Kluwer Copyright Blog

A legal field trip to the post-pandemic digital classroom

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In a period when the COVID-19 pandemic is occupying less and less space in the daily news and in our thoughts, with the World Health Organization (WHO) having stated that it "no longer constitutes a public health emergency of international concern", things may seem to be returning to the normal. This is, of course, a simplification. On the one hand, the pandemic is not over and COVID-19 is still around (as an "established and ongoing health issue", according to the WHO). On the other hand, the return to normal might not mean the same across society. The periods of lockdown and other restrictions of rights imposed changes in the daily practices and habits, among which those related to the digitization of work. In some fields, specifically at the workplace, the new digital practices might be here to stay, at least to a degree. That seems to be the case in the education sector.

In this light, taking a look into the currently consolidating practices and challenges of the education sector from a legal perspective seems to be much needed. This is the idea behind the last issue of the Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC), titled "The Law and the Digital Classroom".

As argued by the journal editors, and with my agreement, education makes a particularly interesting case study for lawyers – and not only them. Remote teaching long preceded the

pandemic, and the sector was feeling the need to change in order to adapt to the digital age. Some things were already changing in copyright legislation before the pandemic, at least in the EU: article 5 of the CDSM Directive, for example, introduced a new mandatory exception for the use of protected works for educational purposes, specifically for digital and cross-border teaching activities. With COVID-19, schools, universities, libraries, and similar entities found themselves in a position where they had to suddenly find new solutions to allow them to continue their mission through digital means. This both exacerbated existing legal problems and created new ones.

A much publicly debated issue regarding online teaching during lockdown was online exams. Across the world, schools and universities resorted to e-proctoring technologies with the objective of monitoring students during online exams, to avoid cheating. The intrusiveness of e-proctoring software raised fundamental rights issues, not only regarding privacy and data protection, but also discrimination, which can lead to chilling effects and therefore threaten the intellectual freedom required in any learning environment. Giannopoulou, Ducato, Angiolini and Schneider offer an overview of online proctoring-related decisions in the EU, from a data protection and anti-discrimination angle. Those decisions refer to different types of e-proctoring software, with different modalities and features, in different countries, in a context of an exceptional situation. They can, however, provide an important view of the legal issues identified by the Member-states authorities. On data protection, the main issues identified by Data Protection Authorities were related to GDPR's transparency rules and extra-EU data transfers.

On this matter, Wong, Racine, Henderson, and Ball present a more suitable alternative to handle the challenges of students' data protection: a model of data commons for online learning. The objective is allowing students better agency in protecting their personal data. This is essential in education, as the power imbalance usually does not allow students to have a say on the tools adopted by schools and universities – even less during the pandemic, with the urgency of finding digital solutions.

Both these articles identify legal issues that must be addressed by policy-makers in the future, especially if online education and online exams are here to stay. At least in part, as hybrid education has now become common.

As it happens, remote teaching and learning can also present advantages: it allows providing access to education for more people, as well as providing better access conditions for people from distant locations and people with disabilities. In this context, Celeste and De Gregorio elaborate on the meaning of the right to education in the digital age, from a Constitutional perspective, namely whether there is a right to access education online. The Constitutional perspective on the right to education has been guaranteeing equality of access by offering financial aid to students who need it. The authors examine the idea of widening such constitutional obligation, adding to it a "a duty to guarantee that education should reach as many students as possible", including through online education. Constitutional drawbacks are also identified, as this could deepen social inequalities related to the level of digital skills of the students, as well as the inequalities related to conditions of access to the Internet and digital devices.

Digital access to education materials, including crossborder access, was precisely at the core of Article 5 of the CDSM Directive in the EU. In light of the objectives of the provision and the pandemic experience it followed, Trapova offers insights to its implementation in Germany, Bulgaria and Ireland. The author claims that, while harmonization itself was not a goal of the provision, the mandatory transposition of the new exception did not manage to avoid diverse

transposition models across Member States. None of these three countries managed to achieve a similar treatment for digital and analogue educational uses, which would be the ideal transposition, nor did they do a good job at achieving legal certainty. As such, Article 5 of the CDSM Directive appears to have been a missed opportunity, as the new educational exception targeting digital educational uses, after the pandemic, already seems outdated.

In a different contribution, Mezei explores the experience in Hungary, the first country to implement Article 5 of the CDSM Directive, in April 2020, specifically to respond to the outbreak of the pandemic. The author offers a "empirical analysis of the awareness, perceptions and use practices of students, educators and librarians of the University of Szeged with respect to digital (distance and online) learning and teaching in the pandemic". Interestingly, both students and lecturers who filled the questionnaire declared to have relied more on shadow libraries than on the University's internal platform that hosts digital education materials. The author links this to the fact that the main goal at that moment was just "surviving" the pandemic, rather than implementing better solutions, including improving the legal flexibilities of the system.

Naturally, relying on shadow libraries is not the way to overcome eventual shortcomings of the IP regime in providing access to educational materials. Other solutions are possible within the system. Such is the case of the Open Education Resources (OERs), analysed by Priora and Carloni, regarding the state of their usage in schools and universities in the EU. OERs are digital materials designed for educational purposes, open and freely reusable. Their adoption in the EU is still lagging behind the USA and Canada. Scattered efforts can be found in some EU countries, but they seem to be on the rise, with sector-specific EU and international policies already put in place. The authors offer both a pedagogic and legal perspective on the use of these resources. OERs are ideal to foster diversity, knowledge co-creation, students agency and empowerment, equality and inclusion in the education field. However, legal constraints related to EU's expansionist IP policies conflict with the objectives of fostering digital education through the use of OERs. The authors identify a need to obtain a "more sustainable balance between author's protection and right to education".

In the same line, Caso and Pievatolo present the case of Consortium GARR, a public and free federated system used by a minority of Italian Universities as an alternative to the large proprietary platforms. Despite being under-resourced, GARR manages to offer an open and privacy-friendly learning platform for universities. As Priora and Carloni, the authors also identify contradictions in the EU policy making regarding open science policies and the strengthening of IP. Furthermore, the authors offer a broader view by emphasizing several forms of non-IP exclusive control on data, achieved through the control of technology and infrastructure, which are also an obstacle for open science. It is then necessary to go beyond IP policy and to look into issues that result from the power of platform monopolies and oligopolies, which ultimately may represent a threat to universities' own autonomy. The authors identify important issues in this regard, such as public storage and access to research data, public infrastructure, free access to publications, control over digital learning and respective tools, and access to platform data for research purposes.

A general idea resulting from these articles is that, while copyright is still a major obstacle in fostering quality digital education in the EU (even after the CSDM Directive), it is only part of the problem. A wider legal approach is needed. As Celeste and Di Gregorio point out, in order to tackle the challenges of digital education, a coherent regulatory framework is lacking. It could take the form of Karen Maex's Digital University Act, as Caso and Pievatolo suggest. Ideally, such framework would provide answers to the issues currently undermining the right of access to

education. Those include: a more sustainable balance between authors' copyright protection and the right to education (Priora and Carloni), and fostering open policies; safeguarding students' privacy and data protection rights; addressing the conflicting interests and unbalanced power between private platforms and the education institutions (Celeste and Di Gregorio, among others) which ultimately represent a threat to their very autonomy and intellectual freedom (Caso and Pievatolo).

The right to education is a matter of fundamental rights. But the future of digital education in the EU, to date, has remained mostly a policy option. JIPITEC's issue "The Law and the Digital Classroom" helps to identify concrete legal and policy problems that must be addressed, while suggesting possible solutions. But, at the end of the day, those are dependent on policymaking action. Let's hope the EU lawmakers are paying attention and willing to take on the several legal challenges that education faces in this digital age.

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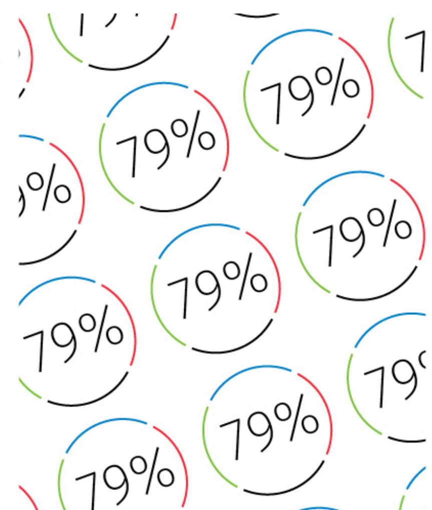

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