

Open Access Workshop – Tartu Oct 20th 2010



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

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<http://www.urheberrechtsbuendnis.de/index.html.en>



1. ENCES – objectives and strategy
2. How to overcome the problems with copyright exceptions
3. Studies on alternative copyright regulations
4. A generic copyright clause for science and education



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ENCES

European Network for Copyright in support of Education and Science

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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.

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News

[Rainer Kuhlen presenting ENCES at OA Week in Tartu](#)

Rainer Kuhlen, chairman of the ENCES e.V. association, will contribute to the Open Access Workshop in Tartu during the International Open Access Week (October 18-24, 2010). On Wednesday 20th of Oct... [\[mehr...\]](#)

[Hearing on Orphan Works at the German Federal Ministry of Justice – A Report](#)

Members of the Executive Board of ENCES (Karin Ludewig and Michaela Voigt) attended the public hearing on the regulation of the orphan works issue, which took place on 13 October 2010 at the German... [\[mehr...\]](#)

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 **threefold 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 **threefold 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 (**freeeconomics**) 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.

Limitations/Exceptions:

The Center-Piece of Copyright Stuck

Limitations – Exceptions - Barriers (Schranken)

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

enabling?



www.gristede.de/assets/images/a_Schranke.jpg

still valid

Directive 2001/29/EC of the European Parliament and of the Council
of 22 May 2001 on the harmonisation of certain aspects of
copyright and related rights in the information society

Official Journal L 167 , 22/06/2001 P. 0010 - 0019

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

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

for the use of participants of a course 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

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, 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.

(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.

Open Access Workshop – Tartu Oct 20th 2010 – EINES and the need for a general copyright exception

Article 5 Exceptions and limitations

(n) 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

WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by Mr. Sam Ricketson, (document SCCR/9/7) (the Ricketson Study)[1];

Automated Rights Management Systems and Copyright Limitations and Exceptions, prepared by Nic Garnett (document SCCR/14/5) (the Garnett Study)[2];

Study on Copyright Limitations and Exceptions for the Visually Impaired, prepared by Judith Sullivan (document SCCR/15/7) (the Sullivan Study)[3];

Study on Copyright Limitations and Exceptions for Libraries and Archives, prepared by Kenneth Crews, Director (document SCCR/17/2) (**the Crews Study**)[4];

Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean Juan Carlos Monroy Rodríguez (document SCCR/19/4) (the Monroy Study)[5];

Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa Joseph Fometeu (document SCCR/19/5) (the Fometeu Study)[6];

Study on Limitations and Exceptions for Copyright for Educational Purposes in the Arab Countries Victor Nabhan (document SCCR/19/6) (the Nabhan Study)[7];

WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia prepared by Daniel Seng (document SCCR/19/7) (the Seng Study)[8];

Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel, **Raquel Xalabarder** (document SCCR/19/8) (the Xalabarder Study)[9];

[1] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805 [2] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952

[3] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696 [4] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192

[5] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130303 [6] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241

[7] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130302 [8] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249

[9] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393



provided
by Dr.
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The Recasting of Copyright & Related Rights for the Knowledge Economy

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Institute for Information Law
University of Amsterdam
The Netherlands
<http://www.ivir.nl>
November 2006

- 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**.

CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

Final Report 030608

P. Bernt Hugenholtz - Ruth L. Okediji

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
1. **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



The Wittem Project

European copyright code

April 2010

www.copyrightcode.eu

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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 Wittem proposal – a breakthrough in copyright?

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**

A generic clause for science and education

A generic clause for science and education 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.



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.

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**

A generic clause for science and education

§ 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.**

A generic clause for science and education



§ 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)**

A generic clause for science and education



§ 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. ...

How to overcome the problems of existing limitations/exceptions



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 ENCEN is all about

Thank you for your attention

Slides to be downloaded from

www.kuhlen.name/
www.ences.eu



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