

Editorial

by **Rossana Ducato and Giulia Priora** *

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1 Most of us—scholars and researchers across the world—found ourselves in uncharted territories when, in 2020, teaching activities were forced to move online due to the outbreak of the COVID-19 Pandemic. Information technologies allowed the continuity of learning while our physical infrastructures were shut down. Nevertheless, for many among us, this transition represented a challenge, making us experience the complex nature of the digital classroom. Amid the uncertainties and problems that schools, universities, teachers, and students had to face lie legal questions, from fundamental rights queries to governance of educational infrastructures and contractual implications, both at national and supranational levels.

2 Remote education is not a new phenomenon. In some institutions, online and blended activities long preceded the pandemic emergency. The legal scholarship already inquired into aspects of providing education at distance. Attention had mostly been paid to questions of intellectual property of learning materials and tools,¹ lecture

recording policies,² students' authentication aids,³ security,⁴ surveillance,⁵ comparative issues in the use

Property Review 251; Gabriela Kennedy, 'Intellectual Property Issues in E-Learning' (2002) 18 Computer Law & Security Review 91; Louise Longdin, 'Copyright Dowries in Academia: Contesting Authorship and Ownership of Online Teaching Materials in Common Law Jurisdictions.' (2004) 35 IIC 22; Louise Longdin, 'Collaborative Authorship of Distance Learning Materials: Cross-Border Copyright and Moral Rights Problems' (2005) 27 European Intellectual Property Review 4; Hong Xue, 'Copyright Exceptions for Online Distance Education' (2008) 2 Intellectual Property Quarterly 213; Philippa Davies, 'Access v Contract: Competing Freedoms in the Context of Copyright Limitations and Exceptions for Libraries' (2013) 35 European Intellectual Property Review 402; Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction' (2018) 40 European Intellectual Property Review 4.

2 BILETA, Lecture recording policy (2008) < <https://www.bileta.org.uk/news/lecture-recording-policy/>>, accessed 1 December 2022.

3 Marion Rosenberg, 'And You Are...? Will the New Regulation on Electronic Identification Help Universities When Registering Overseas Students? Part 1' (2015) 21 Computer and Telecommunications Law Review 31; Marion Rosenberg, 'And You Are...? Will the New Regulation on Electronic Identification Help Universities When Registering Overseas Students? Part 2' (2015) 21 Computer and Telecommunications Law Review 59.

4 Asim Majeed, Said Baadel, Anwar Ul Haq, 'Global Triumph or Exploitation of Security and Privacy Concerns in E-Learning Systems', *International Conference on Global Security, Safety, and Sustainability* (Springer 2017).

5 Barbara Fedders, 'The Constant and Expanding Classroom:

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1 Ann L Monotti, 'University Copyright in the Digital Age: Balancing and Exploiting Rights in Computer Programs, Web-Based Materials, Databases and Multimedia in Australian Universities' (2002) 24 European Intellectual

- of computer-assisted tools in legal education,⁶ and labour law implications of online teaching.⁷
- 3 However, the volume, variety, and velocity of the digital transition in education imposed by the COVID-19 Pandemic exacerbated these issues and raised a spectrum of new legal problems.⁸ The jurisprudence specializing in digital education demonstrate this momentum: new light has recently been shed on, among others, the digital divide in accessing education,⁹ the lawful use of learning materials online,¹⁰ the dispossession of educators' work in favour of their employers and platforms,¹¹ privacy and human rights issues raised by EdTech monitoring tools.¹²
 - 4 What we observe is an educational sector that is becoming increasingly aware of the potential of digital technologies but that was only recently forced to grapple with the full spectrum of the legal questions arising from them. The latter included, in particular, the impact caused by the reliance on third-party service providers—traditionally external to the “educational circle”—and their infrastructural power.
 - 5 Due to the pandemic-induced emergency, educational institutions mostly relied on platforms, social media, and videoconferencing tools to ensure the continuity of learning. The initial few legal warnings stemming from the scholarship turned into a real risk for schools' and universities' autonomy and the fundamental rights of teachers and students. In preliminary studies we conducted over the next of terms and conditions of platforms used during the pandemic, the problematic aspects arising from opaque operations carried out on content and data exceeded our informed expectations as legal researchers in the field.¹³
 - 6 We, therefore, felt the need for a more comprehensive effort to study the phenomenon of digital education from a legal perspective, dissecting its potential and risks for individuals and groups. Our research endeavour started while we witnessed education gradually returning to presential mode. This change did not mitigate the utility of our research questions, as most of the digital tools introduced during the pandemic remain, and with them, the legal issues they raise. The premise of our legal inquiries lies in the awareness that schools and universities can rely on a growing range of technologies to innovate their pedagogical strategies. However, this evolution cannot occur at the expense of fundamental rights within the educational ecosystems.
 - 7 This *JIPITEC Special Issue on “The Law and the Digital Classroom”* is our choral contribution to the research on old legal problems and newly emerging issues threatening the transition into the post-pandemic digital classroom. We think that building such an environment requires a close analysis of the fundamental right to access online education, the protection of students' data, the promotion of teachers' creativity and the safeguards of their work conditions, the rise of dominant economic actors, and the new infrastructural shapes of the ‘platformised’ learning environment. Our aim is twofold: to cultivate legal awareness and policy
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- Surveillance in K-12 Public Schools’ (2019) 97 North Carolina Law Review 1673; Priya C Kumar and others, ‘The Platformization of the Classroom: Teachers as Surveillant Consumers’ (2019) 17 Surveillance & Society 145.
- 6 Burkhard Schafer, ‘Form and Substance in Online Legal Education—a Look over the Border’ (2002) 36 The Law Teacher 333; John Mayer, ‘Codec: Lowering the Barriers to Inter-Institutional Distance Legal Education’ (2005) 39 The Law Teacher 82; Antoinette Muntjewerff, ‘ICT in Legal Education’ (2009) 10 German Law Journal 669.
 - 7 Andrea Wobick, ‘What Is the Value of Teaching in a Virtual Classroom?’ (2012) 22 Education & Law Journal 117.
 - 8 Chiara Angiolini and others, ‘Remote Teaching During the Emergency and Beyond’ (2020) 1 Four Open Privacy and Data Protection Issues of ‘Platformised’ Education 45.
 - 9 Sofia Ranchordas, “Connected but Still Excluded? Digital Exclusion beyond Internet Access” in Marcello Ienca and others (eds), *The Cambridge Handbook of Life Sciences, Informative Technology and Human Rights* (Cambridge University Press 2021) 244.
 - 10 Carys Craig and Bob Tarantino, ‘A Hundred Stories in Ten Days: Covid-19 Lessons for Culture, Learning, and Copyright Law’ (2021) *Osgoode Hall Law Journal* 57(3) 567-604; Emily Hudson and Paul Wragg, ‘Proposals for Copyright Law and Education During the Covid-19 Pandemic’ (2020) *Northern Ireland Law Quarterly* 71(4) 571-594.
 - 11 Guido Noto La Diega and others, ‘Capturing the Uncapturable: The Relationship between Universities and Copyright through the Lens of the Audio-Visual Lecture Capture Policies’ in Cristiana Sappa and Enrico Bonadio, *The Subjects of Literary and Artistic Copyright* (Edward Elgar 2022) 206-232; Yasmin Ibrahim, Anita Howarth and Ian Stone, ‘Lecture Capture Policies: A Survey of British Universities’ (2021) 3 *Postdigital Science and Education* 144.
 - 12 Teresa Scassa, ‘The Surveillant University: Remote Proctoring, AI, and Human Rights’ (2022) 8 271; Liane Colonna, ‘Legal Implications of Using AI as an Exam Invigilator’ in Liane Colonna and Stanley Greenstein (eds), *2020-2021 Nordic Yearbook: Law in the Era of Artificial Intelligence* (The Swedish Law and Informatics Research Institute 2022); Center for Democracy and Technology, ‘Report – Hidden Harms: The Misleading Promise of Monitoring Students Online’ (2022) <<https://cdt.org/insights/report-hidden-harms-the-misleading-promise-of-monitoring-students-online/>> accessed 1 December 2022.
 - 13 Chiara Angiolini and others (n 8); Léo Pascault and others, ‘Copyright and Remote Teaching in the Time of COVID-19: A Study of Contractual Terms and Conditions of Selected Online Services’ (2020) 42 *European Intellectual Property Review* 548.

- literacy across society and, in particular, within educational environments, and help weave the full legal picture of the digital classroom connecting the dots between different legal expertise and critically engaging in 'legal protection by design' solutions.
- 8 *Part I* focuses mostly on the student's perspective, addressing the question of the protection of fundamental rights in the post-pandemic environment of digital education.
 - 9 Celeste and De Gregorio open the discussion with a critical reflection on the existence of the right to digital education. Although not expressly recognized as such, the authors argue that it can be retrieved from the constitutional obligation to provide access to education. Their paper "*Towards a right to digital education? Constitutional challenges of Edtech*" is a lucid investigation of how such a right shall be implemented in practice, taking into account the datafication and privatization of education brought by the use of digital tools provided and managed by commercial actors.
 - 10 Wong, Racine, Henderson, and Ball explore another type of power imbalance: the one experienced by students before their universities in relation to the collection and use of the personal data generated in the digital classroom. Their paper investigates the question of conceiving "*Online learning as a commons: Supporting students' data protection preferences through a collaborative digital environment*". The results of their empirical research suggest that the commons model, centred on subjects' data protection preferences, can increase students' agency over their data, such as those contained in tutorial recordings.
 - 11 Giannopoulou, Ducato, Angiolini, and Schneider conclude this Part by focusing on the data protection challenges raised by one specific tool increasingly used during the pandemic: e-proctoring. Forced to organize exams at distance, a few universities decided to ensure the validity and integrity of exams via monitoring tools for online invigilation. The use of such software, however, give rise to several concerns in terms of accuracy, proportionality, discrimination, and intrusiveness. Their paper "*From data subjects to data suspects: challenging e-proctoring systems as a university practice*" thoroughly discusses how courts and data protection authorities have responded to such issues in the past two years, highlighting both the opportunities and pitfalls of the data protection regime in this area.
 - 12 *Part II* turns to a perspective closer to the teachers, shedding light on the legal implications of the selection and use of copyrighted materials in the digital classroom and on recent developments in teaching practices and open digital infrastructures.
 - 13 Trapova kicks off this focus by illustrating the EU copyright legal framework applicable to the access and use of third parties' materials for educational purposes. In her article "*The exceptional mismatch of copyright teaching exceptions in the post-pandemic university: Insights from Germany, Bulgaria, and Ireland*", the author explains the exegesis of a new digital teaching exception in the EU, highlighting its pursued objective of modernizing the law and demonstrating its failed attempt to enhance the harmonization and legal certainty regarding who, what, and how much can we benefit from a copyright teaching exception in Europe.
 - 14 Priora and Carloni provide another European perspective, this time looking at the specific phenomenon of the wide spreading of Open Educational Resources (OERs). The topic, extensively analyzed in the North American legal scholarship, invites a timely European focus due to the evolving EU copyright legal regulation and the emerging policy goal to promote innovative digital teaching practices. Their article, entitled "*Open Educational Resources through the European lens: Pedagogical opportunities and copyright constraints*", is an interdisciplinary attempt to dissect both the pedagogical potential and enduring copyright constraints vis-à-vis OERs.
 - 15 Concluding the Special Issue, we have two case studies. Mezei, in his "*Digital higher education and copyright law in the age of pandemic: The Hungarian experience*", presents an empirical study of the Hungarian higher education scenario during the outbreak of the COVID-19 Pandemic between 2020 and 2022. This study aims to fill the gap of adequate observation of the ongoing teaching and learning practices and the impact of the pandemic experience on the awareness, perception, and coping mechanisms with regard to national copyright rules.
 - 16 Caso and Pievatolo, in "*A liberal infrastructure in a neoliberal world: The Italian case of GARR*", look at the development of *ad hoc* digital infrastructures serving the purpose of an open and flourishing educational sector. Critically investigating the long arm of the intellectual property legal culture, the authors present the Consortium 'GARR' (*Gestione Ampliamento Rete Ricerca*, Research Network Expansion Management) as an example of alternative public infrastructure that, *de facto*, facilitates the sharing and exchange of knowledge across Italian universities. This bottom-up experience serves as a meaningful insight into the diverse and pluralistic nature that the post-pandemic digital classroom will need to build and preserve.