Copyright reform on the EU level

European Network for Copyright in support of Education and Science (ENCES) workshop

organised in cooperation of the Library of the Hungarian Academy of Sciences and Budapest Business School
Copyright reform on the EU level

What can science and education expect from a copyright reform on the EU level?

Rainer Kuhlen

University of Konstanz, Humboldt-University Berlin, IPR Center of Helsinki University
Copyright reform on the EU level

still valid


Official Journal L 167, 22/06/2001 P. 0010 - 0019
Copyright reform on the EU level

still valid Directive 2001/29/EC

- harmonisation
- exhaustive enumeration of exceptions and limitations
- high level of protection
- appropriate reward for the use of authors’ work
- author's right of communication to the public
Copyright reform on the EU level

still valid Directive 2001/29/EC

- rights ... may be transferred, assigned or subject to the granting of contractual licences

- 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
Copyright reform on the EU level

still valid Directive 2001/29/EC

- harmonisation: failed (non-adaptive)
- exhaustive enumeration of exceptions and limitations: mainly in commercial interest
- high level of protection: modest success
- appropriate reward for the use of authors’ work: mostly not an author’s right
- author's right of communication to the public:
Copyright reform on the EU level

has strengthened commercial exploitation

still valid Directive 2001/29/EC

- rights ... may be transferred, assigned or subject to the granting of contractual licences

- 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

yes, but making excs & lims often useless

yes, but very restrictive
Copyright reform on the EU level


WIPO Copyright Treaty (WCT) - 1996

WIPO Performances and Phonograms Treaty (WPPT) 1996

Digital Millennium Copyright Act - USA 1998


„has caused a subtle re-orientation of copyright away from the author towards a trade-oriented perspective“
<table>
<thead>
<tr>
<th>Copyright reform on the EU level</th>
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<tbody>
<tr>
<td><strong>Extension of IPR in time</strong></td>
</tr>
<tr>
<td><strong>Extension of IPR to living objects</strong> and other objects in nature</td>
</tr>
<tr>
<td><strong>Extension of IPR to software (still controversial, at least in the EU)</strong></td>
</tr>
<tr>
<td>Introduction of some sui-generis-regulation, such as for data bases (as in the EU)</td>
</tr>
<tr>
<td><strong>Extension of publishers´ rights</strong></td>
</tr>
<tr>
<td><strong>Extension of technical protection of IPR (Digital Rights Management)</strong> and legal protection of technical measures</td>
</tr>
<tr>
<td><strong>Reducing copyright exceptions</strong> (science, private copies,...)</td>
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</tbody>
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Copyright reform on the EU level

Limitations: The Center-Piece of Copyright Stuck

Prof Dr Thomas Dreier, Institute for Information and Economic Law, Karlsruhe Institute of Technology

Jonathan Griffiths, Senior Lecturer, Queen Mary University of London

March 17th Hannover – Commons, Users, Service Providers

http://www.iri.uni-hannover.de/program.html
Copyright reform on the EU level

Limitations – Exceptions - Barriers (Schranken)

<table>
<thead>
<tr>
<th>disabling?</th>
<th>enabling?</th>
</tr>
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</table>

[Image: www.gristede.de/assets/images/a_Schranke.jpg](www.gristede.de/assets/images/a_Schranke.jpg)

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

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

Copyright reform on the EU level

Limitations: The Center-Piece of Copyright Stuck

Article 5 Exceptions and limitations (a) – (o)
Copyright reform on the EU level

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
Copyright reform on the EU level

§ 52a Exceptions for education and research

only small parts of published work

for the use in classroom 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 Umfanges 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 Umfanges 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.

each use has to be reimbursed
Copyright reform on the EU level

Article 5 Exceptions and limitations

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

sounds o.k. but also only optional and unclear what „fair practice“ means
Copyright reform on the EU level

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;

libraries, educational establishments or museums, or by archive
Copyright reform on the EU level

Article 5 Exceptions and limitations

(\textit{n}) use by communication or making available, for the purpose of \textit{research or private study}, to individual members of the public by \textit{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;

\begin{itemize}
  \item sounds o.k. but useless in an electronic environment: user has to go to the information, not the information to the user
  \item libraries, educational establishments or museums, or by archive
\end{itemize}
Copyright reform on the EU level

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.
Copyright reform on the EU level

Conceiving an International Instrument on Limitations and Exceptions to Copyright†

FINAL REPORT

March 06, 2008

P. Bernt Hugenholtz* & Ruth L. Okediji**

Institute for Information Law
University of Amsterdam

University of Minnesota
Law School
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

3. **consumer law** with the potential for protecting consumers against unfair terms in standard licensing agreements
1. Exclusions from protection (facts, ideas,...)
2. Limits to economic rights (permitting, for instance, exhaustion and various nonpublic acts of communication)
3. Limitations and exceptions proper (enumerating both mandatory and optional L&E’s)

according to the three-step-test
Copyright reform on the EU level

Three-step-test

The other Center-Piece of Copyright Stuck

*Article 13*

*Limitations and Exceptions*

Members shall confine limitations or exceptions to exclusive rights to

(a) *certain special cases* which

(b) do not conflict with a *normal exploitation* of the work

(c) and do not unreasonably prejudice the *legitimate interests* of the right holder.
Copyright reform on the EU level

Three-step-test - A holy cow of copyright?

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.
Copyright reform on the EU level

Three-step-test - A holy cow of copyright?

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
Three-step-test - A holy cow of copyright?

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

including

- 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.
Copyright reform on the EU level

Three-step-test - A holy cow of copyright?

Reformulation – why could it be more innovative?

Commercial exploitation of intellectual work

a) only in special cases

b) when it is guaranteed that the original works are freely available for everyone

c) when authors’ information autonomy and attribution, in particular their moral rights, is guaranteed realistic?
Copyright reform on the EU level

Recent initiatives on the EU level?

GREEN PAPER

Copyright in the Knowledge Economy

2008

Creative Content in a European Digital Single Market: Challenges for the Future

2009
The purpose of the Green Paper to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment.
Copyright reform on the EU level

GREEN PAPER
Copyright in the Knowledge Economy

Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions.

answer from science

not at all – contractual agreements mostly strengthen the rights of commercial exploiters
Copyright reform on the EU level

GREEN PAPER
Copyright in the Knowledge Economy

Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

answer from science

yes – in particular excs & lims in favour of science and intermediaries (libraries)
Copyright reform on the EU level

GREEN PAPER

Copyright in the Knowledge Economy

Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

(a) Format shifting;
(b) The number of copies that can be made under the exception;
(c) The scanning of entire collections held by libraries

answer from science

yes – clarification strongly necessary
Copyright reform on the EU level

GREEN PAPER

Copyright in the Knowledge Economy

Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes?

Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

answer from science

yes – but not as an substitute for legally guaranteed excs & lims
Copyright reform on the EU level

GREEN PAPER

Copyright in the Knowledge Economy

Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

answer from science

yes – absolutely necessary
Copyright reform on the EU level

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.10.2009
COM(2009) 532 final

COMMUNICATION FROM THE COMMISSION

Copyright in the Knowledge Economy
The consultation has revealed that a sustainable system of prior authorisation for a variety of library initiatives requires simple and cost efficient rights clearance systems covering digitisation and online dissemination.

This work will address, inter alia, the clarification of the legal implications of mass-scale digitisation and possible solutions for the issue of transaction costs for right clearance.
Copyright reform on the EU level

Résumé from the Commission on the basis of 372 responses

The overall aim of tackling orphan works - their digitisation, preservation and dissemination - is to establish common standards on the level of due diligence in searching for the owners of orphan works and resolve the issue of potential copyright infringement when orphan works are used.

As a key building block in the new comprehensive strategy on intellectual property rights, an initiative on orphan works should provide for an EU-wide solution to create legal certainty, facilitate the knowledge flow necessary for innovation, and prevent obstacles to intra-Community trade in orphan works.
Résumé from the Commission on the basis of 372 responses

The advent of the Internet and its possibilities for borderless dissemination of knowledge and science has led the Commission, in close consultation with stakeholders, to already take concrete action in relation to open access to publicly-funded research results.

The licensing burden encountered by a typical European university should be reduced.

With respect to distance learning, the Commission will continue to monitor the evolution of an integrated European space for cross-border distance learning.
Copyright reform on the EU level

Creative Content in a European Digital Single Market: Challenges for the Future

A Reflection Document of DG INFSO and DG MARKT

22 October 2009
Copyright reform on the EU level

Creative Content in a European Digital Single Market: Challenges for the Future

A Reflection Document of DG INFSO and DG MARKT

22 October 2009

neither science nor education is mentioned in the document

is science not creative work for the EU?
Copyright reform on the EU level

Creative Content in a European Digital Single Market: Challenges for the Future

Output from science is also creative content.

Content form science is user-generated content. Producers of knowledge need access to published knowledge.

There is a need for new and more flexible copyright limitations.

Comment of the German Coalition „Copyright for Science ad Education“

There is a need for a paradigm shift towards a user-oriented copyright.

The moral rights, not the exploitation rights, need to be strengthened in copyright.

Both science and information economy are best served when business models in publishing are based on open access.
Copyright reform on the EU level

Conclusion
Basic requirements
Copyright reform on the EU level

Priority of legal regulation (excs & lims) opposite to contractual agreements
Copyright reform on the EU level

Three-step-test - a reformulation is needed

Otherwise excs & lims are more or less useless
Copyright reform on the EU level

Commercial exploitation of intellectual work from science and education

a) only in **special cases**

b) when it is guaranteed that **publicly funded intellectual works from science** is made **freely available** (immediately or after a short embargo period)

c) when **authors’ information autonomy and attribution, in particular their moral rights**, is guaranteed
Copyright reform on the EU level

a special copyright privilege for science and education is needed

going beyond the fair use principle in anglo-saxon copyright
Copyright reform on the EU level

Business models in publishing must be based on the open access paradigm.

Commercial business models for publicly funded research must allow parallel open access publishing.

This right must be embedded in copyright regulation.
Copyright reform on the EU level

A legal solution for an institutional mandate for open access publishing - guaranteeing immediate free access to everyone if not in copyright, then somewhere else in law
Copyright reform on the EU level

Theses goals cannot be achieved on the respective national level of copyright reform
Copyright reform on the EU level

The **interests and needs** of higher education and research are traditionally **underrepresented** in political discourse.

To overcome this deficit there is a need to build a **European network for copyright in support of education and research** in order to get “the EU to tackle its complicated patchwork of copyrights” in a sustainable way.

This is what **ENCES** intends to do
Copyright reform on the EU level

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