

Expert Workshop

"Copyright fit for the Internet Age: National and International Strategies to support Education and Research"

British Library, London, UK

Friday, 27 May 2011



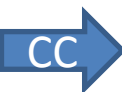
The need for a European-wide general Exception in favor of Research and Education

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The need for a European-wide general Exception in favor of R&E





University
of
Konstanz





Coalition for Action "Copyright for Education and Research"

Aktionsbündnis „Urheberrecht für Bildung und Wissenschaft“

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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.

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

News

[RSS 0.92](#)

July 15th 2010:

Aktionsbündnis zieht positives Resümee der 2. Anhörung, sieht aber weiteren Handlungsbedarf für Bildung und Wissenschaft ([more...](#))

July 6th 2010:

Aktionsbündnis stellt seinen Entwurf einer Wissenschaftsschranke im Urheberrecht vor ([more...](#))

June 30th 2010:

Mit ENCES (European Network for Copyright in Support of Education and Science) wurde eine wichtige Interessenvertretung gegründet. ([more...](#))

June 29th 2010:

Ein Leistungsschutzrecht ist für Presse- und Schulbuch-Verlage nicht zu rechtfertigen, wie die Anhörung des BMJ am 28. Juni 2010 ([more...](#))

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.

Infrastructure Copyright for Research and Education

Suche

Erweiterte Suche



Rückblick IUWIS-Workshop

Eine **Zusammenfassung** des ersten IUWIS-Workshop
Verfügung.

Funded by the German Research
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Neue Meldungen

Die JIPITEC Ausgabe 1-2011 ist erschienen 1
Über Twitter verbreitete sich heute die Meldung, dass eine neue... 13.05.2011 – 16:53

Nachdenken über Promotionsverfahren 1
Vertrauen & Kontrolle, Transparenz, Betreuung, Qualität & wissenschaftliche Standards – das sind die Schlagworte in der... 13.05.2011 – 12:53

Verschärftes Promotionsrecht an der Humboldt-Universität? 0
Der Präsident der Humboldt-Universität zu Berlin Jan-Hendrik Olbertz sprach mit der... 12.05.2011 – 14:09

Französische Verlage J. Google 0
Buchreport.de meldete bereits am... 12.05.2011 – 13:23

Silvana Koch-Mehrin legt Ämter nieder 0
Die FDP-Politikerin Silvana Koch-Mehrin verkündete am Abend des 11.05.2011 den Rücktritt von ihren Ämtern als Vizeprä... 12.05.2011 – 10:01



Neue Dossierbeiträge

Eine Sicht von STM 0
In: § 38 UrhG / Zweitveröffentlichungsrecht
'STM Statement on Negotiating Rights for Institutional Repository Postings and Author Rights'... 18.05.2011 – 09:08

Aktuelle Rechtsprechung: § 38 UrhG nicht gänzlich in Verlags-AGB abbedingbar? 0
In: § 38 UrhG / Zweitveröffentlichungsrecht
Der Schwachpunkt des Zweitveröffentlichungsrechts in § 38 UrhG ist seine vertragliche Abbedingbarkeit. Verlagsverträge fü... 29.04.2011 – 13:57

Jedes Bundesland und jeder Richter mit eigener

Neue Blogbeiträge

Das Fehlverhalten und die Wissenschaft. Ein Kommentar zum SPD-Antrag vom 10.05.2011 0
"Wissenschaftliche Integrität ist ein Wert, der nicht nur auf Ebene der individuellen Wissenschaftlerinnen und ... 14.05.2011 – 18:19

Das Prinzip Dialogizität. Der öffentliche Austausch zum Wissenschaftsurheberrecht zwischen Allianz und Börsenverein. 0
Jeder, der die drei Körbe der Überarbeitung des deutschen Urheberrechtsgesetzes verfolgte, weiß, dass sowohl die Novellen wie... 12.05.2011 – 21:07

Mutmaßungen über 52a. Wie sich ein Verlag gegen den Einsatz seiner Produkte in der Lehre sträubt. 1
Ein Kommentar Vermutlich ist es nur ein Textbaustein, der immer wieder und unreflektiert den üblichen... 12.05.2011 – 15:48

Digitale Gesellschaft und Deutsche Content Allianz. Neue Interessenvertretungen kurz kommentiert. 1
Das kollaborative Paradigma der Web-Welt schlägt Wurzeln im Real Life: Vor ca. zwei Wochen haben sich gleich zwei neue B... 29.04.2011 – 17:35

Buy-Out-Vertragsklauseln im Journalismus unzulässig 0
OLG München, Urteil vom 21.04.2011 - 6 U 4127/10 (einstweilige Verfügung) Geklagt hat der Landesverband des... 29.04.2011 – 13:32



Neue Kommentare

Die JIPITEC Ausgabe 1-2011 ist erschienen 1
Per E-Mail erreichte uns heute der Hinweis, dass es zu Eckhard Höffners Urheberrechtsgeschichte eine weitere Rezension in der Februar-Ausgabe der Zeitschrift BuB –

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Content - Topics

- **Questions – Objectives – Assumptions**
- **Limitations and exception - EU-policy – Guideline 2001**
- **New Thinking in the EU? Green paper „Copyright in the Knowledge Industry“ 2008**
- **The Wittem proposal – use without permission – with remuneration?**
- **A science-friendly copyright privilege – a proposal of the German Coalition for Action Copyright for Science and Education**
- **Consequences**



Content - Topics

- **Questions – Objectives – Assumptions**
- **Limitations and exception - EU-policy – Guideline 2001**
- **New Thinking in the EU? Green paper „Copyright in the Knowledge Industry“ 2008**
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- **Consequences**

Questions – Objectives – Assumptions

Questions – Objectives – Assumptions

Is a **strong copyright** an appropriate means to
further progress in science and education?

It depends

on what one considers a strong copyright to be

Questions – Objectives – Assumptions

What is a strong copyright?

1. One that it is built on the idea of a **homogenous copyright** irrespective of the domain of knowledge, of the interests and expectations of authors or of those of the users, respectively
 - 2.1 One that sets emphasis on **public interests** by providing society (users) with information products and with unhindered access to them under fair conditions
 - 2.2 One that sets emphasis **on individual private rights** of either authors or exploiters
3. One that fosters the **progress of science and the arts**
 - 4.1 One that admits **public (political) responsibility** for the production and usage of knowledge and information by explicitly acknowledging **priority to their regulation** by (copyright) law **rather than on contractual agreements** as a means of the market
 - 4.2 One that leaves space for **contractual agreements** (between producers, exploiters and users, respectively intermediaries) for the exploitation and usage of knowledge and information **rather than on explicit regulation** by means of the law

Questions – Objectives – Assumptions

What is a strong copyright?

5. One that supports **economic innovation and growth of the economy in general** by providing unhindered access to published knowledge under fair conditions
6. One that protects the interests of **information (publishing) industry and encourages innovation** (value-adding effects)
7. One that stimulates the production of new knowledge by providing **effective incentives to creative people** and by ensuring **strong protection of their work**
 - 7.1 either by turning the attention to **authors rights** by strengthening their moral rights (personality rights – Persönlichkeitsrechte)
 - 7.2 or by turning the attention to authors rights by strengthening their interest in **appropriate remuneration**
8. One that is **flexible and easily adoptable to perpetual changes in the arenas for the production, exploitation and usage of knowledge and information**
9. One that is able to find a **general consensus for a copyright balance** between the different actors (actor groups) involved in the domains of knowledge and information

Questions – Objectives – Assumptions

What is a strong
copyright?

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

or

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

Questions – Objectives – Assumptions

Enforcement of strong copyright regulations (type a)

in Europe and North America in the last 20 years,
makes it **more and more difficult to freely access the
world-wide information resources**
in principle available on world-wide information markets.

Questions – Objectives – Assumptions

**Copyright regulation does not acknowledge
access to knowledge a right in itself**

**Copyright regulation does not find a systematic compromise
between copyright norms and other humans rights**

**such as freedom of expression or
freedom of science**

Limitations and exceptions

The need for a European-wide general Exception in favor of R&E

Questions – Objectives – Assumptions

There is **no special copyright privilege** for science and education
or for intermediaries/libraries

The interests of science and education **are only taken into consideration**
by exceptions of and limitations to exclusive rights of the right-holders
according to a
strong interpretation of the three-step-test

Limitations and exceptions - three-step-test

Article 13 Limitations and Exceptions [TRIPS/WTO]

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

Limitations and exceptions in the EU

The need for a European-wide general Exception in favor of R&E

Limitations and exceptions

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

Leaves this directive sufficient space for adequate
norms for research and education?

Limitations and exceptions

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

This Directive provides for an **exhaustive enumeration of exceptions and limitations** to the reproduction right and the right of communication to the public. (32)

Member States should be given the option of providing for certain exceptions or **limitations for cases such as educational and scientific purposes**, for the benefit of public institutions such as **libraries and archives, ...** (34)

Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as **publicly accessible libraries and equivalent institutions, as well as archives**. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should **not cover uses made in the context of on-line delivery** of protected works or other subject-matter. (40)

Limitations and exceptions

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

When applying the exception or limitation for **noncommercial educational and scientific research purposes**, including **distance learning**, the **non-commercial nature** of the activity in question should be determined by that activity as such.

The **organisational structure** and the means of funding of the establishment concerned **are not the decisive factors** in this respect. (42)



(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;

Art. 5, 3, a

The need for a European-wide general Exception in favor of R&E

Limitations and exceptions

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

(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;

but

When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. (44)

The need for a European-wide general Exception in favor of R&E

Exceptions for science, education (§ 52a German copyright law)

Only small parts of works

Only for use **in** classroom

Time limit end of 2006, then
2008, now 2012

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 rightholders

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**
any case

1. **angangs 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.

Use of movie/video material
only 2 years after public
performance

Limitations and exceptions - three-step-test

Development of a strong copyright (type b)
depends on a balanced liberal flexible
interpretation of the three-step-test

- ((a) One that makes knowledge and information a scarce good – a commodity ?
- (b) One that supports open free access to knowledge and information ?

**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.

The need for a European-wide general Exception in favor of R&E

Limitations and exceptions - three-step-test

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

Development of a strong copyright (type b)
depends on a balanced liberal flexible
interpretation of the three-step-test

In applying the Three-Step Test, account should be taken
of the **interests of original rightholders, as well as of
those of subsequent rightholders.**

Limitations and exceptions - three-step-test

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

Development of a strong copyright (type b)
depends on a balanced liberal flexible
interpretation of the three-step-test

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

New Thinking in the EU?



GREEN PAPER

Copyright in the Knowledge Economy

Brussels,
COM(2008) 466/3

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf

The need for a European-wide general Exception in favor of R&E



Copyright in the Knowledge Economy

The Green Paper will **focus on how research, science and educational materials are disseminated to the public** and whether **knowledge is freely circulating** in the internal market.

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf

The need for a European-wide general Exception in favor of R&E



Copyright in the Knowledge Economy

The Copyright Directive allows Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public when a work is used "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." (Article 5, 3, a)

*This exception has **often been implemented in a narrow sense** and distance or **Internet-based learning at home is not covered**.*

Also, the exception often only covers copying excerpts of the research material rather than the entire work. Sometimes Member States have opted for a teaching exception, while having no exception for research.

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf



Copyright in the Knowledge Economy

In the Member States where the **exception for teaching and research** is reflected in the **national law**, the relevant provisions **differ to a significant extent**. While some countries extend the exception to the rights of communication and making available to the public (e.g. **Belgium, Luxembourg, Malta, and France** (as of January 2009)), others restrict it to the right of reproduction (**Greece, Slovenia**) or allow communication to the public only on the condition that it cannot be received outside the premises of the educational institution (UK).

Germany, on the other hand, makes a distinction between teaching and research activities; for the former, it allows the use of protected works only for teaching in the classroom and by intranet where it is limited to a group of students attending a particular course. The approach towards research is less restrictive as the making available of works is permitted "for purposes of own research" and "to a limited number of participants"

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf



Copyright in the Knowledge Economy

Different treatment of the same act in different Member States may lead to **legal uncertainty** with regard to what is permitted under the exception, especially when teaching and research are carried out within **a transnational framework**.

An increasing number of **students and researchers** prefer to have access to relevant learning resources not only in a traditional classroom environment, but also **using online networks, without any constraints of time or geography**.

Provisions only allowing reprographic copying of works or requiring students to be **physically present on the premises of the educational institutions** do not allow these establishments to **exploit the potential of the new technologies** and engage in distance learning programs.

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf



Copyright in the Knowledge Economy

Questions

- (19) **Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? ...**
- (20) **Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?**
- (21) **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?**
- (22) **Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?**
- (23) **Should there be a mandatory minimum requirement that the exception covers both teaching and research?**

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf

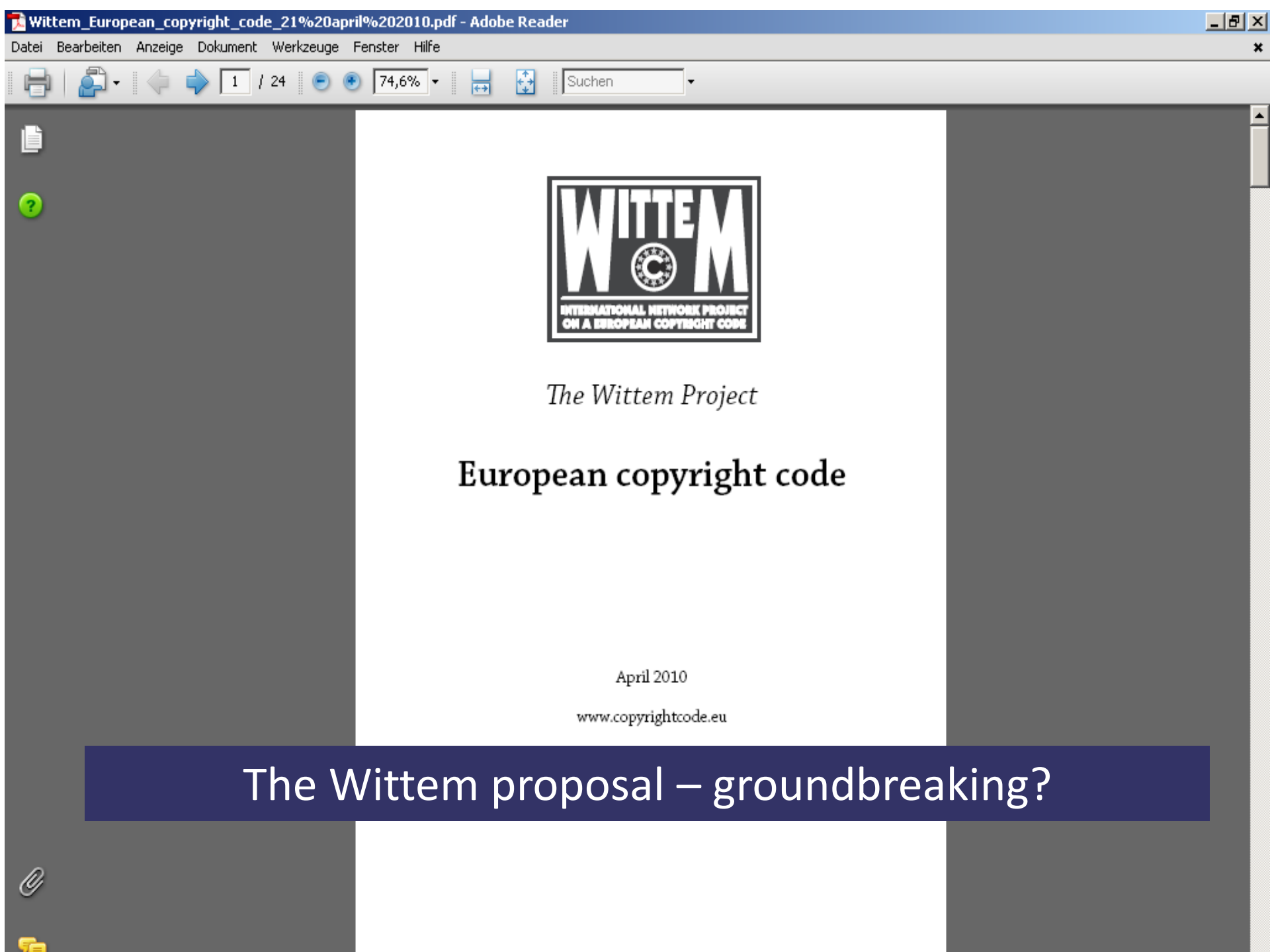


Copyright in the Knowledge Economy

Therefore, there have been calls to introduce a **mandatory exception for teaching and scientific research**, with a clearly defined scope in the Directive.

For example, the **Gowers Review** recommends that the educational exception "**should be defined by category of use and activity and not by media or location**".

Gowers Review of Intellectual Property 2006, para. 4.15



The Wittem Project

European copyright code

April 2010

www.copyrightcode.eu

The Wittem proposal – groundbreaking?

The Wittem proposal – groundbreaking?

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The Wittem proposal – groundbreaking?

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**.

The Wittem proposal – groundbreaking?

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 – groundbreaking?

The approach of the Wittem group is both

traditional, conservative (realistic) **and** surprisingly innovative



focus on a set of
exceptions



focus on single author
and unitary closed work



unrestricted use for
purposes of
scientific research



unrestricted use for
**educational
purposes**

without authorisation, but only against payment
of remuneration

The need for a European-wide general Exception in favor of R&E

A generic clause for science and education

A proposal of the German Coalition for Action „Copyright for Research and Education“

Similar proposal by the German Alliance of the Research Organizations

Similar proposal by the Conference of Culture of the States in Germany

The need for a European-wide general Exception in favor of R&E

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.

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

§ 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 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. ...

§ 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.

Consequences

needed

a new understanding of copyright
free access in R&E is not an exception but as right

a new understanding of copyright
free access in R&E → the default
commercial exploitation → the exception

New business models for knowledge
and information in recognition of
the free access paradigm

Consequences

needed

A European-wide initiative for a research- and education friendly copyright

ENCES

Overcoming the shortcomings of the system of exceptions

Introducing a general clause for research and education
„to promote the Progress of Science and useful Arts“
(US Constitution, Article I, Section 8, Clause 8)

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attention***

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