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

Rainer Kuhlen
Department of Computer and Information Science
University of Konstanz, Germany
The Göttingen Declaration on Copyright for Education and Research of 5 July 2004

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

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.
Rückblick IUWIS-Workshop
Eine Zusammenfassung des ersten IUWIS-Workshops steht Ihnen nun zur Verfügung.

Neue Meldungen
Die JIPITEC Ausgabe 1-2011 ist erschienen
Über Twitter verteilte sich heute die Meldung, dass eine neue Ausgabe erschienen ist.
13.05.2011 – 10:55

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

Verschärftes Promotionsrecht an der Humboldt-Universität?
Der Präsident der Humboldt-Universität zu Berlin, Jan-Hendrik Obertz, sprach über die Änderungen in der Promotionsgesetzgebung.
12.05.2011 – 14:09

Französische Verläge J. Google
Buchreport.de meldete bereits am Morgen des 12. Mai, dass die französischen Verlagsgruppen J. Google ihre Bücher auf dem Markt haben.
05.12.2011 – 13:23

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

Neue Dossierbeiträge
Eine Sicht von STM
In § 38 UrhG / Zweckveröffentlichungsrecht
18.05.2011 – 09:08

Aktuelle Rechtsprechung: § 38 UrhG nicht gänzlich in Verlags-AGB abbedingbar
In § 38 UrhG / Zweckveröffentlichungsrecht
Schwarzwege der Zweckveröffentlichungsrechts in § 38 UrhG ist seine vertragliche Abbedingbarkeit.
29.04.2011 – 13:57

Jedes Bundesland und jeder Richter mit eigenem Verständnis

Neue Blogbeiträge
Das Fehlverhalten und die Wissenschaft. Ein Kommentar zum SPD-Antrag vom 10.05.2011
14.05.2011 – 18:19

Wissenschaftliche Integrität ist ein Wert, der nicht auf Ebene der individuellen Wissenschaftlerinnen und Wissenschaftler lagen.

Das Prinzip Dialogizität. Der öffentliche Austausch zum Wissenschaftsrecht: von Allianz und Torsoverträge
Jeder, der die drei Körpers der Wissenschaft der deutschen Urheberrechtsrechtsverträge, weiß, dass sowohl die Novellen wie...
12.05.2011 – 21:07

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

Digitale Gesellschaft und Deutsche Content Allianz
Neue Interessenvertretungen kurz kommentiert.
Das kollaborative Paradigma der Web 2.0 schlägt Wurzeln im Real Life: Vor ca. zwei Wochen haben sich gleich zwei neue...
29.04.2011 – 17:35

Buy-Out-Vertragsklauseln im Journalismus
unzulässig
OLG München, Urteil vom 21.04.2011 – 5 U 4127/10 (einstweilige Verfügung) geklagt hat der Landesverband des...
29.04.2011 – 13:32

Neue Kommentare
Die JIPITEC Ausgabe 1-2011 ist erschienen
Per E-Mail erreichte uns heute der Hinweis, dass es zu Eckhard Höfners Urheberrechtsgeschichte eine weitere Rezension in der Februar-Ausgabe der Zeitschrift BuB –...
11.05.2011 – 12:07
The need for a European-wide general Exception in favor of R&E

- 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

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- The Wittem proposal – use without permission – with remuneration?
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The need for a European-wide general Exception in favor of R&E
The need for a European-wide general Exception in favor of R&E

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

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?
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.
Copyright regulation does not acknowledge access to knowledge as a right in itself.

Copyright regulation does not find a systematic compromise between copyright norms and other human rights such as freedom of expression or freedom of science.
The need for a European-wide general Exception in favor of R&E

Limitations and exceptions
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 do not conflict with a normal exploitation of the work 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
The need for a European-wide general Exception in favor of R&E

Limitations and exceptions

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

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

**A reasonable fee needs to be paid to collecting societies in any case**

UrhG § 52a Öffentliche Zugänglichmachung für Unterricht und Forschung

§ 52a: Nicht mehr anzuwenden gem. § 137k (F 10. September 2003) mWv 1.1.2007
(1) 1. 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.


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

**For the use of defined research groups**

**Only for registered students in classes**

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

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

**Only for use in classroom**

**Only small parts of works**
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 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.

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

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
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 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

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

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?

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

(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?
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**".
The need for a European-wide general Exception in favor of R&E

The Wittem proposal – groundbreaking?
Chapter 5: Limitations

Art. 5.1 – Uses with minimal economic significance
Art. 5.2 – Uses for the purpose of freedom of expression and information
Art. 5.3 – Uses permitted to promote social, political and cultural objectives
Art. 5.4 – Uses for the purpose of enhancing competition
Art. 5.5 – Further limitations
Art. 5.6 – Relation with moral rights
Art. 5.7 – Amount and collection of remuneration
Art. 5.8 – Limitations prevailing over technical measures
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 need for a European-wide general Exception in favor of R&E

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
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.
§ 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 legimitely 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 education
A generic clause for science and education 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)
§ 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.

A generic clause for science and education education
Consequences

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

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

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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