



Mediterranean Open Access Network

22-23 nov. 2012 Lyon (France)



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La situation de copyright en Allemagne et en Europe

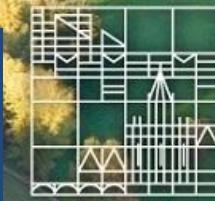
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University
of
Konstanz



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

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.

News

RSS 0.92

July 15th 2010:
Aktionsbündnis zieht positives Resümee der 2. Anhörung, sieht aber weiteren Handlungsbedarf für Bildung und Wissenschaft [\(more...\)](#)

July 8th 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 ist nicht zu rechtfertigen, wie die Anhörung des BMJ am 28. Juni 2010 [\(more...\)](#)



Home
EU Green Paper
Newsarchive
Workshop 08
Workshop 10
Amsterdam
Workshop 10
Budapest
Workshop 11
London
Documents
Association
Contact
Imprint

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 \(pdf\)](#)



News

[Press release on German ancillary copyright for media publishers](#)

On 12 November 2012 we publish our comment on the proposed German ancillary copyright in small parts of journalistic articles in favor of media publishers ("Leistungsschutzrecht für Presse... [\[mehr..\]](#)

[German Federal Court of Justice asks European Court of Justice to clarify copyright directive](#)

After a long court proceedings and different decisions taken by different courts in Germany the question of whether and under which circumstances German libraries are allowed to digitize text books... [\[mehr..\]](#)

[ENCES is on Facebook!](#)

ENCES e.V. has a newly created page on Facebook. Please don't hesitate to visit us there and make friends. [\[mehr..\]](#)

[ENCES on Twitter](#)

You are welcome to follow us on Twitter! [\[mehr..\]](#)

EN CES
part of
medanet
Mediterranean Open Access Network

Press release on German ancillary copyright for media publishers

On 12 November 2012 we publish our comment on the proposed German ancillary copyright in small parts of journalistic articles in favor of media publishers ("Leistungsschutzrecht für Presseverlage"): [\[pdf\]](#)

Press release:

EN CES strongly disapproves of the current German proposals for a new ancillary copyright in small parts of journalistic articles in favor of media publishers.

The proposed new copyright norm can develop into a serious drawback for free information exchange in the Internet. The proposal would probably make the location and use of journalistic writing generally more difficult. There is a danger that search engines and other meta-information services will cancel their existing news services which will result in a major disorientation in the highly diversified media markets.

In addition, we are concerned that any such new 'right' would obstruct the long-accepted cataloguing and indexing activities of cultural institutions.

New restrictive rights are needless and unwelcome in the very complex field of intellectual property rights. Cultural institutions already have difficulty navigating copyright prescriptions, every day, for the benefit of users of cultural material.

Rather than relying on support by copyright law we invite the media/newspaper industry to develop innovative business models which will keep both access to media information open and the media/newspaper industry active and profitable in the Internet.

EN CES appeals to the members of the German Bundestag not to approve the draft of the German Government for this new ancillary copyright in favor of media publishers. And we also appeal to law-makers in other European countries not to affiliate to this approach from Germany.

- **Questions – Objectives – Assumptions**
- **Limitations and exception**
- **New Thinking in the EU?**
 - ❖ Wittem
 - ❖ Green Paper – Copyright in the Knowledge Economy
 - ❖ Recommendation access to and preservation of scientific information
- **A generic clause for science and education**
- **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?

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

or

**(b) One that supports free and open 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 and openly
access the world-wide information resources**
in principle available on world-wide information markets.

Questions – Objectives – Assumptions

**Copyright regulation does not acknowledge
access to knowlegde as 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

Limitations and 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**

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

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**

Does this directive leave sufficient space to
adequate norms for research and education
and open access?

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**

(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

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)

Limitations and exceptions

Transforming

Art. 5, 3, a

into German
Copyright Law

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, again extended
till 2014

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**

angs 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

**Only for registered
students in classes
without any direct or
indirect commercial
interest**

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

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

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

Legislation towards open access in Germany?

A long-lasting (never-ending) debate about an **author's right to a second publication**, in addition to the first (normally) commercial one

Expecting/hoping that authors will use their **new freedom** for making their works **available according to Open Access principles**

Legislation towards open access in Germany?

Everyone in Germany (even in different political parties)
seems to be in favour of such a right

Diskussionspapier der CDU/CSU-Bundestagsfraktion zum Urheberrecht in der digitalen Gesellschaft – 12.6.2012

„Zudem setzen wir uns für die Verankerung eines verbindlichen Zweitveröffentlichungsrechts in den Förderrichtlinien für Autoren wissenschaftlicher Beiträge im Internet ein. Ziel ist es, dass öffentlich geförderte Forschungsprojekte nicht ausschließlich in Verlagspublikationen veröffentlicht werden.“

Obligatory right to a second publication

Publicly funded research should not be exclusively commercially published

Legislation towards open access in Germany?

Everyone in Germany (even in different political parties) seems to be in favour of such a right

except for the government (Ministry of Justice) and the publishers and some authors`rights fundamentalists



Strong objections towards the green OA approach:

“Free availability of significant proportions of a journal’s content may result in its cancellation and therefore destroy the peer review system upon which researchers and society depend”

BRUSSELS DECLARATION

STM, International Association of STM Publishers

http://www.stm-assoc.org/2012_07_17_STM_Press_Release_on_UK_Gov_Support_for_Finch.pdf.



Strong objections towards an OA mandate:

an author’s right to a second publication will actually force authors to OA publishing (public pressure)

This is considered against the constitutionally guaranteed freedom of science, in this case the freedom of publishing (if, when, how, and where to publish)

New Thinking in the EU?

needed

a reconsideration of the three-step-test
with its rigorous exceptions and limitations

Limitations and exceptions - three-step-test - reconsidered

Development of a science-friendly copyright depends on a balanced liberal flexible interpretation of the three-step-test

**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.

Limitations and exceptions - three-step-test

Development of a science friendly copyright 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

Development of a science friendly copyright 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?

Wittem_European_copyright_code_21%20april%202010.pdf - Adobe Reader

Datei Bearbeiten Anzeige Dokument Werkzeuge Fenster Hilfe

1 / 24 74,6% Suchen



The Wittem Project

European copyright code

April 2010

www.copyrightcode.eu

Start Microsoft PowerPoint - [...] Texte Wittem_European_co... DE 15:07

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**.

unrestricted use for
purposes of
scientific research

**without authorisation,
but only against
payment of
remuneration**

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**.

**without authorisation, but only against
payment of remuneration**

unrestricted use for
**educational
purposes**

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

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

Copyright in the Knowledge Economy

Exception Article 5, 3, a of the 2001 Copyright Directive

"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**.

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**

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

New Thinking in the EU?



COMMISSION EUROPÉENNE

Bruxelles, le 17.7.2012
C(2012) 4890 final

RECOMMANDATION DE LA COMMISSION

du 17.7.2012

relative à l'accès aux informations scientifiques et à leur conservation

on access to and preservation of scientific information

http://medoanet.sciencesconf.org/conference/medoanet/pages/recommendation_access_and_preservation_scientific_information_f_r_copie.pdf

http://ec.europa.eu/research/science-society/document_library/pdf_06/recommendation-access-and-preservation-scientific-information_en.pdf

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

with reference to the

Revised strategy on UNESCO's contribution to the promotion of open access to scientific information and research

OECD Declaration on Access to Research Data from Public Funding

Cf. Commission Communication (12 Dec 2011) on open data - a proposal for a Directive amending Directive 2003/98/EC

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

main objectives

Open access to scientific publications

Libre accès aux publications scientifiques

Open access to research data

Libre accès aux données de la recherche

Preservation and re-use of scientific information

Conservation et réutilisation des informations scientifiques

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

Policies on open access to scientific research results should apply to all research that receives public funds.

Les politiques de libre accès aux résultats de la recherche scientifique devraient s'appliquer à toutes les activités de recherche financées par des fonds publics.

Open access is a key feature of Member States' policies for responsible research and innovation by making the results of research available to all and by facilitating societal engagement.

Le libre accès est un élément clé des politiques des États membres en faveur d'une recherche et d'une innovation responsables: il permet de mettre les résultats de recherche à la disposition de tous et facilite la participation de la société.

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

Recommendation

Define clear policies for the **dissemination of and open access to scientific publications resulting from publicly funded research**. These policies should provide for:

- concrete objectives and indicators to measure progress;
- implementation plans, including the allocation of responsibilities
- associated financial planning.

de définir des politiques claires en matière de **diffusion des publications scientifiques issues de la recherche financée par des fonds publics** et du libre accès à ces dernières. Ces politiques devraient prévoir:

- des objectifs et des indicateurs concrets permettant de mesurer les progrès accomplis
- des plans de mise en oeuvre, incluant la répartition des responsabilités,
- la programmation financière correspondante;

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

result of these policies:

there should be open access to publications resulting from publicly funded research as soon as possible, preferably immediately and in any case no later than six months after the date of publication, and twelve months for social sciences and humanities;

à ce que les publications issues de la recherche financée par des fonds publics soient librement accessibles dans les meilleurs délais, de préférence immédiatement et, dans tous les cas, au plus tard six mois après leur date de publication, et au plus tard douze mois pour les publications dans les domaines des sciences sociales et humaines,

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

result of these policies:

licensing systems contribute to open access to scientific publications resulting from publicly-funded research in a balanced way, in accordance with and without prejudice to the applicable copyright legislation, and encourage researchers to retain their copyright while granting licences to publishers;

à ce que les systèmes d'octroi de licences contribuent, de façon équilibrée, au libre accès aux publications scientifiques issues de la recherche financée par des fonds publics, dans le respect et sans préjudice de la législation applicable en matière de droit d'auteur, et encouragent les chercheurs à conserver leurs droits d'auteur tout en concédant des licences aux éditeurs,

New Thinking in the EU?

RECOMMANDATION DE LA COMMISSION du 17.7.2012 relative à l'accès aux informations scientifiques et à leur conservation

result of these policies:

the academic career system supports and rewards researchers who participate in a culture of sharing the results of their research, in particular by ensuring open access to their publications and by developing, encouraging and using new, alternative models of career assessment, metrics and indicators;

à ce que le système des carrières universitaires soutienne et récompense les chercheurs qui adhèrent à une culture de partage de leurs résultats de recherche, notamment en garantissant le libre accès à leurs publications et en élaborant, en encourageant et en utilisant de nouveaux modèles, critères et indicateurs alternatifs pour l'évaluation des carrières,

A generic clause for science and education

A proposal of the German Coalition for Action „Copyright for Research and Education“ – and revised by ENCES

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

ENCES, the European Network for Copyright in favor of Education and Science,

proposes a unified copyright regulation for the use of published work in science and education in order to overcome the complex system of limitations and exceptions.

Objectives of a generic clause for science and education

1. Access to and use of commercially published works, **without further authorization**, for
 - a) personal use in **scholarly environments**
 - b) personal use in non-commercial institutions in **education**
 - c) **non-commercial communication and intermediary services** of **culture and memory institutions** such as libraries, archives, documentation and media centers, and museums
2. Making these **works publicly available** for well defined **user groups in science and education**

Objectives of a generic clause for science and education

3. **Free use** (without authorization and without remuneration) for **documentation, preservation, and long-term archiving** purposes of non-commercial culture and memory institutions
4. The use may be subject to **remuneration** provided it does not affect the **normal development of research activities and education**.
5. **Flat remuneration** only and provided by the **public state-owned** science and education **institutions**

Perspectives

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
in order

„to promote the Progress of Science and useful Arts“
(US Constitution, Article I, Section 8, Clause 8)

Perspective 1

realistic

Perspective 2

public (social) consensus
already available

Politically realistic in the
medium term

Perspective 3

part 1 - realistic in the
medium term

part 2 –realistic in the long
term

The more restrictive copyright law is, the
more likely it is that open acces will be the
default in scientific publication

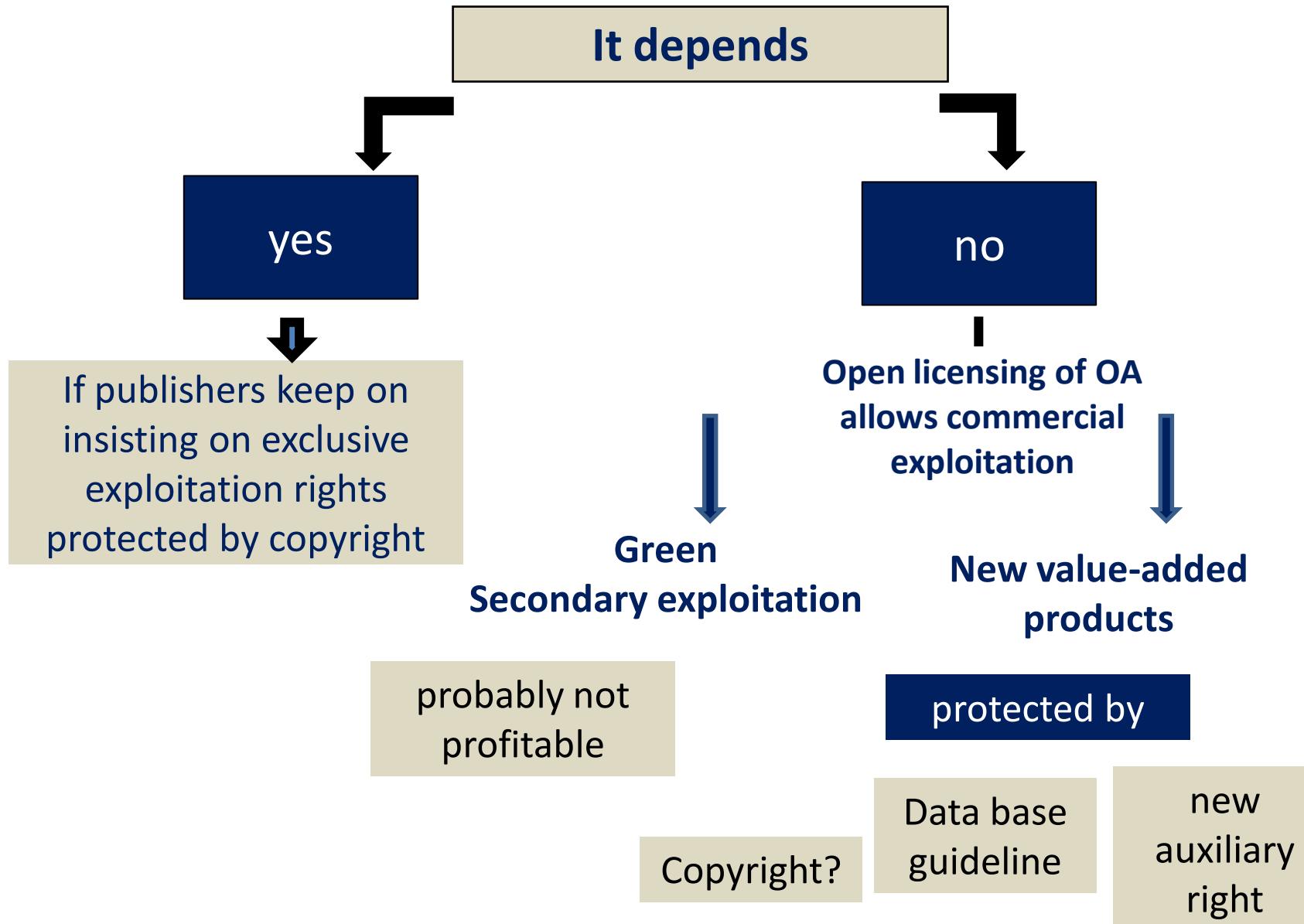
A general copyright clause for science and
education as a substitute for existing
exceptions and limitations

Development of special science copyright

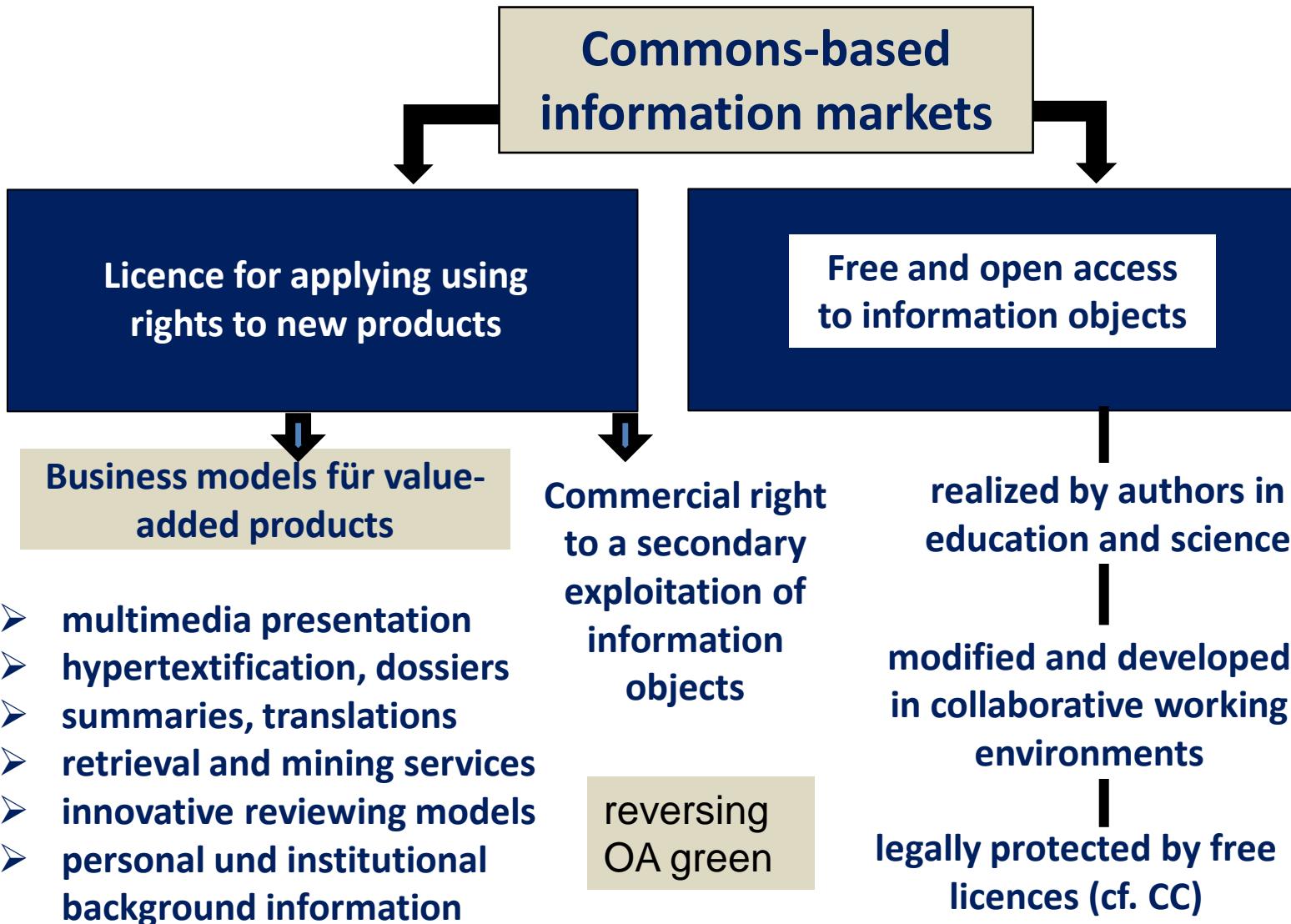
New business models for the
proprietary exploitation of knowledge and
information

Approval of knowledge and information as
commons.

Will Open Access destroy commercial information markets?



Models of a *commons-based information economy/society*



*Thank you for your
attention*

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