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# IFRRO's response to Communia's Report on Educational Licences in Europe

In the context of the discussion of a mandatory educational exception in Europe (Article 4 of the proposed Directive on copyright in the Digital Single Market) Communia issued a review of 10 educational licences, from three countries, France, Finland and the UK in March 2018.

From this limited analysis they have drawn conclusions about the collective licensing of education, particularly schools across Europe. However, Communia's analysis contains a number of errors and mistakes of fact which invalidate the conclusions they draw in the report.

This paper is IFRRO's response to the conclusions in the Communia report. IFRRO's comments relate only to its understanding of the terms and conditions of the licences offered by its members – CLA and NLA (UK), CFC (France) and Kopiosto (Finland).

## LICENSING: THE FACTS

Communia has interpreted the licences on a standalone basis and as a result their analysis ignores obligations and conditions imposed by other legislation. An important example of this are the obligations in specific national laws related to data protection and privacy, as well as those implementing Directive 2014/26/EU on collective rights management ("CRM Directive").

### IFRRO notes:

- There are effective collective licensing systems in 26 of the 28 EU Member States, and in the remaining two Member States efforts are being made to develop licensing solutions
- These licences operate, as Communia itself acknowledges (page 82), **to lead to licensing offers covering uses that are not foreseen in copyright exceptions** which have benefits for teachers and students
- The licences are the outcomes of negotiations, generally between the licensor (CMO) and either a peak industry body or a government agency with significant bargaining power
- If a licensee is unhappy with the licence terms negotiated, there is generally recourse not only to a court or specific administrative Tribunal (such as the Copyright Tribunal In the UK) but to alternative dispute resolution
- The fees collected under collective licences are distributed to authors and publishers, contributing to an ecosystem that supports and promotes a national reading culture and contributes to cultural diversity.

## THE BEST OUTCOME FOR AN EDUCATIONAL EXCEPTION

In IFRRO's view the optimum means to achieve the desired outcome of responsive and effective cross border access to copyright content for education is:

- licence override, but in the absence of a licence, the exception operates. This encourages the respective parties to enter into agreements (and also accommodates extended collective licencing, which is used in Finland and other countries).
- mandatory remuneration for the exception, because unpaid access under exceptions would result in users being disinclined to seek licensing solutions.
- the discretion for certain content, i.e. textbooks or print music, extremely impacted by copying, to be excluded from the operation of the exception.

# COMMUNIA'S REPORT: THEORY vs PRACTICE

## 1 Communia does not seem to understand how licences work in practice

Communia claims the following three provisions are the most disadvantageous to schools:

### Claim: Licences restrict the scope of protection of the educational exceptions

*Actually, the licences clarify the scope and impact of the educational exceptions, by including straightforward definitions of concepts such as commercial use and specifying the quantity of material that can be used in percentage terms. These provisions are generally definitions which make the licences easier to understand and implement for non-lawyers, such as students, teachers and school administrators.*

### Claim: Licences grant questionable rights to right holders

*This statement refers to the provisions in the licences regarding audits and data collection. Data collection obligations are necessary to distribute the fees collected accurately and meet regulatory requirements such as the CRM Directive. As the CRM Directive imposes a positive obligation on users to cooperate in data collection, and the licences clarify the extent of this obligation, data collection activities are managed in consultation and cooperation with the licensees.*

*Personal data relating to students and teachers is not collected, and the use and confidentiality of the data collected is prescribed and limited by other legislation.*

*In respect of compliance checks and audits, Communia itself acknowledges (p 66 and 71) that **prescribing reporting obligations and audits in licensing agreements is common practice**. IFRRRO also understands that in more than 20 years of licensing none of the CMOs concerned have invoked an audit provision in a school. This demonstrates the cooperative and mutually beneficial context in which the licences operate.*

### Claim: Licences impose burdensome obligations on schools

*A licence actually reduces the burden that schools have to ensure that their staff and students do not infringe copyright whether they are relying on a licence or an exception to copy, by clearly defining the possible uses of materials for educational purposes as well as obligations. In either situation, to avoid infringement, schools are required to make sure that their staff and students are aware of the extent of copying they can undertake. In the licence situation, however, the obligation is only to make staff aware of their obligations and does not extend to actually having to prevent infringement (as the case would be in the absence of licence). The licensor also provides tools such as information sheets to enable the schools to meet these obligations.*

## 2 Communia misinterprets licence terms and conditions

Communia also comment on what they characterise as the 5 Most Unfair Conditions in Educational Licences in Europe. The actual position is as follows:

What Communia says	Communia's Assertions	The Actual Situation
Licensors can inspect materials, secured networks and storage platforms used by schools, without being required to keep the information obtained confidential.	Does not prevent licensors from disclosing or making commercial uses of sensitive information, such as data related with the performance of students.	Obligations to maintain the confidentiality of information collected are imposed by other legislative instruments, including data privacy legislation.  Data enabling the identification or relating to student performance is not actually collected.
Licensors can enter a school's premises at any time provided it gives reasonable notice, to ensure compliance with the licence and inspect procedures.	Can disrupt the normal operation of schools.	Licensors <b>cannot</b> enter the premises at any time, they must give reasonable notice of an intent to inspect, which can only take place in normal business hours.  In fact, Communia itself acknowledges (p 66 and 71) that <b>prescribing reporting obligations and audits in licensing agreements is common practice.</b>
Schools have to take reasonable steps to ensure that licences are not infringed by teachers, students and third parties.	Creates an excessive burden on schools that have to start policing teachers, students, parents and third parties.	School administrators have the responsibility to ensure that those acting on its behalf, such as teachers, are aware of the law, and do not infringe copyright and leave the school liable to legal action.  In fact, the licence reduces the burden on the school from that that applies under the exception, as under the licence terms the school is only required to make staff and students aware of their rights and possibilities in accordance with copyright obligations, not ensure that infringement does not take place.  The school is also indemnified from liability if it meets licence conditions, thus providing certainty and reasonableness.
School must own or subscribe to a copy of the material it copies, scans or uses under the licence.	Does not allow uses of material owned by teachers and students or borrowed from a library or legally obtained.	Most licences permit the use of any legally acquired content as the basis for copying under the licence, such as loans or teachers' own resources.  This provision appears in only one licence and reflects the specific operating circumstances for that licence. This condition was agreed to by the Licensee, who clearly considered it reasonable in the context of the licence negotiations.
Digital copies may not contain hypertext links (or the like) to any external or third-party website.	Prevents teachers and students from comparing, verifying and updating information and knowledge.	This criticism is based on a complete misunderstanding of the licence term. The purpose of the licence is to enable teachers and students to use content for specific educational purposes. There is no provision preventing them from comparing, verifying and updating information and knowledge.  In the event that the licence includes a hypertext link provision, it is focused on preventing use beyond the licence scope such as the open internet, by the content being linked to by third parties. Links within the content can be used.