

Privacy and remote teaching in the time of Corona

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Technology

Zoom reaches \$85 mln settlement over user privacy, 'Zoombombing'

3 minute read

By Jonathan Stempel



NOT ONLY ZOOMBOMBING

WHAT RISKS FOR DATA PROTECTION AND PRIVACY?

The Guardian

'Zoom is malware': why experts worry about the video conferencing platform

The company has seen a 535% rise in daily traffic in the past month, but security researchers say the app is a 'privacy disaster'



Sex video shock for Form 2 students during virtual exam

Jason Thomas - October 15, 2021 8:03 PM

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1.4k



325



136



Google Classroom

The
Intercept_



BECOME
A MEMBER

ZOOM CENSORSHIP OF PALESTINE SEMINARS SPARKS FIGHT OVER ACADEMIC FREEDOM

Zoom cited anti-terrorism laws to shut down an event with Palestinian activist Leila Khaled — and other events criticizing its censorship.

Photo Illustration: Soohee Cho/The Intercept, Getty Images

Remote Teaching During the Emergency and Beyond: Four Open Privacy and Data Protection Issues of 'Platformised' Education

Opinio Juris in Comparatione 1/2020

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The team





Legal issues in Emergency Remote Teaching

1. Emergency Remote Teaching (ERT)
2. Data protection aspects
 - Purpose of the processing
 - Lawfulness of the processing
 - Data subject rights
3. The case(s) of e-proctoring
4. Copyright issues
5. Post-covid and the classroom

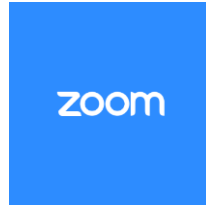
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Outline of the 1st study on ERT

What is (or was) ERT?

“Emergency remote teaching (ERT) is a **temporary shift of instructional delivery to an alternate delivery mode due to crisis circumstances**. It involves the use of fully remote teaching solutions for instruction or education that would otherwise be delivered face-to-face or as blended or hybrid courses and that **will return to that format once the crisis or emergency has abated**. The primary objective in these circumstances is not to re-create **a robust educational ecosystem** but rather to provide temporary access to instruction and instructional supports in a manner that is quick to set up and is reliably available during an emergency or crisis. When we understand ERT in this manner, we can start to divorce it from "online learning."

The method



- ❑ Cross-reading and analysis of the terms of service, privacy policies, community guidelines, etc. ('legals') available online
- ❑ EU copyright & data protection law focus, but expertise in UK, Italian, French, US, Dutch, Greek, and German law

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Data protection aspects

Data protection

Problematic clauses

- Purpose of the processing
- Lawfulness of the processing
- Data subjects rights

Principle of purpose limitation

- ❑ Backbone of the GDPR (art. 5.1.b)
- ❑ The processing must correspond to the purposes identified by the data controller (and communicated to the data subject)
- ❑ No further processing incompatible with the original purpose
- ❑ This principle is a safeguard for the data subject: to ensure the control over the flow of information concerning them



Purpose of the processing: Findings

- ❑ Original purpose of the processing in ERT: provision of education
- ❑ Problematic point: all the services analysed also pursue autonomous purposes
- ❑ The purpose of the processing is not always transparently described (e.g., “improvement of the service”)
- ❑ Issue of compatibility between the purpose of remote teaching and other purposes pursued by the platform (e.g. marketing)

Principle of lawfulness

- ❑ Art. 5.1.a GDPR
- ❑ The controller must have a lawful ground in order to process personal data (art. 6 GDPR)
- ❑ In case of sensitive data, the controller must also rely on an exception for processing that data, otherwise forbidden by default (art. 9 GDPR)
 - Sensitive data: data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life

Lawful bases (Art. 6 GDPR)

- ☐ **Consent** (free, informed, specific, unambiguous) OR
- ☐ Necessity to enter a **contract** (e.g. name and address for the delivery of a parcel) OR
- ☐ Necessity for compliance with a **legal obligation** (e.g. employer processing employees' data for social security and taxation reasons) OR
- ☐ Necessity to protect the **vital interests** of the data subject or of another person (e.g. humanitarian emergency) OR
- ☐ Necessity for performing a task in the **public interest** (e.g. school processing students' data for the provision of education) OR
- ☐ **Legitimate interests** of the controller or any other party, if they are not overridden by the interests and rights of the data subject

Consent

☐ Valid consent:

- **freely given** (free choice to accept or refuse without detriment, threats, violence)
 - Imbalance of power: e.g. employer's processing of personal data
- **Informed** (data subjects shall receive all the relevant information about the processing in a clear and intelligible manner)
- **Specific** to the processing purpose
- **Unambiguous** (NO silence, inactivity or pre-ticked boxes)

CJEU, C-673/17 - Planet49

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Conditions for processing sensitive data (art. 9.2 GDPR)

- Explicit consent
- Necessity to protect the **vital interests** of the data subject or of another natural person
- Processing relates to personal data which are **manifestly made public** by the data subject
- Necessity for reasons of **substantial public interest** (with a basis in law)
- Necessity for reasons of public interest in the area of **public health**
- ...

Lawfulness of the processing: Findings

General lack of transparency regarding the lawful basis

- Difficult to identify the link data-lawful basis or purpose-lawful basis

When the lawful basis is consent

- 'implied' consent
- bundle consent, where it is impossible for data subjects to give a separate consent to each use

Usually no provisions about the processing of sensitive data

Data subjects rights

- Transparent information (art. 12-14)
- Access (art. 15)
- Rectification (art. 16)
- Erasure (art. 17)
- Restriction of processing (art. 18)
- Notification obligation about rectification/erasure/restriction (art. 19)
- Portability (art. 20)
- Object (art. 21)
- Not to be subject to automated decision making (art. 22)



Data subjects rights: Findings

- ❑ Full list of data subjects' rights generally mentioned
- ❑ The existence of such rights is sometimes accompanied by vague formulas like “you might” or “may have the right to”
- ❑ Sometimes the reader must solve a puzzle to understand what rights they have or what privacy policy applies
- ❑ Most policies include an explanation for data subjects on how they can exercise their rights (but not always)
- ❑ Dubious formulations about the right to lodge a complaint within the DPA

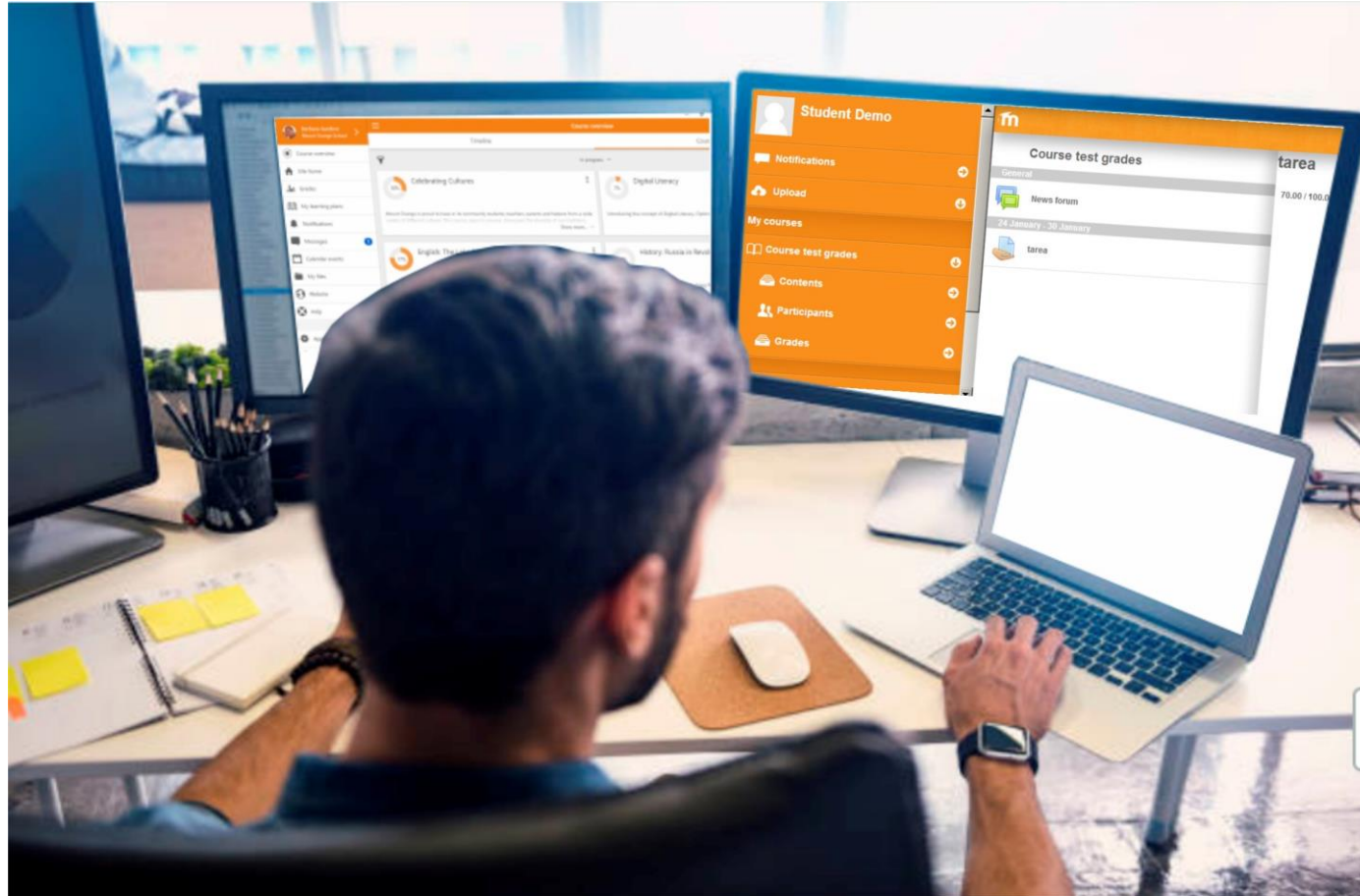
Why data protection in remote teaching matters

- ❑ Data protection is a substantial measure for protecting our students' and colleagues' rights
- ❑ The transparency about the processing is crucial → condition for the exercise of data subjects' rights
- ❑ Rights to privacy and data protection are also enablers of other fundamental rights and digital well-being → right to education, freedom of expression, etc.
- ❑ Fines!

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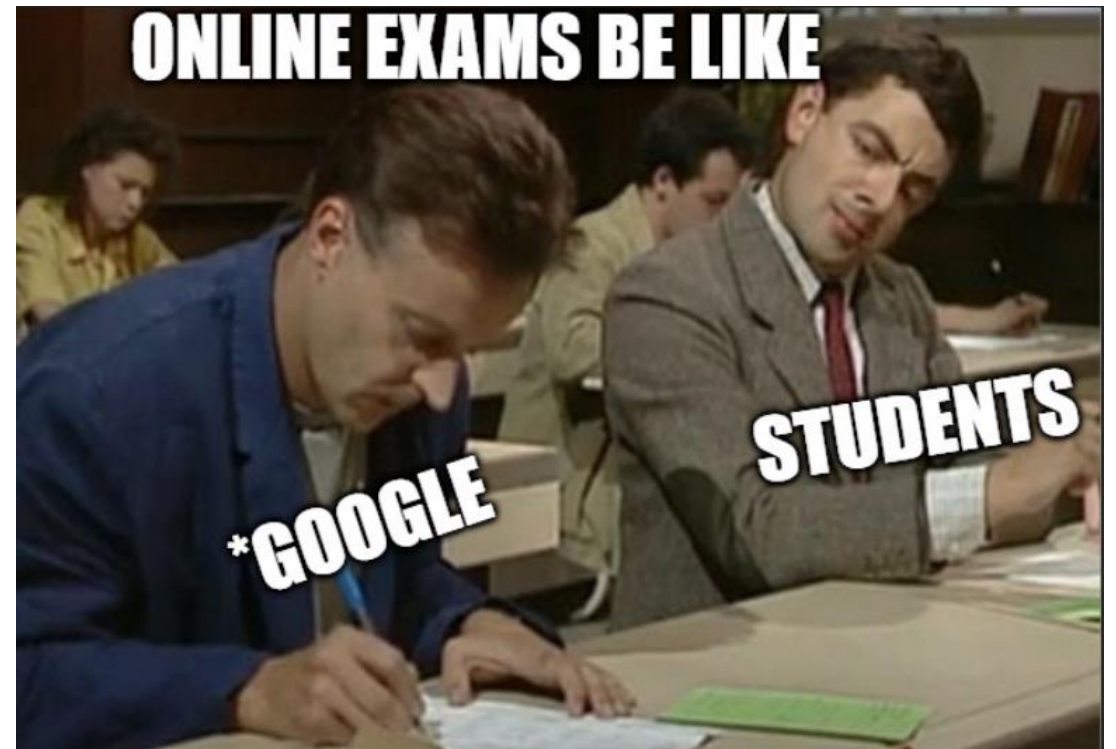
The case(s) of e-proctoring

E-proctoring



E-proctoring

- ❑ Function: to replicate in-class invigilation
- ❑ Offline invigilation is the same as online invigilation?
- ❑ Additional challenges and factors to consider
 - We are bringing the university to students' homes
 - Invigilation becomes systematic
 - Upsetting experience
 - Possible negative effects on anxious students (Woldeab and Brothen 2019)
 - Logistic issues- proxy for new forms of inequalities





Alivardi Khan @uhreeb · 8 set 2020

The @ExamSoft software can't "recognize" me due to "poor lighting" even though I'm sitting in a well lit room. Starting to think it has nothing to do with lighting. Pretty sure we all predicted their facial recognition software wouldn't work for people of color. @DiplomaPriv4All



11



147



506



Alivardi Khan @uhreeb · 11 set 2020

Ok @ExamSoft support told me to "sit directly in front of a lighting source such as a lamp." I'm receiving the same issue preventing me from completing the NY UBE mock exam. Facial recognition technology is racist. @DiplomaPriv4All do y'all think I have "adequate lighting"?



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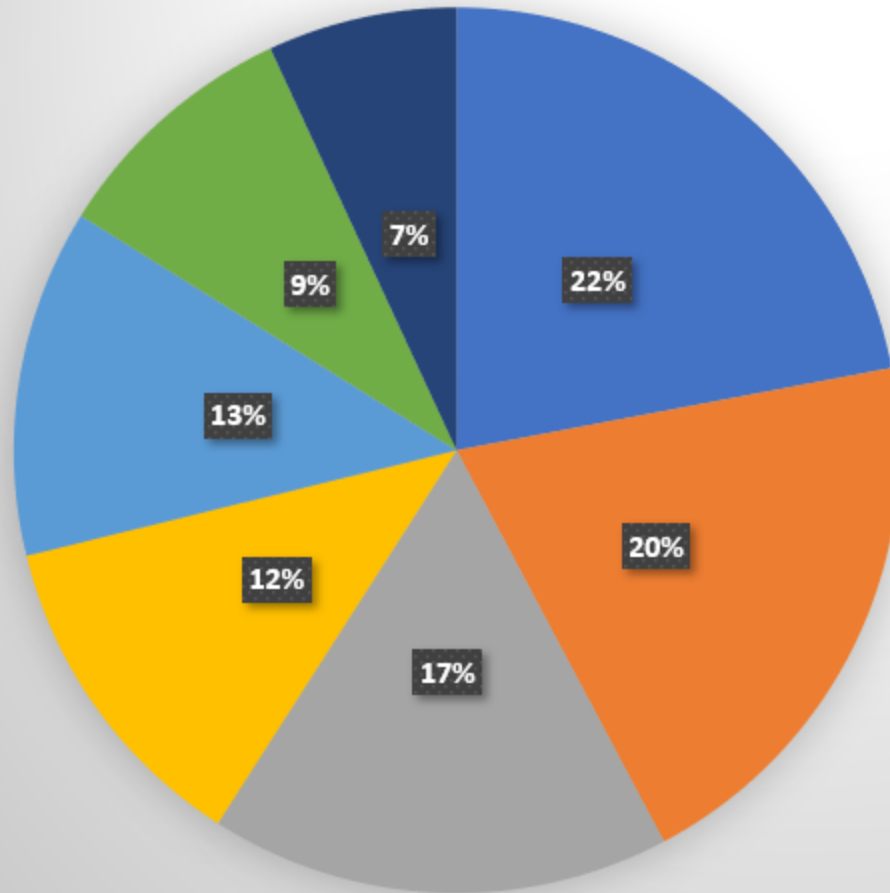
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A distraught college student went viral after posting a TikTok video recounting her negative experience with test proctoring software.

@_daynuh_/TikTok

Most pressing concerns for remote teachers



- Use of data by platforms
- Privatisation of education
- No freedom to choose the platform
- Insufficient legal training and on how to use platforms
- E-proctoring
- Insufficient learning resources in the digital library
- Uncertainty as to the use of the teaching materials

E-proctoring and the GDPR: first cases

- Rb Amsterdam [C/13/684665](#) / KG ZA 20-481
- Case about the use of Proctorio by the University of Amsterdam for the exam session of 2020
- [Appeal](#) decided in June 2021
- [Datatilsynet](#) - 2020-432-0034 (Danish Data Protection Authority, decision of 26 January 2021)
- Use of ProctorExam by the IT University (Copenhagen)

Amsterdam case

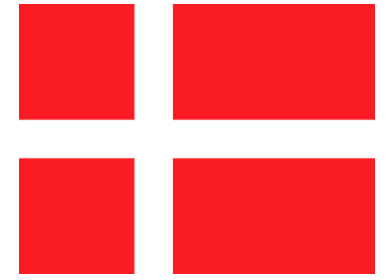


FACTS

- Proctoring involved the use of a plug-in tool for recording:
 - Screen
 - Webcam
 - Audio
 - Webtraffic
 - Keyboard activity
- Automated technology used to **flag suspicious behaviours**
- No Automated technology to **determine the fraud**: the examiner takes the final decision

DECISION

- UvA had a lawful basis (art. 6.1.e GDPR)
- Proctoring used only where there was no alternative
- Data Protection Impact Assessment performed
- No processing of biometric data
- Multi-factor authentication + Proctoring no access to the data
- Less intrusive than live monitoring of webcams and screens
- Upheld on appeal



Copenhagen case

FACTS

- ProctorExam involved the use of a plug-in tool for recording:
 - Screen
 - Webcam (screenshot)
 - Audio
 - Browsing history
- Recording is manually reviewed

DECISION of the DPA

- Necessity test performed
- DPIA performed
- Less intrusive tool adopted
- Contract with the processor establishing clear guarantees and obligations
- Information duty predominantly respected (also with reference to the minimisation measures concerning sensitive data)
- Security measures adopted but 2-factor authentication should be adopted

Bocconi case - €200m fine!



- ❑ A student at Bocconi University filed a complaint to the Garante regarding possible violations of the GDPR by the academic institution. They alleged that it **unlawfully** requested students' **consent** to the processing of **special** categories of personal data. If they refused, students would not be able to carry out online exams.
- ❑ 'Respondus' software captures the video images and the student's screen by identifying and marking with a flag the moments in which unusual and/or suspicious behaviour is detected
- ❑ Use of such software by universities **was generally acceptable** in light of the COVID-19 pandemic, but risks related to the processing of special categories of data, profiling, and international data transfers

Bocconi - transparency

- ❑ Transparency obligations per Articles 5(1)(a), 12 and 13 GDPR.
- ❑ The university only provided "generic information" about the processing without **specific reference to 'Respondus'**
- ❑ No information about the **retention** of relevant data
- ❑ No information about possible data **transfers** to the US (where the company providing the software was based)
- ❑ No explanation of the logic involved in the **profiling**

Bocconi – legal basis for biometric data

- ❑ Students' consent for the processing of data through the 'Respondus' system: neither an allowable legal basis nor a "manifestation of free will" per Article 4(1)(11) GDPR given the **power imbalance** between students and the university (if they did not 'consent', they could not pass their exams)
- ❑ Processing could have only been lawful if it was "**necessary for reasons of substantial public interest**, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject" (Article 9(2)(g) GDPR), which it was not.

Bocconi – other issues

- ❑ **Profiling** should have been "clearly **represented** to the interested parties".(art 35)
- ❑ Transfer to US based on the **Privacy Shield** agreement which was struck down in 2020 by the CJEU in Schrems II. Particularly concerning the fact that special categories of data, such as biometric data, were being transferred

Another way?

☐ Less intrusive means for organising exams?

☐ Time limit?

☐ Different assessment strategies

- take-home exams
 - Essays, case notes, open questions, reports, interviews, etc.
- continuous evaluation
 - Projects, presentations, case studies, group works, artifacts, etc.



Assessment comes from “assidere” which means “to sit with” (Green, 1998)

Takeaways

- ❑ The pandemic has exacerbated existing problems of our education system
- ❑ Assessment methods and endemic problems of HEIs (ratio professors/students)
- ❑ Lack of digital sovereignty (and lack of infrastructure)
 - ❑ Lack of knowledge of available infrastructures
- ❑ Trend during the emergency → reliance on third party digital platforms (non necessarily tailored for education)
- ❑ The paradigmatic shift toward remote teaching brings not only pedagogical challenges but also organisational and legal challenges

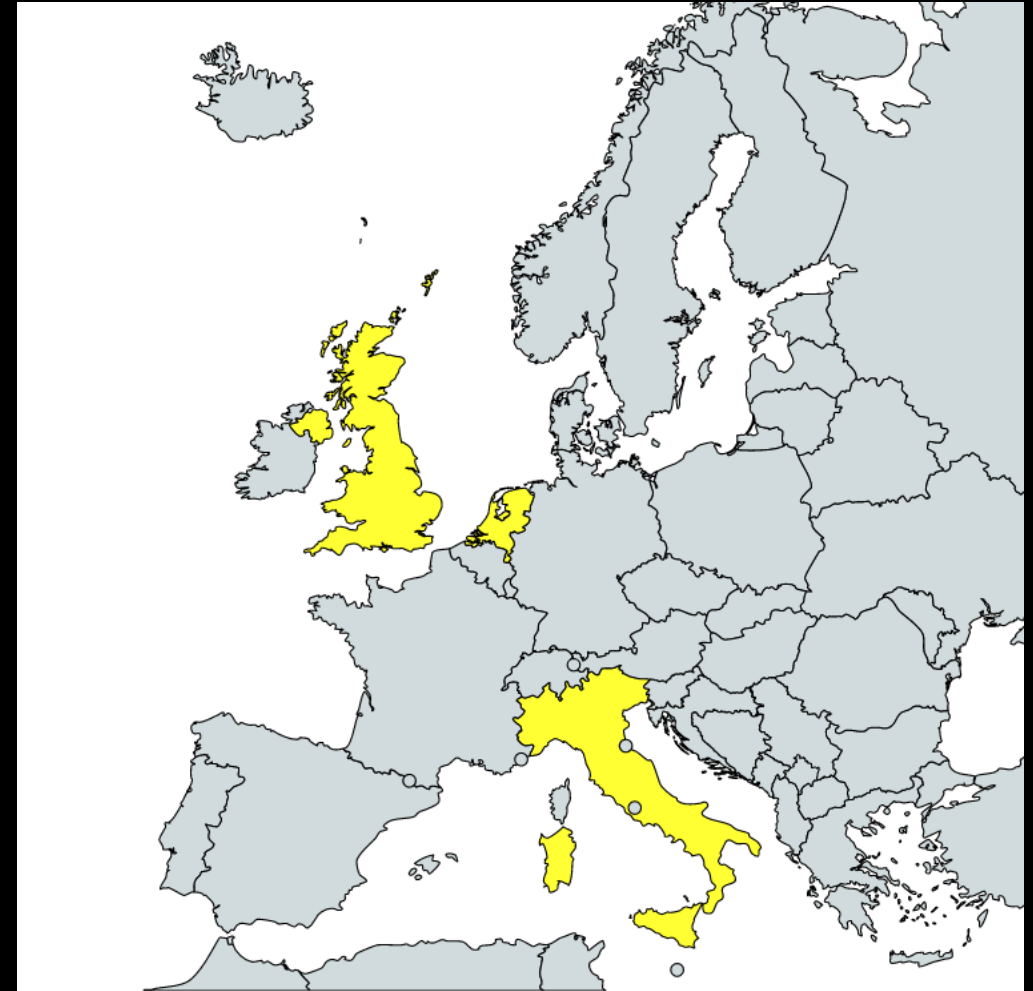
☐ What was your experience with emergency remote teaching?

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2nd empirical study: RT uses and experiences

Empirical study on educators' copyright perception

- Survey
- Qualitative analysis
- Italy, the Netherlands, the UK
- 38 higher education institutions
- 215 respondents



Research questions

USE

- Use of online services/platforms
- Choice of services/platforms
- Changes pre-/post-pandemic

AWARENESS

- Level of familiarity
- Training provided
- Presumptions and habits regarding third-party materials

EXPERIENCE

- Copyright-related problems and service disruptions
- Possibility of complaint/appeal & remedies
- Response to copyright symbols online



Copyright issues in Remote Teaching

- ☐ Control

- ☐ Liability

- ☐ Content moderation/ termination of accounts

Licensed acts in Emergency Remote Teaching



	License to operate service	Broader license	Limited liability	Liability for content of other users	Removal mechanism	Complaint mechanism
Discord	Unproblematic clause	Explicitly problematic	Explicitly problematic	No clause	Explicitly problematic	Unproblematic clause
Facebook	Unproblematic clause	Explicitly problematic	Unproblematic clause	No clause	Explicitly problematic	Unproblematic clause
G-Suite for Education	Problematic by omission	Problematic by omission	Unproblematic clause	Explicitly problematic	Explicitly problematic	Unproblematic clause
Jitsi	Unproblematic clause	No clause	Unproblematic clause	No clause	Explicitly problematic	Problematic by omission
MoodleCloud	Unproblematic clause	No clause	Explicitly problematic	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	No clause	Explicitly problematic	Unproblematic clause
Zoom	Problematic by omission	Problematic by omission	Explicitly problematic	Explicitly problematic	Unproblematic clause	Unproblematic clause



Unproblematic clause



Explicitly problematic









No clause

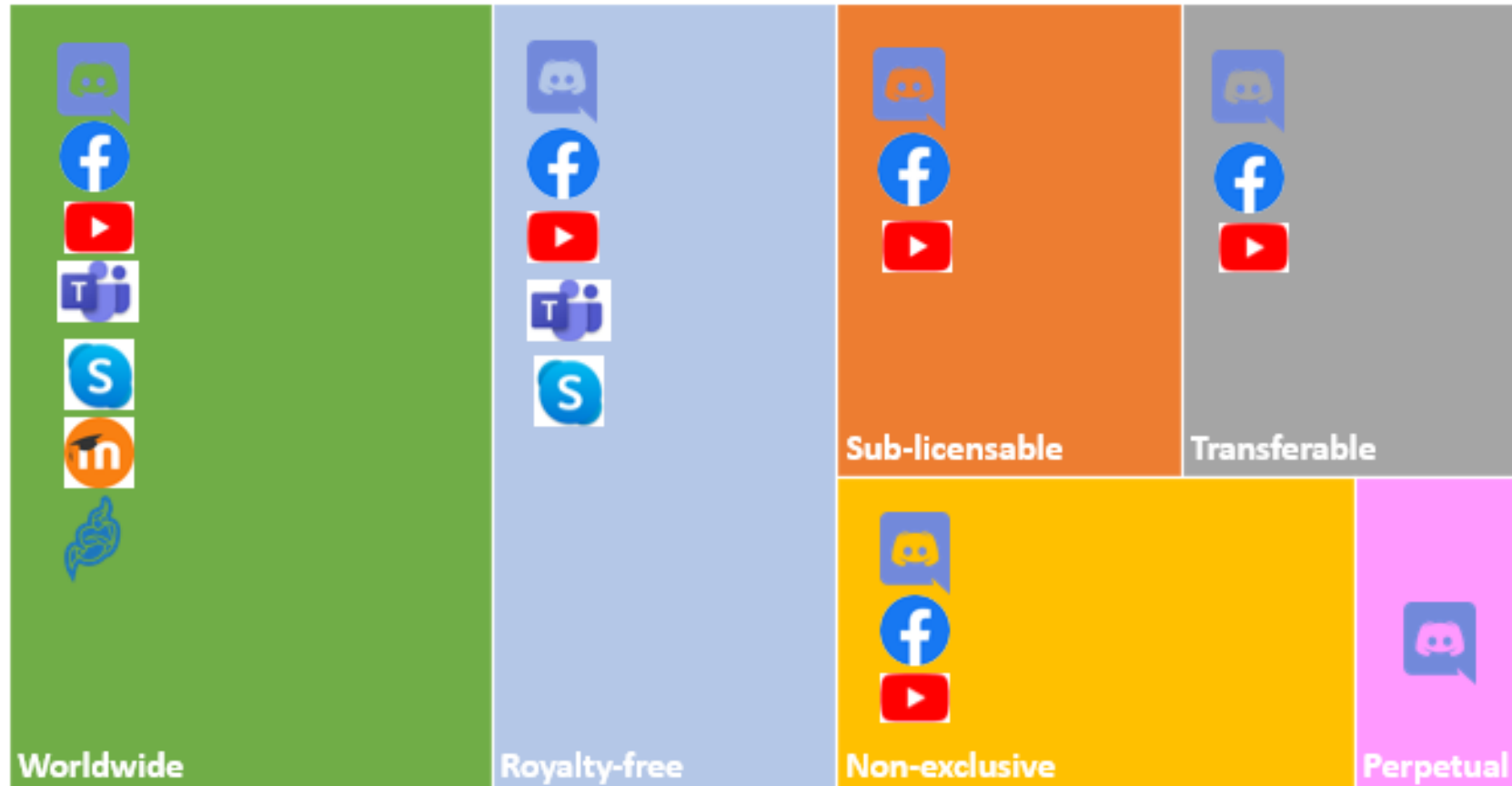


Problematic by omission









Control

- Control is typically negotiated by means of licences.
- User's content is licensed 'solely for the limited purpose of operating and enabling the service to work as intended for you and for no other purposes. 
- To improve the service. 
- Personalized experience and use of the content for commercial purposes 
- License to other users through the service 
- License to third party providers (contractors) for research and development purposes. 
- Leave the regulation of the license largely implicit. 














QUALITIES OF THE LICENSES OF EMERGENCY REMOTE TEACHING SERVICES



Liability

- 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.
- Article 17 of the Digital Copyright Directive
- Some services opt for simpler clauses requiring the user to have “all the rights necessary” to use the content.      jitsi.org
- Require the user to guarantee exclusive ownership of uploaded content.  
- The Content you submit must not include third-party intellectual property (such as copyrighted material) unless you have permission from that party or are otherwise legally entitled to do so.  **YouTube**

Content moderation

- Whereas in some cases the online service reserves the right to remove content at its sole discretion.  
- Most of them foresee a notice-and-take-down (NTD) mechanism (Facebook, G-Suite for Education, Microsoft Teams, MoodleCloud, Skype, YouTube, Zoom).      
- NTD mechanisms become particularly problematic when automated  
- Teachers should have recourse to an easily accessible complaint mechanism. However, not all services make such mechanisms available to their users.   

Conclusion

First, the extent to which the examined terms include broad licenses that go beyond what is necessary to ensure their operation is alarming.

Second, some online services impose strict requirements, whereby users can only upload content they own or for which the owner has given prior authorization.

Third, the mechanisms employed by most services for content removal are unsatisfactory. (removal and complaints mechanism)

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Post-Covid and the classroom

Future scenarios

- Short term
 - Role of national DPAs
 - Collective negotiations with platforms
- Medium-, long-term
 - Public infrastructure for educational services (Caso 2020)
 - Different options to consider: centralisation v. decentralisation (Gurses 2020)
 - Hybrid models?
 - The importance of inclusion and participation of students, lecturers, admin staff in this debate

References

- <http://copyrightblog.kluweriplaw.com/2020/05/27/emergency-remote-teaching-a-study-of-copyright-and-data-protection-terms-of-popular-online-services-part-i/>
- <http://copyrightblog.kluweriplaw.com/2020/06/04/emergency-remote-teaching-a-study-of-copyright-and-data-protection-policies-of-popular-online-services-part-ii/>
- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3779238#

☐ Do you have accounts on social media?

☐ Do you read the terms and conditions of your social media?

- ❑ Thank you very much for attending the sessions!
- ❑ I wish you all the best in your studies
- ❑ Keep in touch! This is my email address zoi.krokida@stir.ac.uk and my twitter [@Zkrokida](https://twitter.com/Zkrokida)