

Kluwer Copyright Blog

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

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

This series of two blogposts intends to shed light on the critical aspects of and potential “creepy” functions hidden in the jungle of terms of service and privacy policies of online services used for ERT. Our aim is to verify whether sufficient and clear information is provided, in order to enable teachers to carry out teaching activities and interact with their students without uncertainties as to the potential legal consequences of their use and concerns regarding the protection of their personal data.

To this end, we examined the terms and conditions of service, privacy policies and community guidelines (collectively ‘terms’) of a sample of nine online services used by teachers at universities across Europe to deliver ERT. The selected services include dedicated software for managing teams and groups of students online, content-sharing platforms and social networks, and video-communication services repurposed or retrofitted to answer the needs of education. Some applications include several of these functionalities. Our analysis looks at the standard terms of freely accessible versions as last accessed on 27 April 2020. We examined the terms of each online service in the light of the teaching activities most commonly employed. These include live discussions and asynchronous interaction with students, provision of teaching materials authored by the teacher or third parties, and submission of materials by students.

Copyright-relevant terms

	Control		Liability		Content Moderation	
	License to operate service	Broader license	Limited liability	Liability for content of other users	Removal mechanism	Complaint mechanism
Discord	Unproblematic clause	Explicitly problematic	Problematic by omission		Explicitly problematic	Unproblematic clause
Facebook	Unproblematic clause	Explicitly problematic	Unproblematic clause		Explicitly problematic	Unproblematic clause
G-Suite for Education	Explicitly problematic	Explicitly problematic	Unproblematic clause	Explicitly problematic	Explicitly problematic	Unproblematic clause
Jitsi	Unproblematic clause		Unproblematic clause		Explicitly problematic	Problematic by omission
MoodleCloud	Unproblematic clause		Problematic by omission	Explicitly problematic	Unproblematic clause	Problematic by omission
Microsoft Teams	Unproblematic clause	Explicitly problematic	Unproblematic clause	Explicitly problematic	Unproblematic clause	Problematic by omission
Skype	Unproblematic clause	Explicitly problematic	Unproblematic clause	Explicitly problematic	Unproblematic clause	Problematic by omission
YouTube	Unproblematic clause	Explicitly problematic	Unproblematic clause		Explicitly problematic	Unproblematic clause
Zoom	Explicitly problematic	Explicitly problematic	Explicitly problematic	Explicitly problematic	Unproblematic clause	Unproblematic clause

Unproblematic clause
 Explicitly problematic
 No clause
 Problematic by omission

The rules that govern the use of material protected by copyright on the online services examined are contained in terms, whose structure varies significantly. In examining these terms, we looked at three different aspects: control, liability and content moderation. The terms set by the services are considered against the background of the harmonized EU copyright rules mainly contained in [Directive 2001/29](#) (InfoSoc Directive) and the recent [Directive 2019/790](#) (DSM Directive), to be transposed into national law by 7 June 2021. Our analysis also takes account of the introduction of a new exception for cross-border teaching activities and a new liability regime for certain types of platforms under the DSM Directive.

Control

In relation to original and third-party content uploaded by teachers, we examined to what extent and for what purposes control over content is surrendered to the service. All terms state that the user retains ownership of uploaded material. Nonetheless, factual control is negotiated by means of licenses that vary greatly from one service to another. Most services require the user to agree to a license granting the licensee a right to perform acts in order to operate, enable and improve the

service (Discord, Facebook, Jitsi, MoodleCloud, Microsoft Teams, Skype, YouTube), which may also include authorization for third party contractors to enable interoperability (MoodleCloud).

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

All in all, the formulations of the licensing terms tend to be rather vague, if not imprecise. What, for example, are acts made "for the purpose of providing the service", when the service is essentially the making available of large amounts of protected subject matter? In addition, two online services (G-Suite for Education, Zoom) leave the regulation of the license largely implicit, thus making it uncertain what Google is authorized to do with the user's content and what the limits are of Zoom's clause which enables it to access, view and process content to perform its obligations under its terms.

Liability

It is also important for teachers who provide their students with learning material to anticipate what liability they might incur. Most of the materials uploaded and used for ERT will be protected by copyright. This might include third party content such as articles, audio or video files, scanned chapters of textbooks, or other content lawfully accessed or in the possession of the teacher. The making available of such materials can constitute an infringement of copyright and would, therefore, either require prior authorization or need to qualify as a use covered by a limitation or exception. Links to freely available lawful content are, however, permitted. This also includes deeplinks into online databases to which students have lawful access as members of a university. All services categorically exclude liability for content uploaded by their users. This must, of course, be qualified by Article 14 of [Directive 2000/31](#) (E-Commerce Directive), which relieves intermediaries from liability only in so far as they have no knowledge of the infringing content. With the new liability rules for OCSSPs under Article 17 DSM Directive these safe harbours will not be available anymore for large hosting platforms, which will now be subject to a specific liability exemption mechanism. This will certainly apply to YouTube and Facebook, but it is unlikely that other services analysed here will come within the definition of OCSSPs.

What is more concerning are the terms that strictly require the user to have acquired and, in some cases, be able to demonstrate, authorization to use the uploaded content. Some services opt for simpler clauses requiring the user to have "all the rights necessary" to use the content (Facebook, Jitsi, Microsoft Teams, Skype, YouTube), while others, more bluntly formulated, require the user to guarantee exclusive ownership of uploaded content (Discord, MoodleCloud). Even more radically, Zoom prohibits the use of protected material "without obtaining the *prior written consent*" of the copyright holder. All these terms have in common that they do not make reference to copyright exceptions and limitations, among others those of Article 5(3)(a) InfoSoc Directive for use for the purpose of illustration for teaching. These omissions can create a significant chilling

effect on the online use of materials by teachers. Moreover, a common sanction found in the various terms is the suspension or termination of accounts of repeat infringers, which can temporarily obstruct the delivery of ERT through a particular channel.

Services that extend the liability of the user to the acts of third parties, including students, are mainly the platforms that are usually operated and maintained by the educational institutions themselves (Microsoft Teams, G-Suite for Education, MoodleCloud, Skype, Zoom), who can thus control who has access to the service and who does not. Open platforms and future OCSSPs do not use clauses to that effect in their terms (Discord, Facebook, Jitsi, YouTube). Although limited to institutionally operated platforms, such clauses can create an excessive burden on teachers, who may suffer the legal consequences of infringing uses by their students.

Content Moderation

Once content has been uploaded, teachers and students have an interest in it staying online for continuous access. Content removal mechanisms, which are expressly included in the terms of all examined services, bear the potential to complicate the provision of learning materials. For our purposes, content moderation is understood narrowly as acts of removal of copyright infringing content and restoration pursuant to review upon complaints by users.

Whereas in some cases the online service reserves the right to remove content at its sole discretion (Jitsi, Discord), most of them foresee a notice-and-take-down (NTD) mechanism (Facebook, G-Suite for Education, Microsoft Teams, MoodleCloud, Skype, YouTube, Zoom). Nonetheless, NTD mechanisms become particularly problematic when *automated* (Facebook, YouTube), as the blocking and filtering of uploads can significantly impede the efficient delivery of ERT.

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

Conclusion

Our review of the terms of services used for ERT has raised a number of copyright concerns. First, although not unique to ERT scenarios, the extent to which the examined terms include broad licenses that go beyond what is necessary to ensure their operation is alarming. This is exacerbated by vague language of the respective terms that fails to make clear how broad the license granted by the user is in practice. Therefore, there is the risk that teachers and students lose control over the content that they upload and share. Second, some online services impose strict requirements, whereby users can only upload content they own or for which the owner has given prior authorization.

This fails to acknowledge the possibility that certain uses may be covered by a copyright exception, for example for teaching purposes. Under the InfoSoc rules, it remains uncertain whether contractual overrides of exceptions is permitted; the new online teaching exception of Article 5 DSM Directive (see [here](#)) will only benefit from immunity from contractual derogations (Article 7 DSM Directive) provided that the service used constitutes a secure electronic environment. This can produce, in turn, a chilling effect for the teacher who reads the terms,

resulting in less content being made available. Third, the mechanisms employed by most services for content removal are unsatisfactory. On the one hand, the removal is often left to the platform's sole discretion and to automated filtering. On the other hand, complaint mechanisms are often unclear or difficult to access; sometimes such mechanisms do not even exist. Therefore, teachers whose materials are unilaterally and unjustifiably removed from the platform may find themselves without recourse against such removal. An inability to ensure the permanent availability of learning materials can constitute a significant obstacle to the safe adoption of learning tools for the "new normal".

The second part of this blogpost will complement this analysis by addressing the data protection concerns related to the same selection of online services used for ERT.

A paper with a detailed analysis of both of these aspects is currently being prepared for publication

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