Controversial copyright regulation in Germany – protection of commercial exploitation vs free/open access in science and education

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Content – Topics - Consequences

Germany testbed for a strong copyright in Europe

What is strong copyright?

Strong copyright in the interest of science?

Innovation

Copyright lobby interest groups

Copyright reform in Germany critical topics

Coalition „Copyright for Education and Science“

Conclusion

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Germany testbed for a strong copyright in Europe
Objective:

to create an “education- and science-friendly copyright regime”

Contract for the coalition of the new German government - 2005
Reality:

There is a large gap between the rhetoric of a political system that preaches the knowledge society and the reality of keeping knowledge and information short resources in the interest of the information industry.
What is strong copyright/IPR?
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Strong intellectual property rights (IPR) regulations not an official legal term.

but strong IPR means

- exclusive publication and exploitation rights for creators/authors
- strong legal protection of exploitation interests
- IPR law more a trade law rather than a person law
- preference for individualized technical protection and licencing means rather than flat-rate compensation
- legal protection of technical protection means
"Too much protection by copyright, by other forms of IP protection, or by technology may restrict the free flow of ideas on which the further progress of ideas and technology depends. For developing countries, affordable access to works essential for development such as educational materials and scientific and technical knowledge may be affected by unduly strong copyright rules."

Study "Integrating Intellectual Property Rights and Development Policy"
UK Commission on Intellectual Property Rights  2002
"Economic theory tells us that we must balance those rights if we are to achieve efficiency, granting intellectual property rights only to the extent necessary to enable creators to cover their average fixed costs. Anything more does harm and no good."

"Because of the costs adding more and more intellectual property protection not only has diminishing marginal benefits, but at some point has a net negative impact on innovation, because the strengthening of existing rights stifles more new innovation building on those rights than further expansion encourages."

Copyright
lobby
interest
groups
stakeholder interests in intellectual property

- governments
- collecting societies
- authors
- global regimes
- law
- market economy
- code economy
- DRM industry
- consumer protection organizations

norms, values

- NGOs
- civil society groups
- global discourses

competence

- science organizations
- educational organizations
- libraries, information centers

acceptability

- media, community radios
- UNESCO

intellectual products

norms, values
Copyright reform in Germany
critical topics
Copyright reform in Germany: critical topics

§ 52a Exceptions for education and research

- for the use in class room only
- for the use of participants of a course only
- for the use of members of a well-defined (IP address) research group only

limited until the end of 2006

only small parts of published work

without any direct or indirect commercial interest

access in schools only with explicit permit of rightholders

use of movies in schools only after 2 years of regular exploitation in movie theatres

Copyright reform in Germany: critical topics

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§ 52b Access to published electronic material from libraries

Wiedergabe von Werken an elektronischen Leseplätzen in öffentlichen Bibliotheken, Museen und Archiven

Zulässig ist, veröffentlichte Werke ausschließlich in den Räumen öffentlich zugänglicher Bibliotheken, Museen oder Archive, die keinen unmittelbar oder mittelbar wirtschaftlichen oder Erwerbszweck verfolgen, an eigens dafür eingerichteten elektronischen Leseplätzen zur Forschung und für private Studien zugänglich zu machen, soweit dem keine vertraglichen Regelungen entgegenstehen. Für die Zugänglichmachung ist eine angemessene Vergütung zu zahlen. Der Anspruch kann nur durch eine Verwertungsgesellschaft geltend gemacht werden.

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§ 53a Document delivery on demand

delivery on demand by public libraries

single orders only

small parts only

delivery via traditional mail or fax

delivery electronically only as image files

electronic delivery by libraries not allowed when commercial content providers (publishing companies) are active in retail document delivery markets (such as Science Direct/Elsevier)

(1) Zulässig ist auf Einzelbestellung die Vervielfältigung und Übermittlung einzelner in Zeitungen und Zeitschriften erschienener Beiträge sowie kleiner Teile eines erschienenen Werkes im Weg des Post- oder Faxversands durch öffentliche Bibliotheken, sofern die Nutzung durch den Besteller nach § 53 zulässig ist. Die Vervielfältigung und Übermittlung in sonstiger elektronischer Form ist aus schließlich als grafische Datei und nur dann zulässig, wenn der Zugang zu den Beiträgen oder kleinen Teilen eines Werkes den Mitgliedern der Öffentlichkeit nicht von Orten und zu Zeiten ihrer Wahl mittels einer vertraglichen Vereinbarung ermöglicht wird.
Coalition „Copyright for Education and Science“
The Göttingen Declaration on Copyright for Education and Research of 5 July 2004

Preliminary Remarks

The answer to the question ‘How accessible are knowledge and information?’ will determine the opportunities for education and development open to every citizen in the information society and the opportunities future generations will have to build on existing knowledge. The legal provisions set out in German copyright law will determine whether open, networked communications structures will continue to develop in our society in the long term. They will also affect the quality of our education system, the inventiveness of the sciences and the innovative capacity of trade and industry. In a global, competitive environment, they play a vital role in promoting social, cultural and economic development and hence in securing the future of our society.

With regard to the implementation of Directive 2001/29/EC in Germany, the legislature has so far mainly addressed the concerns of rightholders regarding the commercial use of digital media and networks as additional distribution channels. The prime concern here has been to minimise the risks related to private copying rather than to encourage exploiting the opportunities afforded by the new technical media to the public at large. The latter point is particularly important for the fields of education and science, because it is here that the information society contains new potential for imparting knowledge and promoting co-operation between scientists. The way these new opportunities are used is a decisive competitive factor on the global stage.

We, the undersigned, undertake to ensure that the full potential of the digital media and communications systems remain open for use by the general public and, in particular, by science, and that these media and systems are not subject to restrictions which primarily serve the commercialisation of information by the private sector.

In a digitised and networked information society, access to global information for the purposes of education and science must be guaranteed at all times from any place.

Goals

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Education and research must be allowed unrestricted use of the new ways of disseminating and acquiring knowledge and information. However, the exceptions in German copyright law (particularly sections 52a, 52b and 53, 53a) no longer set out the privileges needed by education and science in a positive, clearly understandable and practicable way.
**Privileges** are subject to considerable **restrictions** which are likely to create uncertainty or even criminalise those working in education and science, instead of offering the legal certainty they require to perform work for the benefit of the general public.
Schools, universities and colleges have developed and successfully tested, in countless projects, the use of new digital, networked media for disseminating knowledge (eLearning) and for communicating and cooperating with others. A considerable amount of effort has gone into this, supported by funds from federal and state levels.
In many schools, universities and colleges, the use of network-based learning environments now accounts for a significant part of regular curricular activities, and has brought about a lasting improvement in the quality of learning and teaching. The various forms of eLearning also hold enormous potential for vocational qualification programmes and further training schemes.
Hence, in the information society, it is extremely important for teaching staff that their academic freedoms and access to information are not restricted unreasonably, and that both staff and students enjoy the legal protection necessary for them to exploit and develop eLearning to the full in future.
Science and research use and develop the latest knowledge in a continuous communicative process that involves scientists working in small local teams as well as their exchanging information on a worldwide basis. This flow of information and communication must not be obstructed by restrictive provisions in the copyright law.
Coalition „Copyright for Education and Research“

Goals

Science and research

Free access to knowledge and information ... must be encouraged and maintained. There must be an unhindered exchange of knowledge if science is to continue making a productive contribution to society. These are core issues for science and its development.
The duty of **public information institutions**, such as libraries, museums, multimedia centers and archives, to supply society with information must be strengthened and supported so that they can work more efficiently.
This means, above all, sustainable long-term archiving programs and the provision of access to the collections of these institutions using modern digital communications and information systems. Only in this way can the sustainable preservation of our cultural heritage be ensured and global access guaranteed.
Free access to information and knowledge does not necessarily mean cost-free. Copyright law should establish **fair and balanced terms and conditions** to ensure remuneration for the use of protected works and unrestricted access for the purposes of education and science.
Technological protection measures which restrict access to information in order to maximise commercial profits, which impose far-reaching restrictions that impinge upon the private sphere and make secure, long-term archiving impossible are, therefore, the wrong approach. They hinder the free development of education and science and, consequently, the economic development of our society, too.
The appropriate remuneration of rightholders through a **system of flat-rate payments** made through **collecting societies** has a long tradition in Germany. This system has worked well for several decades now. Similar systems of collective compensation can also be applied to Internet usage and must be preferred over all restrictions that rely on technological protection measures.
Conclusion

Education and Science need to be protected against the global tendency of progressive and aggressive commodification of knowledge and information.
A copyright regime is needed where **free access and free use** of published information is no longer considered an exception (Schranke) but an indispensable part of information work in education and science.
Free use of information in education and science should not be the exception but the rule.

Commercial exploitation of knowledge should not be the (exclusive) rule but the exception which must not be allowed to interfere with public interest.
Conclusion

Three-step test (Berne Convention)

Members shall confine limitations and exceptions to exclusive rights [a] to certain special cases which [b] do not conflict with a normal exploitation of the work and [c] do not unreasonably prejudice the legitimate interests of the rights holder.

[TRIPS Art 13]
Conclusion

Three-step test (reformulated)

... shall confine limitations and exceptions to free and unrestricted access to published knowledge to certain special cases (in the interest of commercial exploitation) which do not conflict with the public interest in free and unrestricted access to knowledge and information and do not unreasonably prejudice the legitimate interests of the authors of knowledge and information.
Thank you for your attention

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