



Conference  
**2009**

11<sup>th</sup> Interlending and Document Supply  
Conference

Germany, 20<sup>th</sup> - 22<sup>nd</sup> October 2009

STRATEGIC ALLIANCES AND PARTNERSHIPS IN  
INTERLENDING AND DOCUMENT SUPPLY

► 11th ILDS Conference ► Home

What is a strong  
copyright?  
Who needs a strong  
copyright?



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## Master of Science Information Engineering

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- Digitale Bibliotheken
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### Vielfältige Einsatzfelder:

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Konzept:  
2 Semester Spezialisierung plus Masterarbeit

Berufungsschluss:  
16. Januar oder 15. Juli eines Jahres

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Master of Science Information Engineering

## Informations- wissenschaft

WISSEN ZUGÄNGLICH  
MACHEN

Die Herausforderung:  
Zugang zum digital publizierten Wissen schaffen

### Studienschwerpunkte:

- Informationsmärkte
- Wissensmanagement im kooperativen Arbeiten
- Elektronisches Publizieren
- Informationspolitik - ethik, -recht

### Einsatzfelder:

Management Digitaler Bibliotheken, Berater im  
Bereich E-Business und Informationswirtschaft,  
Organisatorisches Informationsmanagement

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## The Göttingen Declaration on Copyright for Education and Research of 5 July 2004

Göttingen Declaration for printout: [\[PDF-file\]](#) [\[RTF-file\]](#) [\[DOC-file\]](#)

### 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.

***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

**Education and research** must be allowed unrestricted use of the new ways of disseminating and acquiring knowledge and information. However, the limitations in German copyright law (particularly sections 52a and 53) no longer set out the privileges needed by education and science in a positive, clearly understandable and practicable way. Instead, these 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.

#### Next Relevant Dates

December 11<sup>th</sup> 2008:  
„Das Urheberrecht zwischen den nationalen  
Körben und dem internationalen Rahmen“  
Workshop des „Urheberrecht für Bildung und  
Wissenschaft e.V.“ in Berlin, 13 bis 18:30 Uhr.  
Am 12.12. vormittags: **Vollversammlung des  
Aktionsbündnisses** ([more...](#))

#### News

[RSS](#) 0.92

October 20<sup>th</sup> 2008:  
Bildungsgipfel ohne Informationsfreiheit nur eine  
Schimäre ([more...](#))

July 24<sup>th</sup> 2008:  
Vorsichtiger Optimismus — Bewegung im  
europäischen Urheberrecht? Ein neues Grünbuch  
der EU-Kommission ([more...](#))

# What is a strong copyright?

(a) One that makes knowledge and information  
a scarce good – a **commodity** ?

or

(b) One that supports open **free access** to  
knowledge and information ?

# *International regulation to enforce a strong copyright*

**Berne** Convention for the Protection of Literary and artistic works (Paris Text 1971)

Agreement on Trade-Related Aspects of Intellectual Property (WTO-TRIPS-Treaty) – 1994

**WIPO** Copyright Treaty (WCT) - 1996

**WIPO** Performances and Phonograms Treaty (WPPT) - 1996

**DCMA** - *Digital Millennium Copyright Act* - **USA** 1998

**EU** -European Copyright Directive (“the Directive”) 2001

**First Adaptation** of the European Copyright Directive in **Germany** 2003 – **second adaptation** 2008; **third adaptation** (particularly with respect to science and education) agreed on in parliament, but still delayed.

„has caused a subtle reorientation of **copyright away from the author towards a trade-oriented perspective**“

1996  
Pérez de Cuéllar

UNESCO-Bericht

*Our Creative Diversity*

Extension of IPR **in time**

Extension of IPR to **living objects** and other objects in nature

Extension of IPR **to software (still controversial, at least in the EU)**

Introduction of some **sui-generis-regulation**, such as for data bases  
**(as in the EU)**

**Lowering the level** of originality for IPR

Extension of IPR to **business models**

Extension of **publication rights**

Extension of **technical protection** of IPR (**Digital Rights Management**)  
and legal protection of technical measures

**Reducing copyright exceptions** (science, private copies,...)



The **enforcement of strong copyright regulations** (in Europe and North America in the last 20 years), which heavily **supports the commercial exploitation** of knowledge and information (not necessarily creators' rights), makes it **more and more difficult to freely access the world-wide information resources** in principle available on the world-wide information markets.

There is **no special copyright privilege** for science and education (or for libraries)

The interests of science and education **are only taken into consideration by exception and limitation** to exclusive rights of the right-holders

Exceptions and limitations are only allowed when they comply with a **strong interpretation of the three-step-test**

## Exceptions and limitations

Exceptions and limitations are called in German „Schranken“ (barriers) but also in the understanding of „Einschränkungen“ (restrictions)

# *The critical norms – exceptions for science, education*

Tendency: many limitations for originally useful exceptions

disabling?



**English:** A barrier, restricting the access for cars for a nature reserve

**Deutsch:** Eine *Schranke*, die die Einfahrt von Kraftfahrzeugen in ein Naturschutzgebiet verhindert

[http://commons.wikimedia.org/wiki/Image:Moderne\\_Schranke.jpg](http://commons.wikimedia.org/wiki/Image:Moderne_Schranke.jpg)

enabling?



[www.gristede.de/assets/images/a\\_Schranke.jpg](http://www.gristede.de/assets/images/a_Schranke.jpg)

# Exceptions for science, education

**Only small parts** of works

Only for use **in** classroom

**Time limit** end of 2006, then  
2008, now 2012

UrhG § 52a Öffentliche Zugänglichmachung für Unterricht und Forschung

§ 52a: Nicht mehr anzuwenden gem. § 137k (F 10. September 2003) mWv 1.1.2007

(1) **A reasonable fee needs to be paid to collecting societies in**

1. **any case**

angs sowie

For the use of  
**defined research**  
groups

Only for **registered**  
**students** in classes

**without any direct or**  
**indirect commercial**  
interest

Use of copyrighted material in  
**schools only with special**  
**permission** of rightsholders

einzelne Beiträge aus Zeitungen oder Zeitschriften zur Veranschaulichung  
im Unterricht an Schulen, Hochschulen, nichtgewerblichen Einrichtungen der  
Aus- und Weiterbildung sowie an Einrichtungen der Berufsbildung  
ausschließlich für den bestimmt abgegrenzten Kreis von  
Unterrichtsteilnehmern oder

2. veröffentlichte Teile eines Werkes, Werke geringen Umfangs sowie einzelne  
Beiträge aus Zeitungen oder Zeitschriften ausschließlich für einen  
bestimmt abgegrenzten Kreis von Personen für deren eigene  
wissenschaftliche Forschung

öffentlich zugänglich zu machen, soweit dies zu dem jeweiligen Zweck geboten und zur  
Verfolgung nicht kommerzieller Zwecke gerechtfertigt ist.

**Use of moovie/video material**

(2) Die öffentliche Zugänglichmachung eines für den Unterrichtsgebrauch an Schulen  
bestimmten Werkes ist stets nur mit Einwilligung des Berechtigten zulässig. Die  
öffentliche Zugänglichmachung eines Filmwerkes ist vor Ablauf von zwei Jahren nach  
Beginn der üblichen regulären Auswertung in Filmtheatern im Geltungsbereich dieses  
Gesetzes stets nur mit Einwilligung des Berechtigten zulässig.

**only 2 years after public**  
**performance**



# Exceptions for document delivery

„§ 53a

Kopienversand auf Bestellung

on individual order only

small parts only

(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 ausschließlich 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.

delivery via classic postal service or fax

electronic delivery as graphic file (facsimile reprint) only

Electronic delivery (of any kind) is not permitted if there is a comparable commercial retail (end-user) service available on the information markets (such as Elsevier's Science Direct) – these services must be clearly visible to the public (or to intermediaries) and the price for a single article must be reasonable/appropriate (angemessen)

## Preliminary results

Copyright is strongly based on **the romantic concept of the individual author** und his. **exclusive right on intellectual property**

In reality, not the creators, but the exploiters (publishing companies) take advantage of a strong protection of intellectual property

## Preliminary results

Interests of users are only taken care of by exceptions and limitations

Criterion for exceptions and limitations is the three-step-test

Norms for exceptions and limitations are therefore very restrictive

## Preliminary results

On the basis of the **existing copyright** with a strong understanding of **intellectual property as a personal right** it is quite **unlikely that copyright will make knowledge and information a common good** which everyone can use for their private, professional, social and political interest

## What can be done?

To make copyright an **enabling**  
**tool** for development not a  
**disabling tool**



The holy cow of copyright

## *Article 13* *Limitations and Exceptions*



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

## **DECLARATION A BALANCED INTERPRETATION OF THE “THREE-STEP TEST” IN COPYRIGHT LAW** (Geiger, Hilty, Griffiths, Suthersanen 2008)

The Three-Step Test **does not require limitations and exceptions to be interpreted narrowly**. They are to be interpreted according to their **objectives and purposes**.

**A normative, not a dogmatic** understanding of copyright

**DECLARATION  
A BALANCED INTERPRETATION  
OF THE “THREE-STEP TEST” IN COPYRIGHT LAW**  
(Geiger, Hilty, Griffiths, Suthersanen 2008)

**A normative, not a dogmatic** understanding of copyright

**“promote the progress of science and useful arts”  
(United States Constitution)**

**DECLARATION  
A BALANCED INTERPRETATION  
OF THE “THREE-STEP TEST” IN COPYRIGHT LAW**

The Three-Step Test should be interpreted in a manner that respects the  
**legitimate interests of third parties**, including

# A reformulation of the three-step test

## DECLARATION A BALANCED INTERPRETATION OF THE “THREE-STEP TEST” IN COPYRIGHT LAW

- the interests deriving from **human rights** and fundamental freedoms; interests in competition, notably on secondary markets; and
- other public interests, notably in **scientific progress** and **cultural, social, or economic development**.

**realistic?**

freedom of science  
(„Wissenschaftsfreiheit“)

information and  
communication rights



## Paradigm shift need

Knowledge societies should reformulate the old three-step test

**realistic?**

## The holy cow of copyright

- free use of k&i only as an exception
- free use of k&i must not hamper normal commercial exploitation
- free use of k&i must not hamper unreasonably creators' rights

- Commercially exploiting use of k&i only as an exception
- Commercially exploiting use of k&i must not hamper free use of k&i
- Free use of k&i must not hamper unreasonably creators' rights

# What can be done?

One of the problems of copyright is the combination between contractualism and a dogmatic interpretation of intellectual property

Exploiters gain complete (exclusive) rights by transferring authors exploitation rights into users rights via contract

# What can be done?

One of the problems of copyright is the combination between contractualism and a dogmatic interpretation of intellectual property

Exploitation rights shall only be **transferred as simple using rights, not** as exclusive rights on all (future) applications

**realistic?**

# What will authors do with their remaining/regained rights?

Will they keep their positive publication rights?

Or can they be **requested** or **required/mandated** (by law)  
to give their publishing rights to **public open  
repositories**?

**realistic?**

# Perspectives



Science and education need to have  
their voice heard at the Eu level

### ***ENCES Initiative***

**European Network for Copyright  
in support of Education and  
Science**

# ***ENCES Initiative* - European Network for Copyright in support of Education and Science**

There is currently **no organized group representing European interest in a science- and education-friendly copyright**. This needs to be changed.

One way to do so is by developing an **EU-wide network of organizations and individuals in science and education** who share the view that the primary objective of copyright is to promote the progress of science, education, and culture as public goods.

***ENCES***

One might ask **whether copyright is still an appropriate means** for achieving public goals in education and science.

**Open access**, an initiative from science itself, is on its way to becoming the dominant scientific publishing model, making possible free access to knowledge for all.

But one still has to take into account commercial publication markets, also in science and education (increasingly in e-learning), which promise to hold their own in the foreseeable future. And these **markets are strongly influenced by copyright regulation.**

therefore

Answers to the following questions are on the agenda for next few years

(1) What needs to be done to make **copyright**, in particular with respect to science and education, an **enabling tool for development** and not primarily for exploitation?

Answers to the following questions are on the agenda for next few years

(2) Is there a need – and if so, a chance, – to overcome the traditional copyright approach of exceptions and limitations to the exclusive rights of rights-holders, replacing it by **a general privilege in favour of science and education?**

Answers to the following questions are on the agenda for next few years

(3) Is a **new understanding of intellectual property needed**? Do we need to develop new ways of protecting and guaranteeing intellectual property? What are the consequences of intellectual property **no longer** being considered primarily an **individual right** but also a **responsibility towards society** and social welfare?

Answers to the following questions are on the agenda for next few years

(4) What are the main factors in making k&i **sustainable and accessible for future generations**? Which role will copyright regulation play in achieving this goal?



Answers to the following questions are on the agenda for next few years

(5) How likely is it that the traditional information industry will gradually mutate into what has been called a **common-based economy**, where rights on pool resources such as k&i (comparable to other pool resources such as water or the air) are considered **common property rights rather than private property rights**?

Answers to the following questions are on the agenda for next  
few years

(6) How can **these common property rights** for k&i be **institutionalized**, in analogy to recent suggestions for natural common pool resources from institutional economy (Ostrom 1990/2007)?

How can commercial models for k&i be developed in the **framework of a commons-based economy**?

# Conclusion

## A strong copyright

yes

but only, when **free access** and usage of the common good „knowledge and information“ is **guaranteed for everyone.**

**in agreement with Locke:**

**Information – a private property and a  
commodity?  
may be**

**But only, according to the riparian principle, if there is left  
enough for all of us in unfettered quality**

**Thank you for your attention**

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