have been reformed in the opposite direction so as to extend its application to the most technologically advanced teaching methods.

Both Article (5)(3)(a) EUCD and Article 10(2) of the Berne Convention grant national legislators the option to permit the unauthorized use of artistic and literary works for educational purposes on condition that such uses stay within the limits justified by educational ends and conform to the idea of "fair practice." These provisions seem flexible enough to permit national lawmakers to satisfy the needs of teachers without unreasonably compromising the interests of copyright holders.11 Moreover, the adoption of a neutral term in these provisions (utilization in the Berne Convention; use in the EUCD) shows that the national exceptions and limitations for educational uses can apply to different types of use and, therefore, not only to quotations (which are taken into consideration under specific

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8 See Article 5(3)(a).

9 After the entry into force of Legislative Decree of April 9, 2003, n. 68, Article 70, par. 1, ICA, reads as follows: "The summary, quotation or reproduction of works or parts of works and their communication to the public are free if they are used for purposes of criticism or discussion, within the limits justified by these purposes, provided that the use does not compete with the economic exploitation of the work; *if the work is used for teaching or scientific research purposes, the use should take place for illustration and non-commercial purposes*" (author's own translation; emphasis added).

10 Technically, Article 70 ICA constitutes an exception to both the right of reproduction under Article 13 ICA and the right of communication to the public under Article 16 ICA; in the sole case of a summary, the exception touches also upon the exclusive right of adaptation of the work under articles 4 and 18 ICA.

11 See S. VEZZOSO, E-learning e sistema delle eccezioni al diritto d'autore, op. cit., pp. 197-198.

provisions of the Berne Convention).12 While referring to purposes of illustration in publications, broadcasts or sound and visual recordings for teaching, Article 10(2) of the Berne Convention potentially covers not only the reproduction of literary, musical and audiovisual works, but also the communication and making available of such works to the public in all possible formats and by all means, including digital means.13

A first limitation on copyright exceptions that allow the reproduction and communication of protected works for educational purposes is imposed by the requirement of the purposes of illustration, which establishes a necessary correlation between fair use and the subject matter of teaching.[14] The requirement was introduced into Article 10(2) of the Berne Convention by the Stockholm revision of 1967. This revision aimed at reducing the scope of the exception at issue by replacing the original reference to "educational purposes" – which was deemed to be too generic and permissive - with the current reference to the purposes of illustration for teaching. Article 10(2) provides now that national exceptions for educational uses are permissible insofar as the uses exempted from copyright are undertaken within the objective and subjective frames of a certain educational activity. This means that the exceptions for educational use must be applied to the sole benefit of students (*subjective* frame) and with regard to the sole works that form part of the study program of a class or a course, and no further (*objective* frame).

In addition to the limitation of the illustration purposes, which is inherent to the exceptions for educational use, international and EU provisions establish a second, external set of limits that restricts the implementation of *all* copyright exceptions, namely, the three-step test. This test for the legitimacy of national exceptions was originally provided under Article 9(2) of the Berne Convention, which also dates back to the Stockholm revision of 1967.

According to Article 9(2), it shall be a matter for national legislation to permit the reproduction of copyrighted works in certain special cases (first step), on condition that such reproduction does not conflict with a normal exploitation of the work (second step) and does not unreasonably prejudice the legitimate interests of the author (third step). After its introduction into the Berne Convention, subsequent international provisions regarding copyright law, that is, Article 13 of the 1994 TRIPS Agreement and Article 10(2) of the 1996 WIPO Copyright Treaty, resumed this test. These provisions expressly extended the applicability of the three-step test to all rights granted to copyright holders, i.e., the rights of communication to the public, distribution and rental.[15]

A short digression on the normative dimension and on the contours of the three-step test seems necessary. By referring to "certain special cases," the first step of the test forces national legislators to define exceptions clearly and with a specific object in mind, limiting these exceptions both quantitatively and qualitatively. In particular, according to authoritative commentators of the provision, the wording of the first step forces contracting parties of the Berne Convention (and of subsequent international agreements) to confine the subject matter of copyright exceptions to the realm of narrow categories justified by evident reasons of public policy or by other exceptional circumstances.[16] The second step of the test requires that the allowed uses do not compromise present

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12 See articles 10(1) and 10(3) of the Berne Convention.

13 R. XALABARDER, Study of Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, World Intellectual Property Organization (WIPO), Geneva, November, 5th, 2009, available at http://wipo.int/"http://wipo.int, pp. 14-15.

14 See R. XALABARDER, Study on Copyright Exceptions and Limitations for Educational Activities, op. cit., p. 15.

15 M. SENFTLEBEN, Copyright, Limitations, and the Three-step Test. An Analysis of the Three-step Test in International and EC Copyright Law, Kluwer Law International, The Hague, London, New York 2004, p. 47; R. XALABARDER, Study on Copyright Exceptions and Limitations, op. cit., p. 23.

16 S. RICKETSON, The Berne Convention for the protection of literary and artistic works: 1886-1986, London 1987, p. 535; H. COHEN JEHORAM, 'Restrictions on Copyright and their Abuse', European Intellectual Property Review 2005, 359, p. 361.

or potential sources of revenue for the copyright holder (i.e., the "normal exploitation") by entering into competition with licensed uses of the work. In the relevant literature it is asserted that, if the concept of "normal exploitation" were to apply to all present and potential forms of commercial use of protected works, the test might be deprived of a concrete field of application, and it would essentially become useless.[17] To guarantee a useful and balanced application of the second step, it would seem appropriate to focus on its original intent, which was that of ensuring that the use allowed by a certain exception did not enter into a relation of economic competition with the main sources of commercial exploitation of the work.[18] The third step requires that the interests of the right-holders should not be affected in an *unreasonable* way by the exceptions. That is why the payment of fair compensation for uses allowed by certain exceptions is deemed to make the prejudice *reasonable* and to bring the exception back in line with the third step of the test.[19] Finally, it is generally accepted that these three limits, which constitute the international standard for evaluation of the legitimacy of copyright exceptions, must be applied cumulatively, given their interdependence and considering the order of importance related to the structure of the test.[20]

So far, the only decision that interpreted and applied the three-step test at an international level with reference to copyright law is that of a WTO dispute resolution panel in 2000.[21] This decision settled a dispute that arose between the European Union and the United States about the compatibility of Section 110(5) of the U.S. Copyright Act with Article 13 of the TRIPS Agreement.[22] After having confirmed that the three criteria of the test should be applied cumulatively, an analysis of the WTO panel found that no exception should be considered legitimate if it causes significant damage, in quantitative terms, to the commercial exploitation of a copyrighted work. For an exception to be considered legitimate from this perspective, it is necessary to show that the impact of the exception on the market of the protected work is limited to exceptional circumstances, in conformity with the first step of the test, and this is done by properly measuring the economic impact of any exception.

In the case under examination, the exception concerning the amplification of radio and television music broadcasts in paragraph B of Section 110(5) was deemed not to constitute a special case, but rather the rule, since the exemption applied to seventy percent of restaurants and commercial spaces

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17 S. DUSOLLIER, Droit d'auter et protection des oeuvres dans l'univers numérique. Droits et exceptions à la lumière des dispositifs de verrouillage des oeuvres, Larcier, Brussels 2005, p. 445; P. MARZANO, Diritto d'autore e digital technologies - Il digital copyright nei trattati OMPI, nel DMCA e nella normativa comunitaria, Giuffré, Milano, 2005, p. 261; M. SENFTLEBEN, Copyright, Limitations and the Three-step Test, op. cit., p. 181.

18 M. SENFTLEBEN, *Copyright, Limitations and the Three-step Test*, op. cit., p. 177. The minutes of the preparatory work during the Stockholm Conference in 1967 (which reformed Article 9 of the Berne Convention) show that, through the criterion of "normal exploitation," the drafters intended to reserve to the copyright holder not all the possible forms of exploitation of the work; rather, they intended to preserve all forms of exploitation that have or are likely to have a considerable economic or practical importance.

19 H. COHEN JEHORAM, 'Restrictions on Copyright,' op. cit., p. 361; P. MARZANO, *Diritto d'autore e digital technologies*, op. cit., p. 264.

20 As explained in the relevant literature, moreover, the test coexists with no interference with the specific provisions that Article 10 of the Berne Convention provides for copyright exceptions: see S. RICKETSON and J. GINSBURG, *The Berne Convention for the Protection of Literary and Artistic works: 1886-1986*, Oxford University Press, Oxford, New York 2006, § 13.10; R. XALABARDER, *Study on Copyright Exceptions and Limitations*, op. cit., p. 26.

21 World Trade Organization, United States – Section 110(5) of the U.S. Copyright Act, Report of the Panel, WT/DS160/R, June 15, 2000.

22 Section 110(5) of the Copyright Act (U.S. Code, Title 17) establishes, respectively, two types of exemptions: the first (so-called "homestyle") exemption, provided in paragraph (A), allows small restaurants and shops to amplify music broadcasts without the authorization of the copyright holders and without any payment of compensation, on condition that they use typologies of instruments commonly used in private houses ("homestyle equipment"). The second (so-called "business") exemption, embodied in paragraph (B), essentially allows the amplification of music broadcasts, without the authorization and the payment of compensation by restaurants, drinking establishments and shops, on condition that their size comply with certain limits. The exemption regards also music broadcasts inside bigger establishments if certain limits concerning the amplification tools are respected.

serving drinks and to forty-five per cent of retail spaces in the United States. As a result, the WTO panel concluded that the aforesaid exception did not comply with Article 13 of the TRIPS Agreement and, in particular, with the first step of the test.

As emphasized in the relevant literature, this decision was based on a purely quantitative analysis of the uses allowed by Section 110(5)(B) of the U.S. Copyright Act in consideration of the absence of a strong public policy aim, which encouraged a merely economic interpretation of the specialty criterion.[23] As evidenced by Jane Ginsburg, in future applications of the test a qualitative approach might prevail over a quantitative approach when an exception is justified by the pursuit of public policy goals.[24]

In 2001 Article 5(5) EUCD borrowed the lexicon of the Berne Convention and of the other above-mentioned international agreements and introduced the three-step into EU law. As a consequence, the test has a binding force not only for EU Member States, when codifying their own national exceptions, but also (and most importantly) for national courts in the concrete application of the same exceptions.[25] For EU Member States, then, the three-step test at the moment not only constitutes a series of criteria for interpretation addressed to the national Parliaments (criteria that all EU Member States were already compelled to comply with as a result of their adhesion to the Berne Convention and the WTO); the test is also a standard of evaluation and of judicial application of the exceptions provided under national law, in conformity with the catalogue of (optional) exceptions spelt out under Article 5 EUCD.[26]

2.1.2 Implementation of Article 70 ICA in Italian case law

The most important provision on educational uses in Italian law is the first paragraph of Article 70 ICA. As already mentioned, this provision now incorporates both the requirement of the purposes of illustration and the second step of the three-step test (which requires that free uses should not compete with the economic exploitation of the work). Before the adjustment of this provision to the requirements imposed by EU law, the Italian case law had already been absolutely stringent about the implementation of Article 70 ICA, excluding any interpretation of uses for purposes of criticism, discussion and teaching that could be considered extensive. Hence, it is unlikely that the higher severity from a textual point of view of the provision coming out from the legislative amendment of 2003 may lay the foundation for an even more restrictive interpretation of the exception at issue.

The Italian Supreme Court (*Corte di Cassazione*) has held that the free uses granted under Article 70 ICA are exceptional and therefore of strict interpretation and cannot be applied by analogy.[27] For the legitimacy of such uses, the case law has considered essential the existence of a strict link between the work used and the activity of criticism, discussion and teaching concretely developed, provided that the use does not end up competing with the economic exploitation of the work made by the copyright holder. For example, the reproduction without authorization of a pictorial work in a book made,

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[23] J. GINSBURG, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions', (187) *RIDA* 2001, 17, p. 29.

[24] J. GINSBURG, 'Toward Supranational Copyright Law?, op. cit., p. 51.

[25] G. MAZZIOTTI, *EU Digital Copyright Law and the End-User*, Springer, Berlin, 2008, pages 84-86.

[26] See S. DUSOLLIER, Droit d'auter et protection des oeuvres dans l'univers numérique, op. cit., pp. 439-441; L. GUIBAULT, Le tir manqué de la Directive européenne sur le droit d'auteur dans la societé de l'information, Institute for Information Law, University of Amsterdam, available at http://ivir.nl/"http://ivir.nl. §3.3; H. COHEN JEHORAM, 'Restrictions on Copyright and their Abuse', op., cit., p. 364; G. MAZZIOTTI, EU Digital Copyright Law, op. cit., p. 86.

[27] See Corte di Cassazione, Section I, 07/03/1997, no. 2089, Il Diritto Industriale 1997, p. 812; and Giurisprudenza Italiana 1998, p. 1191.

though in an academic context, for profit and not for teaching purposes was found to be unlawfully competing with the exclusive right of the author of the pictorial work.[28] The same relationship of unlawful competition was found in a case of full, unauthorized reproduction of significant parts of a literary work aimed at distracting the natural readers from the original work to the benefit of the imitator.[29] A quotation was considered legitimate in the event that the insertion of the cited text was intended to uphold a certain reasoning, or in the event that it constitutes the premise of a discussion or an organized review.[30] This means that, as a general rule, quotations of copyrighted works having no connection to a specific discussion, to criticism, or to an educational session, as in the case of anthologies or reproductions with purely illustrative purposes, are not considered legitimate without proper authorization.[31]

As far as the necessary connection between the use of a work and the subject matter of an educational activity is concerned, the Italian Supreme Court denied that the existence of the sole educational purpose can be in favor of the freedom of use when musical works are used without the authorization of the copyright holders (through the intermediation of their collecting society) within an undertaking in which such works are chosen and performed with artistic peculiarity for the teaching of dance in a private school.[32]

The Supreme Court recognizes another principle in the application of Article 70 ICA based on the reference of the statute to "pieces" or "parts of the work". According to this principle, the reproduction or publication of the work is free only for partial reproductions and not for reproductions in which the whole work is used, even though the use strictly pursues purposes of criticism, discussion, and teaching. According to the Italian Supreme Court, these objectives cannot justify the violation of the exclusive right of the author through the consequent sacrifice or reduction of the relative economic substance of a work.[33] As a result, the case law is almost unanimous in considering Article 70 ICA inapplicable to those cases in which the quotation for purposes of criticism, discussion or teaching necessarily leads to the reproduction of a work in its entirety, as is the case with reproductions of figurative works of art in catalogues for exhibitions or shows,[34] and with short or very short literary works,[35] such as the lyrics of a song, short stories, or articles.[36] Hence, it can be clearly inferred that a literature professor would infringe copyright law in Italy if she copied and provided her students with copies of a short work, wholly reproduced, even though she stayed within the boundaries of Article 70. The same professor would act legally, instead, if she used an extract from a longer work, such as a novel.

In addition to the previous requirements, Article 70 ICA provides a further condition, introduced in 2003, for the legitimacy of the summary, quotation, reproduction or public communication of extracts or parts of copyrighted works, namely, the *non-commercial character* of the use. Considering the absence of any further specification in the statute, the mere reference to non-commercial purposes of educational uses could lead to the exclusion from the subject-matter of the exception for all those uses

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28 See Court of Milan, 03/03/2003, Annali Italiani Diritto Autore (AIDA) 2004, p. 706.

29 See Court of Milan 20/04/1993, Diritto dell'Informazione e dell'Informatica 1994, p. 45.

30 See Court of Milan, 05/10/1993, Il Diritto di Autore, 1994, p. 603.

31 Ibidem.

32 See Corte di Cassazione, Section I, 01/09/1997, no. 8304, Giurisprudenza Italiana 1998, p. 2329.

33 See Corte di Cassazione, Section I, 19/12/1996, no. 11343, *Foro Italiano* 1997, I, p. 2555; Corte di Cassazione, Section I, 15/01/1992, *Diritto dell'Informazione e dell'Informatica* 1993, p. 97.

34 See Court of Appeal Milan, 25/02/1997, *Il Diritto di Autore* 1998, p. 346; P. Torino, 15/07/1996, *AIDA* 1997, p. 762.

35 See Court of Rome, 26/03/1999, AIDA 1999, p. 771.

36 See, respectively, Court of Milan, 20/04/1993, Diritto dell'Informazione e dell'Informatica 1994, p. 45; and Court of Rome, 12/02/1992, AIDA 1992, p. 898. As far as figurative works are concerned, the Italian Supreme Court found the partial photographic reproduction of a pictorial work admissible: see Corte di Cassazione, Section I, 19/12/1996, no. 11343, Foro Italiano 1997, I, p. 2555.

that could be meant to be directly or indirectly commercial, even when the use does not compete with the economic exploitation of the work. If one interpreted this requisite literally, a partial quotation, reproduction or communication to the public of copyrighted works made by a university in the performance of an educational service (in the traditional classroom or at a distance) would not be considered legitimate if students had to pay fees in order to attend the course in which the work is used. In other words, if the requisite of non-commercial purposes were not absorbed into that which imposes a relationship of non-competition with the economic exploitation of the work, as it seems suitable, all institutions offering educational services for a charge, even if minimal (i.e., the vast majority of public educational institutions and all private schools and universities) could not benefit from the exception under Article 70 ICA.

This problem exists since, in reforming the text of Article 70 in 2003, Italian law limited itself to copying the expression "non-commercial" used in the provision of Article 5(3)(a) EUCD, without considering that - as clarified in recital 42 of the same directive - the organizational structure and the means of funding of the educational establishments should *not* be the decisive factors in determining the enforceability of the exception at issue. Compliance with the requisites of illustrative purposes and the absence of economic competition may then be sufficient, according to the EUCD, to allow an educational institution to benefit from the educational exceptions under discussion. This means that Italian courts could solve the problem by merely applying the above-mentioned requirements without taking into consideration the typology of the institution organizing a given educational activity. This is desirable, above all, considering that Article 70 ICA, unlike similar provisions in the law of other EU Member States (see infra, §3.1), does *not* explicitly identify the beneficiaries of the exceptions for teaching purposes, and it does not distinguish among different typologies of educational institutions.

With the legislative amendment of 2003, therefore, the regime of Article 70, paragraph 1, ICA became (if possible) even more restrictive than it had been, in a technological context in which teachers and educational institutions can proceed more easily than ever before with the use of summaries, quotations and whole or partial reproductions of copyrighted works with illustrative purposes, both in the classroom and via electronic communication systems. The consequence of this legislative approach is that Article 70 ICA can hardly be applied concretely. As emphasized above, for shorter types of work (e.g., poems, song lyrics) the case law has found this exception not applicable *tout court*. For larger works, instead, the law renders the implementation of Article 70 ICA nearly impossible since it does not identify the concrete beneficiaries of this copyright exception, nor does it define the space and time limits of such uses. For example, it is very unclear whether the reproduction and distribution, both in the classroom and via e-learning platforms, of the extracts of a novel, a movie or a scientific periodical - which might be necessary or useful complements to a certain lesson or course - are legitimate without the authorization of the copyright holder.

As we will see more in depth below, a much higher degree of legal certainty would have been ensured if Italian law had explicitly expanded the subject matter of the educational exception so as to permit its enforcement beyond the traditional boundaries of a classroom and to cover e-learning education. To this end, updating and clearly defining the boundary between educational uses within restricted school circles (or closed electronic networks) and public use of the works would certainly have sufficed (see infra, §2.3).

2.2 Online Publication of Low-Resolution or Degraded Music and Images

In addition to the exception under Article 70, paragraph 1, ICA, there is a clumsy provision under Italian law, legally approximate and libertarian in taste, which makes the online publication of "…low resolution or degraded images and music for educational or scientific, and non-profit use" free (see Article 70, paragraph 1-*bis*, ICA). The provision was introduced in the ICA through a January 2008

act composed of only two articles, the most important of which contained new provisions for the governance of the Italian Society of Authors and Publishers (SIAE).[37]

This exception was introduced after a long debate within the Commission for Culture of the House of Representatives (*Camera dei Deputati*), in which then-president of the Commission, Pietro Folena, announced many times that he wanted "…to render the dissemination of music more free from the obstacles of copyright."[38]

The issuance and entry into force of this new provision gave rise to a harsh debate among different stakeholders, which was mostly due to the vagueness of the statutory wording and to its glaringly incomplete subject matter. The second part of the provision, indeed, delegates any clarification concerning the subjective and objective limits of the educational or scientific uses at issue to a "decree of the Minister of Cultural Heritage and Activities, heard the Minister of Education and the Minister of University and Research, upon advice of the competent parliamentary Commissions," which has never been issued and probably will never be.[39]

Having taken the provision seriously, a large number of Italian Internet users were given false hopes. News about this provision appeared prematurely, causing hundreds of websites, even those considered most reliable, to hypothesize scenarios that could not be legally plausible. According to such news, Article 70, paragraph 1-*bis*, ICA would have allowed the free and unlimited circulation of music protected by copyright when in a low-resolution or "degraded" format (compressed when compared to the original, as in the mp3 format), on condition that the online publication - strictly free and not for profit - had educational or scientific purposes. Examples of this kind would have been the publication of the discography of a music composer for the purpose of comment or review or the creation of a peer-to-peer network by Italian music academies aimed at placing low-quality or degraded music files at the disposal of their students for educational purposes.[40] Evidently, these excessively optimistic views did not consider the limits set in general upon copyright exceptions by the three-step test, nor did they consider the concrete inapplicability of a provision whose subject matter should have been completed through an administrative decree.

In the midst of confusion raised by the discussion that followed the enactment of the new law, the President of the Parliamentary Commission for Culture, the very person who put the law forth, intervened on his blog to make his thoughts clear. His intention was that of elaborating upon any possible scenarios that could have materialized with the issuance of the expected decree of the Minister of Cultural Heritage and Activities (which must be approved by the Minister of Education, University and Research and by the competent parliamentary commissions: something far from easy).[41] As Mr. Folena claimed, Article 70, paragraph 1-*bis*, was not approved with the intent to permit the free publication of music or images protected by copyright for purely illustrative and non-commercial purposes, as many parties asserted. For the generality of copyright-protected works - Folena correctly recalled - it is the first paragraph of Article 70 ICA, intact in its applicative sphere even after the introduction of paragraph 1-*bis*, that defines the boundaries of permissible educational uses, limiting them to the summary, quotation, reproduction and communication for illustrative purposes of small pieces of copyrighted works. According to this source, the new provision only

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37 Law January 9, 2008, no. 2 ("Disposizioni concernenti la Società italiana autori ed editori").

38 A. LONGO, 'Quel comma della legge italiana che "libera" gli mp3 su Internet', *La Repubblica*, January 31, 2008, available at http://repubblica.it.

39 This is the opinion expressed via email to the author by Mr. Gianluigi Chiodaroli, President of the Italian collecting society of record producers *Società Consortile Fonografici* (http://scfitalia.it) at the time of the entry into force of the provision under discussion.

40 See A. LONGO, 'Quel comma della legge italiana che "libera" gli mp3 su Internet', op. cit.

41 See P. FOLENA, *Una risposta doverosa sul diritto d'autore*, January 8, 2008, available at Folena's blog: http://pietrofolena.net.

intended to create a "small, very small, but also important, island of freedom" exclusively in favor of educational websites or blogs for the integral use of music or images that, considering their low-quality or degraded format, would not have touched upon the economic exploitation of musical compositions or figurative works by their respective right-holders.[42]

Unfortunately, though, the applicability of the new exception to the sole publication on the Internet of low-quality or degraded music and images undertaken by schools and universities by means of their websites and blogs, in accordance with the original parliamentary draft, is not mentioned anywhere in the final version of the act. Such a crucial restriction of the field of application of the new exception should, therefore, be implemented into the expected administrative decree of the Ministry of Cultural Heritage, which was strongly opposed by SIAE, as well as by the Italian recording industry. FIMI (Italian Music Industry Federation), not wrongly, considers the exception under Article 70, paragraph 1-*bis*, ICA unlawful, and it is absolutely against the enactment of a ministerial decree, which, according to FIMI, while allowing the publication of degraded or low-quality formats of music recordings, would end up infringing the moral right to the integrity of copyrighted works provided under Article 20 ICA.[43]

Administrative decree aside, in my view the biggest obstacle to the concrete application of the exception at stake in its present form remains its clear incompatibility with the three-step test.[44] The non-individuation of the beneficiaries (i.e., websites and blogs managed by educational institutions and their teachers, as provided in the original legislative draft) and of its field of application makes the exception too generic and, therefore, incompatible with the first step of the test. In addition, the possibility of integral reproduction of music recordings or figurative works in a degraded format (whatever this actually means), in the absence of remuneration for the copyright holders, seems, respectively, in conflict with the normal modes of exploitation of the work (second step) and to prejudice unreasonably the legitimate economic and moral prerogatives of the right-holders (third step).

The thesis of the incompatibility with the three-step test of a *full* reproduction and communication to the public of music and images in a low-quality format was recently upheld by a judgment that found Article 70 ICA *not* applicable to the publication of *fragments* of television broadcasts on YouTube without the authorization of the copyright holder.[45] Logically, then, Italian courts would reach an even stronger negative conclusion for the online publication of music recordings and images in their entirety, such as that which Article 70, paragraph 1-*bis* takes into consideration.

In conclusion, considering the unusually complex procedure for the approval of the necessary administrative decree, and the strong level of dissent expressed by SIAE and by the Italian recording industry as of the time of parliamentary hearings, such decree could never be issued. Even if it were, considering its character of secondary legislation, the decree could not easily fill the gaps of primary legislation. It is very likely, therefore, that the exception under discussion will remain a dead letter and will not support the cause of fair digital uses of copyrighted work in Italy in any way.

2.3 Relevance of the Provisions Targeting Private Use of Copyrighted Works

It has been emphasized above that Article 70 ICA has been interpreted strictly by the judiciary and, even after the legislative amendments of 2003 and 2008, it does not clearly enough define the subjective and objective boundaries of educational uses covered by this copyright exception. This

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42 Ibidem.

43 "A technical monstrosity before a legal one", President of FIMI, Enzo Mazza, defined paragraph 1-*bis* of Article 70 ICA, in an e-mail sent to the author on October 9, 2010 to clarify the position of the Italian recording industry about the ministerial decree that should implement the recently enacted provision.

44 S. VEZZOSO, *E-learning e sistema delle eccezioni al diritto d'autore*, op. cit., p. 199, expresses the same opinion.

45 Court of Rome 16/12/2009, Giurisprudenza Italiana 2010, p. 1323.

legislative scenario is clearly harmful both to educational institutions and teachers, who do not know which uses are legitimate and which are not, and to copyright holders, who cannot easily develop licensing mechanisms, especially in the field of digital and interactive uses of their works.

With the advent of Internet and digital technologies, the spatial dimension of educational uses of copyrighted works inevitably changed and expanded. In the digital era, students can attend a course either in a classroom, with the presence of a teacher, or at a distance, by using e-mails and virtual spaces placed at their disposal, and from which they can download, comment upon and modify digital contents of any kind. In spite of this, no trace of technological changes can be found under Italian copyright law, which, in order to preserve the vitality of its educational exception for distance education, has not yet adapted its wording. The outdated character of legislation is also demonstrated by the circumstance that not only Article 70 ICA, but also the copyright law provisions aimed at establishing a relevant distinction between private (or spatially circumscribed) use and public use of protected works are strictly limited to analog scenarios.

To start, it is highly unlikely that Italian courts will implement Article 15, paragraph 2, ICA, according to which the performance of a protected work that occurs "within the ordinary premises […] of the school […]" should not be considered public, if it has no for-profit purposes, in a technologically neutral (and wise) way. This would be possible only if courts interpreted the statutory reference to the "ordinary premises of the school" to mean not just a traditional, but also a virtual classroom, composed of the students who have remote access to a closed digital network, inside of which the course instructor makes available the same protected materials that he or she would legitimately make available in a (physical) classroom. Given the highly restrictive interpretation of copyright exceptions in the Italian case law, it is unlikely that judges would grant that the extract of a movie placed at a student's disposal via streaming on an on-line platform, albeit accessible only to the students of a course of history of cinema, would be equivalent (under Article 70 ICA) to the legitimate display of the same extract in the classroom of a school or a university.

The existing legislation, however, is heading for the exemption of closed (or numerically limited) networks from the exclusive right of public communication of copyrighted works. This approach is clearly demonstrated by the exception under Article 71-*ter* ICA, which follows literally the model of Article 5(3)(n) EUCD. According to Article 71-*ter*, the communication to the public of copyrighted works is free when it is "[...] addressed to single individuals, for purposes of research or private activity of study, on dedicated terminals located *in the premises of libraries accessible to the public, educational institutions, museums and archives*, with regard to works or other materials included in their collections, in so far as these works or materials are not subject to limitations stemming from deeds of transfer or licenses."[46] Unfortunately, this provision, like its European prototype, is very restrictive with regard to the spatial field of application of the exception, and it makes this category of free uses subject to any possible restrictions created by the contracts or licenses concluded by the above-mentioned institutions and the copyright holders (for instance, the major publishers who sell access to entire catalogues of on-line scientific periodicals). It seems relevant in this regard that such unfortunate textual restriction does *not* exist for the exception under Article 70 ICA, which merely requires that copyright-free uses should pursue purposes of illustration. That is a requirement that could also be met for distance education uses on digital networks, in so far as access to such networks were granted (through a password or another identification code) to the sole students enrolled in the courses that the network groups refer to.

Other copyright law rules that are relevant here for the understanding of the spatial definition of educational uses are the ICA provisions concerning photocopying and private copying of phonograms and audiovisual recordings.

[46] Author's own translation (emphasis added).

As far as photocopying is concerned, Article 68 ICA provides for precise quantitative limits (fifteen percent of any volume or issue of a periodical) on the number of photocopies that can be made without authorization, establishing at the same time that it is forbidden to market these photocopies and, in general, to enter into competition with the commercial exploitation reserved to the copyright holder.[47] The law creates a right to remuneration for both photocopies made privately and for those made in the premises of public libraries, obliging, respectively, the managers of copy shops and the institutions administering public libraries to collect and pay such remuneration to copyright holders.[48]

Article 71-*sexies* ICA allows for the private reproduction of phonograms and audiovisual recordings on any devices on condition that private copying is undertaken by individuals for their sole personal use and their copy does not have any direct or indirect commercial purposes. Such provision could be of great benefit to teachers and educational institutions in the realm of distance education if the exception were applicable to digital copies made for personal use by students. Let us think, for instance, of a limited number of course participants downloading onto their computers from an e-learning platform materials such as a literary work or one of its extracts (for instance, the chapter of a novel or an article from a scientific periodical) or a series of pieces or music videos placed at their disposal by their course instructor.

The aforesaid provisions, however, are clearly inapplicable to educational uses in digital settings. Like Article 70 ICA, the exceptions about photocopying and private copying seem to be confined to the analogical (or at least the physical) world. Moreover, in accordance with Article 5(2)(b) of the EUCD, these exceptions require the payment of fair remuneration to the copyright holder, which constitutes an unavoidable element for the legitimacy of the non-authorized copying of the work.[49] In other words, if the user (in this case a student) makes a copy for which she does not pay compensation, her copying is not covered by the exception for personal use.

In the case of Italian law, indeed, no exception exists for private digital copying of texts and literary works that are covered by the set of rules about photocopying under Article 68 ICA. As far as music and audio-visual recordings are concerned, nowadays the regime created by Article 71-*sexies* ICA recognizes the legitimacy of digital copying in light of a decree issued by the Minister for Cultural Heritage and Activities in 2010, which included computers and other digital copying devices like portable hardware, memory drives and mobile phones into the class of products over which the consumer ends up paying a private copy levy.[50] However, the same provision of Article 71-*sexies* ICA strictly limits the field of application of the private copying exception, providing for the non-applicability of the exception anytime the copyrighted works or materials are made available to the public on demand (i.e., so that anybody can have access to them from the place and at the time individually chosen) or when the work is protected by technological measures under Article 102-*quarter* ICA, or, finally, when access is granted and regulated by contractual agreements. This means, in sum, that under the Italian law, the private digital copying of music or video recordings is allowed without the authorization of the right-holders only when the user has legitimately had access to an original copy of the work and makes a copy of the original in a physical format (for example, a CD or a DVD) or by means of a device for which the mechanism of preventive fair compensation is provided. In any other scenarios in which the user is subject to the respect of the terms of a license of

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47 See Article 68, par. 6, ICA.

48 See Article 68, par. 4 and 5, ICA.

49 See, respectively, articles 68, paragraph 4, and 71-*septies* ICA. Within these exceptions, fair compensation constitutes a preventive remuneration that the law reserves to the right-holders to cover the losses caused by the lack of authorization of private copying.

50 Ministerial Decree of December 30, 2009, issued by the Minister for Cultural Heritage and Activities under Article 71-*septies* ICA ("Determinazione della misura del compenso per copia privata"), which came into force on January 14, 2010, available at: http://beniculturali.it. For a critical review see G. MAZZIOTTI, 'Ma quel compenso non è equo', *La Voce*, June 22, 2010, http://lavoce.info.

use and/or to the restrictions imposed by a technological protection measure, private copying of music and audio-visual recordings in intangible formats is not considered fair use under the law, but rather an activity that the copyright holder should be able to control (technically and legally) and to monetize.[51]

If one applies the provisions at stake to examples of distance education, the logical conclusion is that Italian copyright law provides no copyright exception to enable students accessing a closed digital network managed by a school or a university to download course materials on their computers. This means that what the EUCD hypothesized in its recital 44 materialized with regard to educational uses under Italian law. This recital of the 2001 directive took for granted that the enforcement of copyright exceptions could legally shrink or be phased out in electronic environments because of the increased economic impact that uses covered by exceptions might have on the commercial exploitation of copyrighted materials. It is not surprising, then, that in a legal system bound to follow the EUCD, educational uses under Article 70 ICA and private copying for purposes of studying can be suppressed through contractual restrictions and technological protection measures that accompany the delivery of copyrighted works via online networks.

[51] Article 71-*sexies*, par. 4, ICA, provides that, in spite of the application of the technological measures mentioned under Article 102-*quater*, copyright holders must permit lawful users of the protected work to make a copy (even if only an analog copy) of sound recordings and audio-visual recordings for personal use on condition that this possibility does not conflict with the normal exploitation of the work and does not cause unjustified prejudice to right-holders.

3. Exceptions and Licenses for Educational Uses from a Comparative Perspective

In two of its recent studies concerning copyright in the so-called knowledge economy, the European Commission focused on the risk that fair use for educational purposes might be confined to a condition of unbearable uncertainty in the digital era.[52] In particular, in the Green Paper entitled *Copyright in the Knowledge Economy* (2008), the Commission explicitly recognized how inadequate the provisions of the EUCD had been with regard to the regulation of copyright on e-learning platforms. Indeed, despite the wording of recital 42, where the application of the educational exception under Article 5(3)(a) in the digital world was explicitly taken into consideration, the directive did not develop this principle in its prescriptive part, leaving Member States with the freedom to decide whether and how to implement that exception.[53] As a consequence of this approach, the implementation under national law of the educational exception provided under the EUCD resulted in a highly fragmented legal scenario that, according to the European Commission, creates a huge obstacle to cross-border educational services and activities and stifles the use of new technologies in education, to the detriment of both students and European educational institutions.[54] That is just the opposite outcome of what a directive wishing to harmonize copyright laws for the information society should have ideally achieved.

3.1 Types of educational exceptions and their fields of application

Considering the low degree of harmonization of copyright exceptions at the EU level, the legal treatment of educational uses remains essentially a matter for national law. As we will see in this section, in continental European countries, exceptions covering certain educational uses are shaped clearly enough by legislation and often take the form of statutory licenses. In exchange for freedom of use, such licenses create a remuneration right in favor of copyright holders. In northern Europe, in contrast, copyright law delegates the definition of fair educational uses mostly to the collective bargaining of organizations representing stakeholders. A different example is given by U.S. copyright law, under which the educational uses falling outside the field of application of the fair use doctrine, and of that of the specific exemptions for teaching provided in §110 of the U.S. Copyright Act, are regulated through effective licensing mechanisms.

3.1.1 Continental Europe

In continental Europe, copyright exceptions for education cover uses that are very similar to those of the first paragraph of Article 70 ICA. Educational uses concern acts such as the reproduction and public communication of small parts of works or extracts from newspapers or periodicals on condition that they are undertaken for purposes of illustration (and, thus, exclusively to the benefit of a defined and limited circle of students) and without commercial purposes. As already mentioned, Article 5(3)(a) EUCD now imposes these requirements on EU Member States.[55]

In spite of similarities, each legal system following the above-mentioned model is characterized by a different combination of elements concerning educational exceptions: the recognition of a remuneration right in favor of copyright holders; the individuation of the beneficiaries of the exceptions (i.e., classes of individuals and of institutions) and of the types of copyrighted works

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[52] See Commission of the European Communities, *Green Paper - Copyright in the Knowledge Economy*, Brussels. COM (2008) 466/3; Commission of the European Communities, *Communication from the Commission. Copyright in the Knowledge Economy*, Brussels, 19/10/2009, COM (2009) 532 final. Both documents are available on the website of the European Commission: http://ec.europa.eu/internal_market/copyright/index_en.htm.

[53] See Commission of the European Communities, *Green Paper, Copyright in the Knowledge Economy*, op. cit., p. 16.

[54] Ibidem, p. 17.

[55] See §2.1.1. *supra*.

included in their field of application; and the definition of the limits of space and time in which the mentioned acts should be accomplished in order to be legitimate.

Countries like Germany, France and the Netherlands create proper statutory licenses for educational uses of small parts or extracts from published works, while establishing a symmetrical remuneration right in favor of right-holders.[56] Spain, in contrast, achieved a similar outcome at the time of implementing the EUCD through the extension of the exception of quotation for teaching purposes, under Article 32 of Intellectual Property Act, but with no right to remuneration for copyright holders.[57] Originally, the above-mentioned Spanish provision exempted from authorization all quotations made for purposes of analysis, comment or criticism for purposes of teaching or research. Now, a second, distinct paragraph makes the reproduction, distribution and communication to the public of small fragments of copyrighted works free on condition that these acts are undertaken for educational ends with no commercial purposes.[58] In principle, the fact that Spanish law does not establish a right to remuneration in favor of copyright holders renders the quotation exception very similar to that of Article 70 ICA (see §4 below). However, unlike Italian law, the Spanish exception for quotation in teaching has had a wider field of application as a result of the open and flexible way with which the case law has interpreted it.[59]

As anticipated above, the mentioned exceptions markedly differ in their respective fields of application. This is because some States restrict the benefit of educational exceptions to specific classes of users and institutions, whereas in other jurisdictions (for example, France and Italy) restrictions of this kind do not exist. For instance, whereas Germany provides that only secondary school institutions and institutions of higher and continuing education can benefit from the educational exception, Spain provides only that educational institutions be officially recognized (the law refers to the "educación reglada"). Certain systems also exclude particular classes of works from the field of application of educational exceptions: Spanish law excludes school books and university handbooks; German law excludes works specifically conceived for didactical uses and cinematographic works before the expiration of two years from the time of release in cinemas; French law excludes, in addition to specifically didactical works, sheet music. Finally, as far as spatial restrictions are concerned, German law exempts from copyright the communication of small fragments of a work (or of small works), and of single articles from newspapers or periodicals in so far as online transmissions of such materials occur to the exclusive benefit of a limited and defined circle of participants in a class.[60] Interestingly, for the sake of such exemption, German law also exempts from copyright those

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[56] See Article 52 of the German Copyright Act (*Urheberrechtsgesetz*), which creates a remuneration right that is managed, on a mandatory basis, by a collecting society (the text of the law is available on the website http://gema.de). For France, instead, the compensation takes the form of a lump sum payment: see Article 122-5, paragraph 3, letter e), of the Intellectual Property Code, as modified by Law 961/2006, which implemented the EUCD: http://legifrance.gouv.fr. The provision under discussion, which came into force on January 1, 2009, introduced for the first time under French law an exception directly dealing with both education and research. From 2005 to 2008, the use of copyrighted works for teaching activities and research was regulated by means of specific agreements concluded by the Minister of Education, on behalf of educational institutions, and by the Minister of Culture, on behalf of the copyright holders. For the Netherlands, see Article 16 of the Dutch Copyright Act, which establishes a remuneration right managed by associations of publishers such as Reprorecht and PRO: see http://www.auteursrechtenonderwijs.nl.

[57] Article 32 of the Intellectual Property Act (*Ley de Propiedad Intelectual*) enacted through Real Legislative Decree n. 1/1996, as modified by Law no. 23/2006, published in the Boletin oficial del Estado on July 8, 2006: see http://boe.es.

[58] *Ibidem*, Article 32, par. 2.

[59] See R. XALABARDER, Study on Copyright Limitations and Exceptions for Educational Activities, op. cit., pp. 78-80.

[60] See S. ERNST e D.M. HAEUSERMANN, *Teaching Exceptions in European Copyright Law – Important Policy Questions Remain*, Berkman Center for Internet and Society at Harvard Law School, Research Publication No. 2006-10, August 2006, available at http://cyber.law.harward.edu/publications, pp. 9-12.

temporary reproductions that are technically necessary to enable the above-mentioned transmissions within closed digital networks.[61]

3.1.2 Northern Europe

In Northern Europe, the approach to educational uses is slightly different from that of continental Europe. What characterizes the U.K. and Scandinavian copyright systems is the idea of leaving the definition of educational uses to the collective bargaining, instead of fixing it directly into the legislation. In the U.K., a specific "fair dealing" exception for educational activities does not exist, although other exceptions do exist for uses justified by purposes of research and private study and, additionally, for use of protected works for criticism or discussion of current events.[62]

Even if the exception of criticism might apply in the abstract to educational uses, considering also the flexibility of the concept of fair dealing, the exception under discussion is insufficient to cover educational uses that extend beyond the distribution or transmission of very short extracts of copyrighted works.[63] The only exception established specifically in favor of education under U.K. law is that which allows educational institutions to photocopy a minimum percentage of photocopies (one percent per trimester) of literary, dramatic or music works, and which applies only if there are no applicable agreements concluded by the parties concerned.[64] It is evident that a rule of this kind gives copyright holders and educational institutions a high incentive to negotiate collective licenses for all educational uses of protected works, including photocopying beyond the tight limits established by law.

In the Scandinavian countries (i.e., Denmark, Sweden, Norway), the definition of educational uses is subject to the conclusion of extended collective licenses, which are concluded, on the one hand, by associations representing right-holders recognized by the government (for instance, in Denmark, the Ministry of Culture) and, on the other hand, by single educational institutions or by organizations representing other educational institutions of the same type or level. The key aspect of this type of agreements is that the law extends their subjective field of application by granting them general (i.e., *erga omnes*) effects.[65] Traditionally, such agreements have authorized and regulated mostly reproduction for educational purposes, such as photocopying and copying of any published work and radio and TV broadcasts.[66] Nowadays, however, the Scandinavian extended licenses have moved further. An organization like COPYDAN (Denmark), for instance, has offered educational licenses since 2002 that include not only photocopying, but also the possibility of digitizing protected works and placing them at the disposal of teachers and students on closed networks with the consequent

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61 See S. VEZZOSO, E-learning e sistema delle eccezioni al diritto d'autore, op. cit., pp. 146-148.

62 See, respectively, §§29 and 30 of the Copyright, Designs and Patents Act of 1988.

63 See S. VEZZOSO, *E-learning e sistema delle eccezioni al diritto d'autore*, op. cit., pp. 161-163, provides an analysis of U.K. law on this issue.

64 See §36, par. 2, of Copyright, Designs and Patents Act, 1988.

65 See Commission of the European Communities, *Green Paper, Copyright in the Knowledge Economy*, op. cit., pp. 16-17; R. XALABARDER, *Study on Copyright Limitations and Exceptions for Educational Activities*, op. cit., pp. 81-82. The exclusion of certain classes of works from the scope of the extended collective licenses is relevant: for example, under Article 13 (par. 2 and 3) of the Danish Copyright Act (available in an English version on the website of the Ministry of Culture: http://ku.dk/english/Legislation/Copyright/) works such as computer programs and cinematographic works, with the exception of short extracts from movies transmitted on TV, cannot be covered by educational licenses.

66 See R. XALABARDER, *Study on Copyright Limitations and Exceptions for Educational Activities*, op. cit., p. 81. This author emphasizes that the compensation paid to the organizations of copyright holders under this licensing scheme amounts to an annual flat fee per student. In addition, extended collective licenses permit the photocopying of no more than twenty percent or twenty pages of each work.

creation of databases accessible through a password and the possibility of using copyrighted works in the creation of digital presentation tools (such as Powerpoint).[67]

3.1.3 United States

Finally, it seems relevant here to briefly recall the regime of educational exceptions under U.S. copyright law, considering the relevance of the U.S. university system at the international level and the specificity of the doctrine of fair use.

The U.S. copyright system is characterized by the existence of two completely different types of exceptions applicable to educational uses. On the one hand, there is a general doctrine, applicable to any sort of activity that is non-authorized by the copyright holder, which is that of fair use. This doctrine was initially developed by courts and was subsequently codified in §107 of the Copyright Act of 1976.[68] On the other hand, a specific set of educational uses should be considered free as a result of the provisions of §110, which was modified by the Technology, Education, and Copyright Harmonization Act (TEACH) in 2002 with the aim of regulating and facilitating the use of copyrighted material for education in the digital environment.[69]

The fair use doctrine gives rise to a system of exceptions that is to a certain extent antithetic to that of continental Europe and to the idea of limiting the subject matter of copyright through specific and punctual provisions, like the exceptions of *droit d'auteur* systems. The doctrine of fair use operates *ex post*, and it is applied by courts on a case-by-case basis anytime a court reviews an alleged copyright infringement. The doctrine of fair use makes it possible for a court to find a concrete unauthorized use of a copyrighted work for educational purposes (including the reproduction and distribution of copies of the work for use in the classroom, which is an example of fair use expressly foreseen by the law) compatible with the evaluation criteria spelled out under §107 of the U.S. Copyright Act. Even considering the substantial differences existing between the U.S. and the European copyright systems, the fair use doctrine and its criteria are clearly designed to achieve the same objective of European exceptions, i.e., preventing unauthorized uses from competing with any forms of commercial exploitation that are exclusively granted by the law to the copyright holder. According to §107, in assessing the legitimacy of a non-authorized use, courts must consider the aim and the character of the use, the nature of the work and the quantity or portion of the work used, as well as the effect of the use on the potential market value of the work.

The clarity of the objective of the fair use doctrine contrasts with the challenge of applying it in the field of education, mostly because of the open character of this doctrine. When applied to certain uses (such as that of photocopying for distribution in the traditional classroom) fair use would certainly

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67 COPYDAN Writing (see http://copydan.dk/writing) is an organization recognized by the Danish Ministry of Culture and authorized by the Ministry itself for the conclusion of agreements for educational uses of works protected by copyright, under the mechanism of extended collective licensing established under Article 13 of the Danish Copyright Act. So far, the COPYDAN Writing has concluded licenses for the activity of photocopying and for other educational uses with elementary and secondary schools, technical and commercial institutes, colleges for the training of teachers, universities, music schools, institutes of culture, and other institutions of higher education. Moreover, COPYDAN has defined new licenses to authorize digital uses of literary works through closed networks that students can access through a password. Thanks to Jens Schovsbo of the University of Copenhagen and to Anders Christian Rasch, managing director of COPYDAN Writing, for the valuable information.

68 See Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code, §107 (*Limitation on exclusive rights: Fair use*), available at http://copyright.gov.

69 See U.S. Code, Title 17, §110 (*Limitation on exclusive rights: Exemption of certain performances and displays*), as modified by the Technology, Education, and Copyright Harmonization (TEACH) Act, Section 487, which came into force on November 2, 2002. A detailed analysis of the legislative process which led to the enactment of the TEACH Act is provided by the American Library Association (ALA) at http://ala.org/ala/issuesadvocacy/copyright/teachact/distanceeducation.cfm.

provide a higher degree of legal certainty if the doctrine were more precise in terms of criteria of quantitative determination.[70] Secondly, the field of application for fair use is drastically reduced by the development of effective licensing mechanisms for many types of educational uses of protected works (see *infra*, §3.2.1), which makes it more difficult for courts to find unauthorized uses ultimately fair, especially when such uses are undertaken by individuals or entities pursuing commercial ends.[71]

When evaluating this profile of fair use, a pending dispute between publishers (Cambridge University Press and Oxford University Press) and a public university (Georgia State University) before the Georgia Northern District Court is particularly relevant. In short, the publishers asked the court to ascertain whether the making and delivery of electronic copies of educational materials (course readings) to students, without authorization from or payment to the publishers, constitutes a copyright infringement.[72]

In addition to the fair use doctrine, specific copyright exemptions regulate educational uses in the United States. Considering their typology and their fields of application, these exemptions are very similar to the exceptions established by certain European countries (such as Germany: see §3.1.2 *supra*) in conformity with Article 5(3)(a) EUCD. By modifying §110 of the U.S. Copyright Act, the TEACH Act of 2002 aimed at extending the subject matter of fair uses in the digital environment and at offering a sufficient degree of legal certainty to teachers and educational institutions through the punctual identification of digital free uses of copyrighted materials in the context of distance education.[73]

With the modification of the second paragraph of §110, the traditional notion of a classroom was extended in order to embrace the virtual equivalent of a classroom, which does not require the presence of students in the same physical place. Before the reform of §110(2), the exemptions from the exclusive right of public performance to the benefit of educational activities concerned essentially closed circuit television and radio broadcasts. Since the TEACH Act has come into force, in contrast, these exemptions allow for the digitization and reproduction of copyrighted materials in analog format for their communication through the Internet to course participants, in so far as the materials are

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70 To reduce uncertainty in the implementation of the fair use doctrine, in 1976 the House of Representatives of the U.S. Congress promoted the adoption, through a collective agreement, of guidelines for the application of fair use in the activity of photocopying and distribution of books and periodicals in classrooms of not-for-profit educational establishments: see *Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals*, House of Rep. no. 94-1476, p. 68 (1976), available at http://copyright.gov. Such guidelines constitute an important example of standardization in the application of fair use in the field of analog uses: see R. XALABARDER, *Study on Copyright Limitations and Exceptions for Educational Activities*, op. cit., p. 53.

71 In the most important case that has been settled in this field so far, the Court of Appeal of the 6th Circuit took into consideration the application of the fair use doctrine to the photocopying services of a copy shop that used to sell copies of course packs to the students of the University of Michigan: see *Princeton University Press, Macmillan, Inc., et al. See Michigan Documents Services, Inc., et al.*, 99 F.3d 1381 (6th Circuit 1996). Taking its decision with the dissenting opinion of three judges, the Court of Appeal rejected the exception of fair use considering that the plaintiffs had established specific licensing mechanisms for uses such as the production and sale of course packs. As a result, according to the court, such form of commercial exploitation deserved protection, in conformity with the fourth criterion spelt out under §107 of the U.S. Copyright Act (which imposes the assessment of the impact of a supposedly fair use on the potential market of the work and on its economic value).

72 See Cambridge University Press, Oxford University Press, inc., and Sage Publications, Inc., v. Carl V. Patton, Ronald Henry, Charlene Hurt and J.L. Albert, Georgia Northern District Court (notified on April 15, 2008), whose documentation is available at http://dockets.justia.com. The fact that this dispute is likely to establish an important precedent for the enforcement of fair use in the field of educational uses is stressed by VEZZOSO, E-learning e sistema delle eccezioni al diritto d'autore, op. cit., p. 186.

73 See *supra* note 70. For an exhaustive analysis see K. CREWS, *New Copyright Law for Distance Education: the Importance and Meaning of the TEACH Act*, American Library Association, available at http://ala.org.

pertinent to the subject matter of the course itself.[74] The TEACH Act also permits the full classroom representation or performance of "non-dramatic" literary and music works (for example, the reading of poetry or stories, or the performance of musical pieces without lyrics) and the projection of short extracts from movies or videos.

In conclusion, the TEACH Act provides for a number of relevant limitations of the scope of application of its new copyright exemptions in order to protect the commercial exploitation of the works by the right-holders, even in the field of education. To this end, the law provides that the aforesaid exemptions for educational uses do not apply in the case of materials available on the market in digital formats and of materials originally conceived for didactic uses (e.g., handbooks). The TEACH Act also provides that the exemptions under discussion should apply only to the benefit of teaching activities undertaken within *public* or *not-for-profit* educational institutions.

3.2 Licensing Models for Educational Uses

In each of the systems discussed in the previous section, licences and agreements concluded by representatives of educational institutions and of copyright holders constitute an essential element for the regulation of educational uses.[75] Such agreements are of crucial relevance since they aim at identifying the mechanisms and the levels of economic compensation of authors and other copyright holders.

Before starting with the analysis of licensing mechanisms in the field of educational use, it is necessary to make it clear that, due to the limited nature of this study, open access licensing will not be examined, notwithstanding its great relevance for teaching and research. By opting for open access, researchers unilaterally place the results of their work at the public's disposal, without any restrictions of use and for free in electronic format, so as to guarantee the widest possible access to scientific literature on digital archives maintained by academic institutions, research centers, governmental authorities and other institutions in pursuit of similar goals. Authors might opt for such licensing forms either spontaneously or in compliance with directives or guidelines given by their employers (universities or research centers). The movement has its "manifesto" in the Berlin Declaration of 2003 on open access to scientific literature, promoted by the Max Planck Society,[76] and it constitutes a specific area of work for academic organizations like CRUI (Conference of Italian University Rectors).[77]

3.2.1 United States and England

The most relevant examples of *voluntary* licenses with a commercial character concluded by representatives of copyright holders and of educational institutions are, beyond doubt, in the United States. This is mostly due to the nature of the U.S. educational system, which, especially at its most

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[74] The legal treatment of distance education under U.S. copyright law before the entry into force of the TEACH Act is effectively narrated by K. CREWS, 'Distance Education and Copyright Law: the Limits and the Meaning of Copyright Policy', Journal of College and University Law, Vol. 27, (1), 2000, available at http://papers.ssrn.com.

[75] The organizations representing holders of reproduction rights on literary and figurative works at the national level are gathered and represented at the international level by the International Federation of Reproduction Rights Organization (IFRRO). IFRRO's institutional mission, since its foundation, has been that of protecting the interests of its members and to assist national organizations in the development of effective systems of collective rights management, with a view to facilitating also the conclusion of agreements of mutual representation among its members. For more information about the history and the activities of the organization, see its website at http://ifrro.org.

[76] See *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, Open Access at the Max Planck Society, available at http://oa.mpg.de.

[77] See, for example, the guidelines for open access journals developed by CRUI's Commission of Libraries in the area "Open Access" on the website http://crui.it.

advanced levels, is characterized by the strong presence of private universities in direct competition with each other (and with the best public universities) and subject to periodic efficiency reviews by agencies or independent observatories.[78]

In a system like this, in which universities gain profits and students pay tuition fees proportional to the quality of the services received (often running into debt), access to copyrighted materials for education is viewed as a necessary element to guarantee a full and high-level learning experience and is granted through technologically advanced instruments. This is the reason why more than one thousand academic institutions each year undersign specific licenses for educational use with the Copyright Clearence Center (CCC), which acts as a representative for the vast majority of right-holders on works and materials from various sources (books, newspapers, periodicals, scientific publications, websites, blogs, etc).[79] Among the typologies of licenses granted by CCC for academic activities, the most important is the *Annual Copyright License*, which covers the entire repertoire managed by CCC and authorizes the use of materials, both in analogical and digital format, for the reproduction of course packs, distribution in traditional classrooms, transmission through closed networks and via e-mail and, last but not least, for photocopying.[80] Together with this licensing scheme, CCC offers other educational licenses based on a pay-per-use basis and regarding specific categories of works, such as the inclusion of professional images inside of materials for courses, presentations and webpages.[81]

Other examples of licences for educational use are embodied in the terms and conditions of services of consultation, digital copying, photocopying and transmission by e-mail of copyrighted works and documents that U.S. universities undersign with the proprietors of wide databases to provide their students and researchers with study materials for courses, seminars and other activities. This is the case with all U.S. law schools, which conclude such agreements in order to guarantee to each student a personalized access to platforms such as Westlaw (Thomson Reuters) and Lexis Nexis (Reed Elsevier), which collect, index and place at the disposal of authorized users thorough databases containing case law, articles extracted by law journals, official documents such as legislative and administrative acts, etc.[82]

In the U.S. there are also examples of agreements concluded by university libraries and not-for-profit organizations, such as JSTOR or the California Digital Library (CDLIB), for the digitization of works in analog format and for making available catalogues of scientific periodicals and collections of scholarship articles in digital format through online repositories. All these materials are placed at the disposal of researchers and students of the universities adherent to the projects (in the example of the CDLIB, the academic community of the University of California), under standard licensing conditions requiring any content provider to permit uses that include the insertion of their works into course packs, on paper or in electronic formats.

Even in Europe, where educational systems are mostly public and funded by the money of taxpayers, examples exist of voluntary licences for educational uses. Among the countries taken into consideration in this study, the U.K. is certainly the one where voluntary licensing plays the most important function. Voluntary licensing is encouraged by the fact that U.K. law does not provide for a

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78 See, for example, the rankings of U.S. national universities published by the U.S. News and World Report in the "Education" section at http://usnews.com.

79 The Copyright Clearance Center (CCC) is a not-for-profit organization established in 1978 to guarantee an efficient management of copyright on materials coming from both analog and digital sources, such as newspapers, periodicals, books, webpages, blogs, etc. The organization manages the rights of its members both in the United States and at the international level: see http://copyright.com.

80 The CCC places the subscribers of its the annual licence in a position to know at any time and very easily (through direct access to CCC's databases) whether a certain work is included in the scope of its license and is usable.

81 See, for example, the "ReadyImages" licence at http://copyright.com/readyimages.

82 See, respectively http://westlaw.com and http://lexisnexis.com.

specific fair-dealing exception for education, nor does it create a sufficiently broad exception for photocopying. Right-holders and institutional users of protected materials are, therefore, given a high incentive to conclude standard agreements for the regulation of photocopying in schools and universities and for other educational uses. The copyright licences applied to educational activities of U.K. universities are the result of collective bargaining taking place between the Copyright Licensing Agency (CLA), which is the representative of copyright holders, and the umbrella organization Universities UK (UKK).[83]

Even if its present center-right government is dramatically reducing funds for education and academic research, forcing universities to heavily increase tuition fees and inciting student protests,[84] the U.K. still has a predominately public university system, in which universities enjoy a high degree of autonomy and responsibility that is also mirrored in its allocation of funds for research.[85] Moreover, the fact that any dispute regarding agreements or negotiations with collective rights managers of copyright, like CLA, can be examined by the Copyright Tribunal (a body created within the Intellectual Property Office, which is the denomination for the English patent office used as of 2007), shows a high interest of the government in a correct enforcement of collective licensing schemes.[86]

Collective bargaining for educational uses concerns, primarily, the activity of photocopying and the digitization of extracts of copyrighted works, such as books, newspapers and scientific periodicals in analog format for higher education institutions (*Basic Licence*). A more recent and broader licence, known as the *Comprehensive Higher Education Licence*, extended the scope of the previous licensing scheme beyond the realm of photocopying.[87] Whereas the *Basic Licence* allows photocopying and scanning within specific quantitative limits of works in paper format (for example, a single chapter of a book, or an article from any issue of a periodical), the *Comprehensive Higher Education Licence* extends to the clearance of digital copies of the same materials in electronic format, giving universities usage rights, such as sharing and downloading copies on closed networks (like intranet), and applying these rights to materials used in traditional classrooms and for course packs.[88]

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[83] The Copyright Licensing Agency (CLA), established in 1983, is owned by the two most important collecting societies for the management of reproduction rights of authors and publishers in the U.K., i.e., the Authors' Licensing and Collecting Society (ALCS) Ltd and the Publishers' Licensing Society (PLS) Ltd. CLA, which is one of the most active members of IFFRO, has the function to manage the rights of the members of ALCS and PLS as well as those of the partners of the Design and Artists Copyright Society Ltd, with which it has a representation contract. Universities UK (UKK) is an organization formed by the rectors of the U.K. universities that arose from the Committee of Rectors of U.K. Universities (a body similar to the Italian CRUI).

[84] Among many press articles about violent student protests in the U.K. in December 2010, see J. SHEPHERD, 'Students plan more protests over tuition fees and cuts', *The Guardian*, December 30, 2010, http://guardian.co.uk.

[85] See the funding system based on the Research Assessment Exercise (RAE): http://rae.ac.uk.

[86] The jurisdiction of the Copyright Tribunal is defined by §§149, 205B and by Table no. 6 of the Copyright, Designs and Patents Act of 1988: see http://ipo.gov.uk/ctribunal-about.htm. The effectiveness of the system of arbitration before the Copyright Tribunal in the field of educational uses was proved by the resolution in 2002 of a dispute arisen between UUK and CLA with regard to certain provisions of the licence that these parties concluded in 1998 for the activity of photocopying: see *Universities UK* v. *Copyright Licensing Agency* (2002). In that occasion, UUK asked the Copyright Tribunal to establish, beyond the adequacy of compensation paid by universities for each single student under the licence, the reasonableness of the exclusion of photocopies for production and distribution of course packs from the scope of the license itself. As emphasized by R. BURRELL and A. COLEMAN, *Copyright Exceptions. The Digital Impact*, Cambridge University Press, Cambridge, 2005, pp. 133-135, in that case the U.K. Copyright Tribunal came to a conclusion that was favorable to universities. Indeed, the Tribunal fixed a compensation level for the licence that was much closer to the amount originally offered by UKK and determined the inclusion of photocopies for course packs into the subject-matter of the licence.

[87] The text of both the U.K. licenses for higher education can be consulted at: http://cla.co.uk/licences/licences_available/he/uuk

[88] The above-mentioned U.K. licences provide that the making available of digital copies and photocopies to students must be undertaken in direct relationship with a specific course of study and that such deliveries should be authorized by a

In addition to the CLA licences, another relevant licence for educational uses in the U.K. is that of the Educational Recording Agency (ERA) for the reproduction and public performance of recordings of radio and TV broadcasts owned by partners of the organization (e.g., the BBC, the British Recorded Music Industry, Channel Four Television Corporation, Channel 5 Broadcasting Ltd, etc).[89] As of 2007, the original *ERA Licence* was upgraded with the release of the *ERA Plus Licence*, which extends the usage privileges granted by the first licence to on-line uses for education in both traditional classrooms and e-learning platforms.[90]

3.2.2 Continental Europe and Scandinavia

In the countries of continental Europe that this study has briefly taken into consideration, the recourse to voluntary licensing for educational uses is far more limited than in the U.S. and in the U.K. It has been seen above that in countries like Germany, France and the Netherlands, the law directly allows the same educational uses that are cleared through voluntary licences in the U.S. and in the U.K. on condition that educational institutions (or their representatives or supervisory authorities) pay compensation in favor of copyright holders. In these countries, therefore, there is a mechanism of statutory (i.e., compulsory) licensing through which umbrella associations or public bodies and collecting societies representing the parties concerned conclude agreements which set out how much money should be paid to copyright holders for use of their works in education.

In Germany, the Regions (on behalf of educational institutions) and several collecting societies (on behalf of right-holders) concluded a general agreement to calculate the economic compensation provided by the educational exceptions under Article 52a of the German Copyright Act. This agreement applies only to public educational institutions and does not comprise the economic compensation due for use of literary works, whose definition has been targeted under another agreement signed by the Conference of the German Ministers for Culture and Education and the collective rights manager of German publishers (*Verwertungsgesellschaft-VG Wort*).[91]

In Germany, therefore, it is a form of collective bargaining involving public and private actors that determines the amount of fair compensation due to right-holders and specifies the statutory quantitative limits of use of copyrighted works in education.[92] A similar mechanism has been established in the Netherlands, where the amount of economic remuneration for the activities exempted from copyright under Article 16 of the Dutch Copyright Act is set out by agreements concluded by collective rights managers authorized by the government, such as Reprorecht and PRO,

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person appointed by each educational institution (a teacher, for example). Moreover, the licences exclude certain categories of copyrighted materials (e.g., sheet music) from their scope.

89 See http://era.org.uk/what_license.html.

90 See http://era.org.uk/era_plus.html.

91 See http://vgwort.de. S. VEZZOSO, E-learning e sistema delle eccezioni al diritto d'autore, op. cit., pp. 151-152, recalls the great difficulties with which VG Wort and German universities, represented by the the Conference of the Ministers of Regions, sought to agree about the criteria of determination of fair compensation. Whereas publishers proposed to calculate compensation by per-use rates, the conference of ministers expressed a strong preference for a flat-rate compensation system. Not even a proposal of conciliation coming from the German Arbitration Panel of the German Patent Office, based on a system of remuneration per typology of work and use, could break the deadlock, having the proposal been rejected by the Ministers.

92 S. VEZZOSO, *E-learning e sistema delle eccezioni al diritto d'autore*, op. cit., pp. 151-152. This Author points out that the agreement of 2007 concluded by the German Regions and collecting societies for the determination of compensation due under Article 52a of the German Copyright Act not only contained criteria for calculation of compensation (i.e., a flat-rate payment for 2008; a compensation calculated through a rate for each type of use for the following years) but also interpreted and gave effectiveness to generic legislative definitions (for example, the definition of "small parts of a work", that the agreement quantified in a limit of fifteen per cent for each work used or the fixation of a 5-minute limit of use for cinematographic works).

and by organizations representing distinct sectors of the educational system, including the association of Dutch universities.[93]

A stronger intervention of the State in this field is evident in countries like France and the Scandinavian countries, which adopt (or adopted until recently) systems of extended collective licenses. Under this model, collective bargaining determines not only the levels of economic compensation that educational institutions (or their representatives or supervisory authorities) should pay to copyright holders, but also the specific kind of permissible educational uses. A key element of this model is that the law automatically extends the effects of collective bargaining to the works of any right-holders, including those who are not represented by the collecting societies signing the agreements.[94] In France, until entry into force of Article 122-5, paragraph 3, letter e) of the Intellectual Property Code in January 2009, the absence of a specific educational exception led the Minister of Education (on behalf of educational institutions represented as a whole) and the Minister of Culture (on behalf of all copyright holders) to negotiate and conclude specific agreements aimed at clearing copyrights for use of protected works in teaching and research activities.[95] In Denmark, instead, the mechanism of extended collective licensing created by Article 13 of the Danish Copyright Act delegates the task of defining permissible uses and setting out the amount of remuneration for each of these uses to agreements concluded by representatives of right-holders (such as Copydan, authorized by the Ministry of Culture) and of the different sectors of the system of public education.[96]

Lastly, it is not a matter of coincidence that one of the very few examples of voluntary licensing in continental Europe is developing, though slowly, in Spain, where copyright exceptions applicable to education (mostly the broad exception of quotation under Article 32 of the Spanish Intellectual Property Act) do not provide for any remuneration right in favor of copyright owners. Nowadays, an organization like CEDRO (*Centro Español de Derechos Reprográficos*), which manages the reproduction rights of Spanish publishers, is claiming the right to authorize any educational uses beyond the private copying of a work made for strictly personal use by the lawful acquirer of an original format of the work.[97] CEDRO has developed and offered different models of educational licences targeted at different sectors of the Spanish educational system.[98] The highly critical element of this initiative is that the scope of these licences (which can be signed by each institution individually) extends to uses that are likely to be covered by the aforesaid quotation exception. This

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93 See, respectively, the websites of collecting societies Reprorecht (http://reprorecht.nl/Onderwijs) and PRO (Publicatie- en ReproductieRechten Organisatie: http://stichting-pro.nl/nl/Universiteit). What distinguishes the Netherlands from Germany is a greater dynamism of collecting societies, which offer licences to several categories of educational institutions. Moreover, all Dutch collecting societies adopted a common code of conduct to guarantee efficiency and transparency in the collection and distribution of compensation and royalties, including those coming from educational uses.

94 See Commission of the European Communities, *Green Paper*, op. cit., p. 16, in which the Commission referred to both the system of extended collective licensing in Denmark, Sweden and Finland and to France's system of "ministerial" licenses, underlining pros and cons of this approach. On the one hand, the legislative delegation of educational uses to the collective bargaining has the advantage of better targeting the needs of educational institutions in their day-to-day activities. On the other hand, as the Commission observed, this system does not assure any legal certainty if the contracting parties do not reach an agreement or establish excessively restrictive conditions.

95 See *supra* note 56.

96 See *supra* note 67.

97 See http://cedro.org/licencias_cedro.asp. In developing its own licenses and in fixing the related rates, CEDRO starts from the (questionable) assumption that in Spain copyright exceptions for educational use do not apply to literary works. According to CEDRO, the only exceptions that can be applied to the use of literary works are those which permit copying for personal use, for public security purposes or for the right execution of an administrative, judicial or parliamentary process and copying made with not-for-profit purposes in favor of people with disabilities. As a result, CEDRO ends up holding that copyright holders must duly authorize all other types of copies. This approach is revealed by a document containing the general rates for the year 2010, available at: http://cedro.org/files/Tarifas2010.pdf.

98 See http://conlicencia.com.

means that the CEDRO licensing solutions are located in a grey area in which it is very hard to distinguish free uses stemming from copyright exceptions from uses subject to the authorization power of copyright holders. Spanish universities are, therefore, reluctant to pay for educational uses that they consider to be freely permitted by law. Interestingly, the uses that CEDRO has been trying to sell to educational institutions are identical or similar to those that fall under the field of application of copyright exceptions in other countries of continental Europe, which reveals an objective overlap between the areas of free and fared uses.[99]

[99] CEDRO's licences authorize the digitization of ten percent of a work or of an entire article contained in a periodical; the reproduction on a server and the subsequent delivery of digitized material through a closed network (like intranet) to students; the display, printing and email delivery of copies of the educational material by the authorized user (for example, a teacher or a student). See http://www.conlicencia.com/Conlicencia/Sectores.html; see VEZZOSO, *E-learning e sistema delle eccezioni al diritto d'autore*, op. cit., p. 177, who recalls that CEDRO's licenses have been signed by several Spanish universities, including the Universidad Oberta de Catalunya and the University of Malaga.

4. In Search of Legislative Solutions for the Italian Case

It seems evident to me that, to invert the trend and break the present deadlock (thereby reducing legal uncertainty and the widespread infringements of copyright in the field of educational activities), Italian lawmakers should urgently reform the structure and the provisions of Article 70 ICA. In doing so, the new law should enact a specific provision for educational use and repeal the provision of paragraph 1-*bis*, which, as it is, is likely never to be concretely applied. The new provision I am advocating should create a mechanism of statutory licensing, providing for a right to remuneration in favor of authors and publishers that should also take digital uses into consideration and should identify the beneficiaries of the statutory licence and the categories of works included in its field of application. We have seen that this is the model adopted for educational uses by EU countries like Germany and France, whose copyright laws and whose systems of public education are very similar those of Italy.

German law, in particular, following the prescriptions of Article 5(3) and Article 5(5) EUCD, identifies permissible educational uses through a set of provisions that is much more detailed than the wording of Article 70 ICA. The approach of France in introducing an exception for education into the Intellectual Property Code, which came into force in 2009, was identical. In both cases, the exceptions for educational use are conceived as statutory licences covering a set of clearly identified uses reserved to closed circles or networks of teachers and students involved in a specific educational activity. As already mentioned, German law also took steps to legalize acts of digital reproduction and communication that constitute a technical necessity for the extension of the notion of classroom and for the inclusion of online deliveries of copyrighted materials within closed digital networks in the scope of the exception.

As things stand, at least on paper, Italy holds a position very similar to that of Spain, even though the judicial implementation of Article 70 ICA has not developed in a way that makes this provision flexible enough to stretch the physical limits of classrooms and to allow for free digital uses in the realm of distance education. As in Spain, the lack of a remuneration right for copyright holders in Italy and the extreme vagueness of the provision applicable to educational uses have had the effect of radicalizing the clash among stakeholders, hindering the conclusion of any agreement that might complete an inadequate legal framework and ensure, from an economic point of view, an effective balance of interests.

In a mostly public educational system, like that in Italy, it is unrealistic to think that schools and universities, with fewer and fewer resources at their disposal and an administrative and financial autonomy not comparable to those of U.K and U.S. universities, should suddenly decide to sign, individually, complex and onerous licences such as those proposed in Spain by CEDRO and in Italy by the Italian Association for the Rights of Reproduction on Creative Works (AIDRO), acting also on behalf of the Italian Association of Publishers (AIE).[100]

AIDRO offers a licence known as the *Educational Standard License*, signed by public and private educational institutions, which aims at legalizing the phenomenon of unauthorized photocopying and enforcing the quantitative limit of fifteen percent established by the statutory licence of Article 68 ICA.[101] In a set of guidelines on the management of copyright in the university system, which ideally accompanies the above-mentioned licence, AIDRO shows the legal background of its own licensing activity.[102] In doing so, the document, wrongly, fails to mention Article 70 ICA, taking for granted the

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[100] See http://aidro.org.

[101] See http://aidro.org/Gestionediritti/Licenze.aspx

[102] AIDRO (edited by), *Linee guida sulla gestione dei diritti d'autore nelle università*, May 2009, available at http://aidro.org/topmenu/DOCUMENTI.aspx.

impossibility of application of this provision for both digital and (rather incredibly) analog educational uses.[103]

The document at stake focuses exclusively on the limits of application of the photocopying exception, as if this were the only exception provided in Italy to the benefit of educational uses.[104] The guidelines establish a precise distinction between the tasks performed by the Italian Association of Authors and Publishers (SIAE) in the management of the fair compensation regime provided by law for the activity of photocopying (Article 68 ICA) and the prerogatives of AIDRO for the licensing of all uses that go beyond the quantitative limits of Article 68 ICA.[105] In its examination of the applicable laws, unfortunately, the document paints white (or black, if one prefers the point of view of universities and other educational institutions) aspects of the Italian copyright system that –from a more impartial position – are really grey. In the guidelines, for instance, it is held that, since the production of university course packs is not explicitly covered in the exception that regulates photocopying for strictly personal use, this use should always be authorized by right-holders (i.e., AIDRO) in order to be legitimate.[106]

This assertion does not seem correct, at least in the event that photocopies of extracts from books or scientific periodicals are distributed to students in a classroom (under the umbrella of Article 70 ICA) without exceeding the statutory limit of fifteen percent of any volume or article of a periodical included in the course packs (under Article 68 ICA).[107] In addition to that, AIDRO takes the position that, since no specific exception for digital use is provided under Italian law, any digitization of protected materials or any use of works originally published in digital format is illegal without authorization of the copyright holder. Even this conclusion seems incorrect since neither the *ratio* nor the wording of Article 70 ICA excludes *a priori* the legitimacy of quantitatively limited uses in digital scenarios.[108] As emphasized in this study, it is the case law that does not seem to leave open the possibility of any technologically neutral enforcement of the educational exception, whose only limits are the requirements of illustration purposes and the absence of economic competition of the use with the commercial exploitation of the copyrighted work.

Just like the uses licensed by CEDRO in Spain, the digital uses AIDRO is seeking to license in Italy are placed in a grey area, in which public schools and universities do not know if they should ask for authorization and pay for the educational uses of course instructors.[109] In such an uncertain legislative

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[103] The only provision that AIDRO's document mentions with regard to Article 70 ICA is, paradoxically, the one of paragraph 1-*bis* that, as explained in this study, is likely to find no application whatsoever: see AIDRO, *Linee guida*, op. cit., pp. 11-12.

[104] As we know, this conclusion is incorrect since Article 68 ICA does not mention teaching purposes at all; instead, this provision establishes a general permission to photocopy up to fifteen percent of any volumes or issues of periodical for strictly personal use, on condition that right-holders receive fair compensation from copy shops or public libraries (according to the criteria established by Article 181-*ter* ICA): see Article 68 ICA, par. 3, 4 and 5.

[105] See AIDRO, *Linee guida*, op. cit., pp. 5-8, recalling the heavy penalties and administrative sanctions that Italian law provides for the activity of illegal photocopying.

[106] See AIDRO, *Linee guida*, op. cit., p. 7.

[107] Holding the contrary would mean to admit that no connection and interplay exist between the provisions of articles 68 and 70 ICA. This would lead to the (in my view unreasonable) conclusion that the statutory licence for photocopying under Article 68 applies if the copier is a single student, whereas it does not apply if the user is the teacher photocopying material before distributing it to the students. The applicability of the exception of Article 68 ICA to the teacher's photocopying activity should also be suggested by the circumstance that Article 70, par. 2, ICA makes the reproduction of parts of works in anthologies for educational use (a use that is very similar to the production of course packs) subject to a mere remuneration right, and not to an exclusive right (see note 7 *supra*).

[108] See §2.1.2. *supra*.

[109] See AIDRO, *Linee guida*, op. cit., pp. 9-14. The authorizations granted by AIDRO to the library of Bocconi University in Milan, within an experimental partnership started in 2009, do not seem so generous and innovative as to give a public university – and Bocconi is a *private* university - a high incentive to change strategy and invest time and resources on the

framework, the incentive for schools and universities to individually sign licences, such as those of AIDRO, for all the courses they offer (with payment of compensation proportional to the number of course participants) is, therefore, very low. To reduce such a grey area, and to make things clearer and more to the advantage of educational institutions and copyright holders, it would be suitable to reform the Article 70 ICA, creating a statutory licence, which could take the provisions of Article 52a of the German Copyright Act (*Urheberrechtsgesetz*) or of Article 122-5, paragraph 3, letter e) of the French Intellectual Property Code, as models to follow. The new provision, after its first paragraph, which could remain as it stands, should precisely list all beneficiaries of the educational exception: for instance, higher education public institutions and other institutions recognized by the Ministry of Education, University and Research (MIUR), as well as their respective teachers, researchers and students. Moreover, any eventual exclusion of particular classes of work from the scope of this exception should be made explicit: for example, to be consistent with Article 68, paragraph 3, ICA, the reproduction of sheet music and scores could be excluded from the exception, as well as handbooks and cinematographic works, until the expiration of two years from their first release in cinemas. A special emphasis should also be placed on the extension of the educational exception to all acts of reproduction that are technically necessary to permit the online delivery of extracts of copyright works (irrespective of whether their original format of publication was analog or digital). This should be granted within closed networks or webpages, which are accessible only to the teacher and students of a given course through a personal identification code.

Finally, as in France and Germany, the new Italian provision should opt for a bargaining model for the concrete determination of the amount of fair compensation, which might prove to be smooth and sustainable in a predominantly public education system. Italian lawmakers might consequently decide whether to confer a lump sum character by law to fair compensation (as French law does) or not. This could be a system of collective management in which the criteria of calculation and the methods of payment of compensation would be negotiated and fixed, on the one hand, by the bodies representing universities and other higher educational institutions and, on the other, by collecting societies representing right-holders in the different categories of works included in the scope of the new educational exception (for example, literary works, sound and audiovisual recordings, photographic reproductions of figurative works of art, etc).

A good example of collective bargaining that could work as a model for educational uses exists under Article 181-*ter* ICA. Such a collective agreement aims at determining the lump sum compensation that Article 68 ICA provides for the activity of photocopying in public libraries.[110] Article 181-*ter* specifies that compensation for photocopying should be set out through an agreement concluded by SIAE and the associations of category concerned. On these grounds, in July 2007, SIAE (on behalf of its authors and publishers), the Italian Association of Publishers (AIE) and associations representing writers (respectively, the Writers National Union, the Free Union of Italian Writers and the National Union of Writers and Artists) signed an agreement with the Conference of the Italian University Rectors

(Contd.)

acquisition of permissions of use slightly wider than the ones granted (freely) under Article 70 ICA. The experimental licence under discussion, indeed, includes only the permission to digitize short extracts of literary works (taken from the repertoire of AIDRO) in analog format and to make them available to students for the duration of a course through a closed network managed by the university. AIDRO makes it clear that its licence for educational uses cannot be extended to "natively digital" materials, since publishers usually manage such materials directly and not under collective agreements: see AIDRO, *Linee guida*, op. cit., p. 11.

[110] Article 181-*ter*, par. 1, specifies that, in the absence of an agreement concluded by the parties, it must be a decree of the Prime Minister to proceed with these determinations. It is also provided that, once the amount of compensation is fixed, SIAE shall collect it and distribute it to right-holders, including the copyright holders that SIAE does not represent directly.

(CRUI), under which the annual compensation due for photocopies by Italian universities is linked and calculated proportionally to the number of students enrolled in each university.[111]

The educational exception of Article 70 ICA advocated here could usefully establish a statutory licensing mechanism similar to that of Article 181-*ter*. However, given the much higher variety of uses that the proposed exception would need to cover, such a mechanism should explicitly state a principle of distinct and proportional remuneration in favor of right-holders for every relevant class of educational uses (for example, the production of university course packs). The allocation of royalties coming from such compensation schemes could easily reflect the effective use of the single works in the different educational activities if the new law obliged universities – as a condition of legitimacy for the uses educational institutions undertake – to communicate periodically to SIAE, by digital means (e.g., a unique database with all necessary electronic rights management information), the aggregated data regarding all materials placed at the students' disposal, including on-line materials, as well as the number of the students that have effectively copied and used these materials.[112] This mechanism could be completed by the attribution of control powers to a committee composed of representatives of all concerned parties, such as that established under Article 6 of the CRUI/SIAE agreement, which could, in turn, guarantee an effective implementation of the new statutory licence, under the supervision of the Minister of Education, University and Research.

Today's political scenario in Italy, along with the lack of interest and commitment shown by recent governments in dealing with copyright law and a credible digital agenda, makes it hard to imagine the enactment of any legislative reform similar to that which I have sought to sketch above. The unfortunate story leading up to the introduction of paragraph 1-*bis* under Article 70 ICA (online publication of low- resolution or degraded music and images) is a clear example of this. Italian copyright law and policy would develop in a better direction if the commission established in May 2007 within the Permanent Advisory Committee for Copyright Law (with the institutional task of studying the adaptation of copyright law to new technologies) effectively found the time to analyze the complex relationship between educational uses and copyright protection.[113] As this article has shown, lawmakers should urgently find a remedy to the serious problems caused, especially in the realm of distance education, by the unbearable carelessness with which Italy implemented the EUCD and, in particular, its Article 5(3)(a), in 2003. The proposals formulated here are ideally addressed to this commission and to the Permanent Advisory Committee at large.

Finally, if a legislative reform of Article 70 ICA is not realistic in the short term, what is plausible, and indeed desirable in my view, in order to get out of the present *impasse*, is a shared initiative of CRUI and of the representatives of authors and publishers (SIAE, AIE and others) for the extension of the agreement they concluded for the determination and payment of fair compensation for photocopying in public university libraries. When renewing the agreement of 2007, which will expire at the end of 2011, the parties concerned will be in a position to negotiate and define the terms of a further collective agreement, concluded on a voluntary basis, to create a provisional and temporary licence for

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111 See *Accordo in materia di reprografia tra SIAE/AIE/SLSI/SNS/UNSA e CRUI* of 19 July 2007, registered at the Literary and Figurative Works Section (OLAF) of SIAE. The Author thanks CRUI for having placed this document at his disposal.

112 In the specific case of literary works, this system would allow SIAE to pay to AIE (or to AIDRO) royalties that would be proportional to the effective use of the works and would be addressed to specific or easily identifiable right-holders.

113 The Permanent Advisory Committee for Copyright Law is a consultancy body of the Minister for Cultural Heritage and Activities, whose composition and tasks are defined under Article 190 ICA. The activities of the Committee can be followed on the website of the Ministry for Cultural Heritage and Activities, in the section maintained by the General Direction for Libraries, Cultural Institutes and Copyright: http://librari.beniculturali.it. One of the most relevant recent initiatives of the Committee was the submission in December 2007 of a document with proposals for a copyright law reform to the then minister Francesco Rutelli. In this document, different working groups, formed by copyright experts and by representatives of different stakeholders, formulated proposals of reforms for many provisions of the Italian Copyright Act: see http://librari.beniculturali.it/upload/documenti/18_12_2007.pdf.

those categories of educational uses that, in my proposal, should be included in a new provision of Article 70 ICA. This agreement could provide not only for the criteria of calculation of the different types of remuneration due to authors and publishers for each class of permissible educational uses; it could also confer supervision and control powers to the technical committee established by the contracting parties, so as to lay out smooth and transparent modalities for the collection and allocation of licensing fees.


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