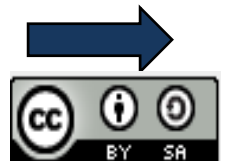


Copyright reform on the EU level



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



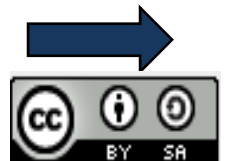
Copyright reform on the EU level



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

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

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

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**

➤ **high level of protection**

mainly in
commercial
interest

➤ **appropriate reward for the use of authors' work**

➤ **author's right of communication to the public**

modest
success

mostly not an
author's right

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 in context

Agreement on Trade-Related Aspects of Intellectual Property Rights (**WTO-TRIPS-Treaty**) – 1994

WIPO Copyright Treaty (WCT) - 1996

WIPO Performances and Phonograms Treaty (WPPT) 1996

Digital Millennium Copyright Act - **USA** 1998

EU -European Copyright Directive (“the Directive”) 2001

„has caused a subtle re-orientation of copyright away **from the author** towards a **trade-oriented perspective**“

1996

Pérez de Cuéllar

UNESCO-Bericht

Our Creative Diversity

Copyright reform on the EU level

Extension of IPR **in time**

Extension of IPR to **living objects** and other objects in nature

Extension of IPR **to software (still controversial, at least in the EU)**

Introduction of some **sui-generis-regulation**, such as for data bases
(as in the EU)

Extension of **publishers' rights**

Extension of **technical protection** of IPR (**Digital Rights Management**)
and legal protection of technical measures

Reducing copyright exceptions (science, private copies,...)

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)

disabling?

enabling?



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

Deutsch: Eine [Schranke](#), die die Einfahrt von Kraftfahrzeugen in ein Naturschutzgebiet verhindert

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

http://commons.wikimedia.org/wiki/Image:Moderne_Schranke.jpg

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

Copyright reform in Germany 2003

§ 52a Exceptions for education and research

only small parts of published work

for the use in class room only

for the use of participants of a course only

limited until the end of 2012

for the use of members of a well-defined (IP address) research group only

without any direct or indirect commercial interest

access in schools only with explicit permit of rightholders

use of movies in schools only after 2 years of regular exploitation in movie theatres

UrhG § 52a Öffentliche Zugänglichmachung für Unterricht und Forschung

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

(1) Zulässig ist,

1. veröffentlichte kleine Teile eines Werkes, Werke geringen Umfangs sowie einzelne Beiträge aus Zeitungen oder Zeitschriften zur Veranschaulichung im Unterricht an Schulen, Hochschulen, nichtgewerblichen Einrichtungen der Aus- und Weiterbildung sowie an Einrichtungen der Berufsbildung ausschließlich für den bestimmt abgegrenzten Kreis von Unterrichtsteilnehmern oder
2. veröffentlichte Teile eines Werkes, Werke geringen Umfangs sowie einzelne Beiträge aus Zeitungen oder Zeitschriften ausschließlich für einen bestimmt abgegrenzten Kreis von Personen für deren eigene wissenschaftliche Forschung

öffentlich zugänglich zu machen, soweit dies zu dem jeweiligen Zweck geboten und zur Verfolgung nicht kommerzieller Zwecke gerechtfertigt ist.

(2) Die öffentliche Zugänglichmachung eines für den Unterrichtsgebrauch an Schulen bestimmten Werkes ist stets nur mit Einwilligung des Berechtigten zulässig. Die öffentliche Zugänglichmachung eines Filmwerkes ist vor Ablauf von zwei Jahren nach Beginn der üblichen regulären Auswertung in Filmtheatern im Geltungsbereich dieses Gesetzes stets nur mit Einwilligung des Berechtigten zulässig.

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

(n) use by communication or making available, for the purpose of **research or private study**, to individual members of the public by **dedicated terminals on the premises** of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

sounds o.k. but useless in an electronic environment: user has to go to the information, not the information to the user

libraries,
educational
establishments or
museums, or by
archive

Copyright reform on the EU level

The Recasting of Copyright & Related Rights for the Knowledge Economy

Bernt Hugenholtz, IViR
Mireille van Eechoud, IViR
Stef van Gompel, IViR
Lucie Guibault, IViR
Natali Helberger, IViR
Mara Rossini, IViR
Lennert Steijger, IViR
Nicole Dufft, Berlecon Research
Philipp Bohn, Berlecon Research

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

- The EC legislature should strive to establish a **more flexible and forward looking regime of limitations** on copyright and related rights.
- A non-exhaustive list of limitations would allow Member States to **respond more quickly** than the EC legislature **to urgent situations** that will arise in the dynamic information market.
- Such an open-ended regime would best reflect the principles of **subsidiarity and proportionality**.

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**

Copyright reform on the EU level

CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

Final Report 030608

P. Bernt Hugenholtz - Ruth L. Okediji

Instruments on copyright limitations can also be based on

1. **human rights**, in particular, on core fundamental freedoms, such as freedom of speech and the right to privacy
1. **competition law** – provision for international norms on compulsory licensing or to address other market failures
2. **consumer law** with the potential for protecting consumers against unfair terms in standard licensing agreements

Copyright reform on the EU level

CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

Final Report 030608

P. Bernt Hugenholtz - Ruth L. Okediji

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

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

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

Copyright reform on the EU level



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.7.2008
COM(2008) 466 final

GREEN PAPER

Copyright in the Knowledge Economy

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

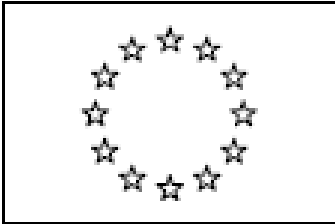
Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

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 – absoluteley 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

Copyright reform on the EU level



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.10.2009
COM(2009) 532 final

Résumé from the Commission on the basis of 372 responses

COMMUNICATION FROM THE COMMISSION

Copyrig

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



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.10.2009
COM(2009) 532 final

COMMUNICATION FROM THE COMMISSION

Copyright in the Knowledge Economy

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.

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

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 MARKET**

neither science
nor education is
mentioned in
the document

is science not
creative work
for the EU?

22 October 2009

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 from 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 and 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 & lms 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

**Thank you very much for your
attention**

You are free:



to Share — to copy, distribute and transmit the work



to Remix — to adapt the work

Under the following conditions:



Attribution — You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).



Share Alike — If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one.

Public Domain — Where the work or any of its elements is in the **public domain** under applicable law, that status is in no way affected by the license.

Other Rights — In no way are any of the following rights affected by the license:

- Your fair dealing or **fair use** rights, or other applicable copyright exceptions and limitations;
- The author's **moral** rights;
- Rights other persons may have either in the work itself or in how the work is used, such as **publicity** or privacy rights.

Notice — For any reuse or distribution, you must make clear to others the license terms of this work. The best way to do this is with a link to this web page.

