Ences and the need for a European-wide general copyright exception in favor of science and education

Rainer Kuhlen
Chairperson of ENCES
Speaker of the German Coalition „Copyright for Science and Education“
http://www.urheberrechtsbuendnis.de/index.html.en
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About ENCES

ENCES (European Network for Copyright in support of Education and Science) is an EU-wide network of organizations and individuals in science and education who share the view that copyright is a socially valuable construct and that the primary objective of copyright is to promote the progress of science, education, and culture as public goods.

ENCES’ basic assumption is that knowledge and information in its digital form should be made available to everyone from everywhere and at any time under fair conditions. This is particularly true in science and education, where access to knowledge and information is indispensable.

More information (pdf)
Copyright is a concern and in the responsibility of the respective national legislative power of the states in the EU, but is highly dependent on directives from the EU.

The success of national coordinated initiatives is very limited.

In order to achieve an education- and science-friendly copyright, science and education need to be present on the European level (and in the future, also in international arenas, such as WTO and WIPO).
There was since recently no organized group representing European interest in a science- and education-friendly copyright.

This was 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.
There is a need for coordinating existing European interest groups and initiatives working towards a copyright in the public interest.

The voice of science and education will only be heard if and when it is legitimized by as many science organizations and individual scientists as possible.

Therefore, all individuals and institutions in science and education are invited to become an active member in ENCES.
The main purpose of ENCES (European Network for Copyright in favor of Education and Science):

to provide a **platform for organizations and individuals** who work towards improving the European and respective members’ national copyright legislation.
ENCES will serve **not only as a means for lobbying work** at the EU level and for supporting comparable national efforts in EU member countries

but also **as a forum for the development of a new and sustainable copyright understanding**

which both goes back to its roots and takes into account the **free potentials of electronic environments for the production, distribution and usage of knowledge and information.**
ENCES intends to pursue a **threelfold strategy**:  

a. **ENCES will make concrete proposals** in the public interest of science and education for the evaluation and the **improvement of the EU directives** related to copyright.  
These proposals should also have **effect** on legislation at the **different national levels**.
ENCES intends to pursue a **threefold strategy**:

b. What is really needed is a **fundamental change, a paradigm shift** in the way all aspects of the production, dissemination, and usage of knowledge and information are organized in the information society, taking into account the value-building potential of information and communication technology.
ENCES intends to pursue a **threelfold strategy**:

c. To encourage the **information economy** to develop new **business models** as part of a **commons-based economy** where access to knowledge and information itself is free (**freeconomics**) but where a reasonable return of investment can be achieved for example by **value-adding products** and services.
One might even 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 there is still a need for a science and education-friendly copyright

- to ease the spread of open access by appropriate copyright regulation
- to overcome the problems of existing limitations/exceptions
How to overcome the problems of existing copyright limitations/exceptions
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 if and when they comply with a **strong interpretation of the three-step-test**

*Article 13 /TRIPS/WTO
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.
How to overcome the problems of existing limitations/exceptions

Limitations/Exceptions:

The Center-Piece of Copyright Stuck
How to overcome the problems of existing limitations/exceptions

Limitations – Exceptions - Barriers (Schranken)

disabling?  enabling?

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
www.gristede.de/assets/images/a_Schranke.jpg
How to overcome the problems of existing limitations/exceptions

still valid


*Official Journal L 167, 22/06/2001 P. 0010 - 0019*
How to overcome the problems of existing limitations/exceptions

still valid Directive 2001/29/EC

➤ certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives

➤ exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention
How to overcome the problems of existing limitations/exceptions

**Article 5 Exceptions and limitations**

(a) use for the sole purpose of *illustration for teaching or scientific research*, as long as the source, including the *author's name*, is indicated, unless this turns out to be impossible and to the extent justified by the *non-commercial purpose* to be achieved

sounds o.k. but *only optional* and if adapted, in most national copyright laws *very restrictively realized*
How to overcome the problems of existing limitations/exceptions

Copyright reform in Germany 2003

§ 52a Exceptions for education and research

Only small parts of published work

for the use in class room only

limited until the end of 2012

for the use of members of a well-defined (IP address) research group only

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

How to overcome the problems of existing limitations/exceptions

UrhG § 52a Öffentliche Zugänglichmachung für Unterricht und Forschung

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

(1) Zulässig ist,
1. veröffentlichte kleine Teile eines Werkes, Werke geringen Umfangs sowie einzelne Beiträge aus Zeitungen oder Zeitschriften zur Veranschaulichung im Unterricht an Schulen, Hochschulen, nügwevlichen Einrichtungen der Aus- und Weiterbildung sowie an Einrichtungen der Berufsbildung ausschließlich für den bestimm abgegrenzten Kreis von Unterrichtsteilnehmern oder

2. veröffentlichte Teile eines Werkes, Werke geringen Umfangs sowie einzelne Beiträge aus Zeitungen oder Zeitschriften ausschließlich für einen bestimm 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 gerechtfeilt ist.


each use has to be reimbursed
How to overcome the problems of existing limitations/exceptions

**Article 5 Exceptions and limitations**

(3) use by communication or making available, for the purpose of **research or private study**, to individual members of the public by **dedicated terminals on the premises** of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

sounds o.k. but useless in an electronic environment: user has to go to the information, not the information to the user

libraries, educational establishments or museums, or by archive
### How to overcome the problems of existing limitations/exceptions

#### Studies related to limitations and exceptions commissioned by WIPO 2003-2009

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<td>WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by Mr. Sam Ricketson</td>
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<td>Automated Rights Management Systems and Copyright Limitations and Exceptions, prepared by Nic Garnett</td>
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<td>Study on Copyright Limitations and Exceptions for the Visually Impaired, prepared by Judith Sullivan</td>
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<td>Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews, Director</td>
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<td>Study on Limitations and Exceptions for Copyright for Educational Purposes in the Arab Countries Victor Nabhan</td>
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<td>WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia prepared by Daniel Seng</td>
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<td>Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, <strong>Raquel Xalabarder</strong></td>
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How to overcome the problems of existing limitations/exceptions

The Recasting of Copyright & Related Rights for the Knowledge Economy

- The EC legislature should strive to establish a more flexible and forward looking regime of limitations on copyright and related rights.

- A non-exhaustive list of limitations would allow Member States to respond more quickly than the EC legislature to urgent situations that will arise in the dynamic information market.

- Such an open-ended regime would best reflect the principles of subsidiarity and proportionality.
Instruments on copyright limitations can also be based on

1. **human rights**, in particular, on core fundamental freedoms, such as freedom of speech and the right to privacy

2. **competition law** – provision for international norms on compulsory licensing or to address other market failures

2. **consumer law** with the potential for protecting consumers against unfair terms in standard licensing agreements
How to overcome the problems of existing limitations/exceptions

The Wittem Project

European copyright code

April 2010

www.copyrightcode.eu
Chapter 5: Limitations
Art. 5.1 – Uses with minimal economic significance 19
Art. 5.2 – Uses for the purpose of freedom of expression and information 20
Art. 5.3 – Uses permitted to promote social, political and cultural objectives 20
Art. 5.4 – Uses for the purpose of enhancing competition 21
Art. 5.5 – Further limitations 22
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Art. 5.7 – Amount and collection of remuneration 23
Art. 5.8 – Limitations prevailing over technical measures 23
Art. 5.2– Uses for the purpose of freedom of expression and information

(2) The following uses for the purpose of freedom of expression and information are permitted without authorisation, but only against payment of remuneration and to the extent justified by the purpose of the use:

(a) use of single articles for purposes of internal reporting within an organisation;
(b) use for purposes of scientific research.
Art. 5.3 – Uses permitted to promote social, political and cultural objectives

(2) The following uses for the purpose of promoting important social, political and cultural objectives are permitted without authorisation, but only against payment of remuneration, and to the extent justified by the purpose of the use:

(a) reproduction by a natural person for private use, provided that the source from which the reproduction is made is not an obviously infringing copy;

(b) use for educational purposes.
The approach of the Wittem group is both traditional and conservative (although realistic).

- Considering knowledge as a private property
- Ignoring the character of knowledge as a commons
- Focus on single author and unitary closed work
- Neglecting collaborative paradigm
How to overcome the problems of existing limitations/exceptions

A generic clause for science and education
§ 45b Education and Science

(1) Copying, distributing and making published works available to the public is permitted for personal use in science and for educational purposes in schools, institutions of higher education (such as universities), and other non-commercial institutions dedicated to education, continuing and professional training. The right to make works publicly available (and to use these works) is restricted in each case to a well-defined group of people in science and education. Sentence 1 is also valid for scientific and educational purposes in documentation, archiving and preservation, in particular for services provided by publicly financed libraries, archives, documentation centers and museums which support scientific usage and serve educational purposes.
§ 45b Education and Science

(1) Copying, distributing and making published works available to the public is permitted for personal use in science and for educational purposes in schools, institutions of higher education (such as universities), and other non-commercial institutions dedicated to education, continuing and professional training.

provided that the source from which the reproduction is made is not an obviously infringing copy from a legitimately acquired copy only, e.g. from a library or bought from a commercial provider

not restricted to publicly financed science
§ 45b Education and Science

(2) The usage of published works according to para (1) **requires remuneration**. Remuneration can only be claimed by a collecting society or by another legitimized institution.

(3) Contractual agreements which rule out para (1) are invalid.
§ 45b Education and Science

... The right to make works publicly available (and to use these works) is restricted in each case to a well-defined group of people in science and education. ...

➢ Scientists within a research group (local but also remote)

➢ Members (students) of a course (local but also remote - e-learning)
§ 45b Education and Science

... Sentence 1 is also valid for scientific and educational purposes in documentation, archiving and preservation, in particular for services provided by publicly financed libraries, archives, documentation centers and museums which support scientific usage and serve educational purposes. ...
EU-wide there is nowhere such a generic clause for science and education

The EU countries are stuck in the traditional system of exceptions and limitations under the control of a strong three-step-test

Only by a joined lobbying effort at the grass-root level can the problems of these limitation be overcome

That is what ENCES is all about
Thank you for your attention

Slides to be downloaded from

www.kuhlen.name/
www.ences.eu

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