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ENCES – an international association for the promotion of a scholarship-friendly copyright

Talk at the 5th UNICA Scholarly Communication Seminar: „Find it, Get it, Use it, Store it“; 7-9 November 2010, Universidade Nova de Lisboa

Ladies and Gentlemen! Dear Paul!

Thank you very much, Paul, for inviting me to Lisbon to speak at the 5th UNICA Scholarly Communication Seminar!

Find it, get it, use it, store it

This is what scholarly communication would like to do: to find it, get it, use it and store it.

What is *it*, then? What would scholars like to find, get, use and store? Well, information and knowledge, which would come in various formats: books, journals, articles, sheet music, illustrations, diagrams, raw data, sound recordings, films etc. etc.

We would like to find it – and we would search for it in libraries, museums, archives, on our bookshelves, and on the internet, in OPACS as well as in Google Book Search.

Whenever the scholar wants to *find* information, to *get* it and *use* it and *store* it, this would imply the making of copies – and there is hardly any step you can take in this circle of knowledge communication without being in danger of infringing the law. Copyright regulates the making of copies, and the default setting of copyright law is: *Whenever* you want to copy, perform, broadcast or distribute works or disseminate them online, you would have to ask the author (or the rights holders) for permission, and most often, remunerate them for copying, using, distributing or disseminating their works. Therefore, copyright law would significantly slow down the process of scholarly communication, or even bar it completely sometimes - if it weren't for the exceptions to copyright law, a few of which are especially made for the use of information and knowledge for the purpose of education, scientific research or private study.

Unfortunately, even the exceptions and limitations are sometimes quite limited. So, before finding it, getting it, using it and storing it, you'd better consult your copyright lawyer!

EU Copyright Directive

All of you come from different European countries. So on the one hand, you are subject to different copyright laws, and also to different exceptions and limitations to these laws. Therefore you may be used to different practices when it comes to dealing with works in copyright.

On the other hand, your national legislation on copyright will not differ completely from the one of your neighbour, because the copyright legislations of the EU Member States were harmonized by the EU InfoSoc Directive in 2001.

This directive would allow Member States to introduce various sorts of exceptions into their national copyright legislations, but would not force them to do so. This is why scholars in different countries of the EU might be allowed to do slightly different things with in-copyright works.

ENCES – aims and objectives

As scholarly communication is strongly regulated by international treaties on copyright and especially by EU Directives, some of us thought that scholars needed a strong lobby for their interests vis-à-vis the EU legislator.

So we founded ENCES. ENCES is the European Network for Copyright in Support of Education and Science. In the beginning, in the year 2008, ENCES was conceived as a network of experts on copyright from legal research institutes and of organisations from the education and research sector.

In August 2010, ENCES was registered as an international association in accordance with the German Civil Code in Berlin; we are still seeking to gain the tax-privileged status of a non-profit organisation.

ENCES' basic assumption is that knowledge and information in their digital forms 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.

ENCES' aim is to analyze the status quo of copyright regulations in all European Member States, especially with regard to exceptions made for education and research. However, ENCES was meant not only to be a project to conduct scientific research on the subject of copyright, but also to act as a loose lobby group in support of the interests of education and research across the EU.

Members of the association are – national –networks and lobby groups for copyright in support of the interests of the education and research sector, legal researchers, research institutes, science and science funding organizations like the Academies of Sciences of the Member States, libraries and

other information intermediaries. In short, anyone, who wants to support the aims of ENCES, is very welcome as a member!

ENCES – organisational structure

ENCES has its office in the Humboldt-University of Berlin. Its members communicate via internet. We think of using the SINAPSE platform (<http://europa.eu/sinapse/>), which is provided by the EU Commission for groups engaging in EU policy making. This will help us save money and ensure everyone can participate.

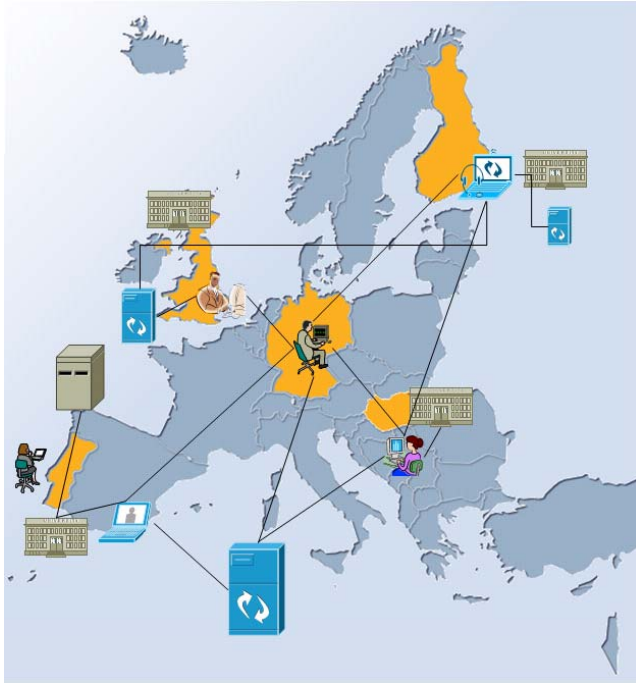
In order to spread news concerning copyright matters all over Europe, a mailing list for all ENCES partners has been created. Anyone interested in EU copyright matters can join it.

However, the success of the ENCES network depends on its meetings. Representatives of the education and research sector of all EU Member States should have discussions about what scholars need from copyright legislation to improve their daily work. We think that intensive face-to-face communication on this issue is a necessity.

ENCES will therefore sustain itself through a series of national and international meetings: the latter concentrate on the discussion of how to improve EU copyright legislation and international treaties – the former are meant to foster national debates in particular countries and will connect these national debates to the pan-European discussion.

General assemblies for association members will be held once a year, preferably in connection with a workshop.

Thought experiment



Imagine you are a scientist working at a UNICA university. You are planning an international research network of various research institutes in Europe; you want to include researchers from at least 5 European countries and apply for funding from the EU, for example from the 7th Framework Programme. Your network partners live and work in, say, Portugal, Finland, Germany, Hungary, and the UK.

This is just an imaginary example, a thought experiment. Imagine, the EU approves your proposal and for the next few years you will receive a sum of 5 million Euros from the EU for doing research on, let's say, the impact of solar energy on ecosystems. To make the researchers of your research network communicate, you might organize workshops and conferences, but as the networking proves to be inspiring some researchers might want to collaborate closer and communicate more directly. They want to share their knowledge, they want to exchange their papers, they may even want to write papers collaboratively and refer to articles written by other researchers who do not belong to the network. With the funding from the EU you set up a *virtual research environment*, i.e. a cross-border eScience intranet for your network members which provides you with digital tools of collaboration. Now you want to store information and knowledge in there, in order to share it with your network colleagues.

As you are conscious of author's rights, and as you want to respect them the trouble begins. You want to digitize an article, which was published by an Australian researcher in a print journal and you want to share it with your colleagues of your network, and you think of uploading it into your eScience system.



Would you be allowed by copyright law to do that? And allowed by which law, anyway? By European law, Portuguese law, German law? By Finnish, Hungarian or UK law? What will your colleagues from your partner institutions be permitted to do? Will they be allowed to take part in this virtual research environment at all, and if so, which sort of information will they be free to upload, download, use and store?



Copyright, Designs and Patents Act 1988

Auteursrecht

droit d'auteur et aux droits voisins dans la société de l'information

code de la propriété intellectuelle

Código do Direito de Autor e dos Direitos Conexos

Ley de Propiedad Intelectual

diritto d'autore e diritti connessi nella società dell'informazione

Tekijänoikeuslaki 8.7.1961/404

Ophavsret

ustawa z dnia 1 kwietnia 2004 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Dziennik Ustaw Nr 91, Poz. 869), ustawa z dnia 28 października 2002 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Dziennik Ustaw Nr 197, Poz. 1662)

UrhG § 52a Autorské právo

Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte i.d.F. der UrhG-Novelle 2003

Szerzői jog

Πνευματική ιδιοκτησία

Don't forget: you are not a legal researcher, but a geographer specialized in climate research; even so in our thought experiment you are supposed to be familiar with the copyright legislation of your own country – however you most certainly do not know much about the legal situation of your foreign research partners and therefore you might want to consult five different lawyers, specialized in five different national copyright laws, or one lawyer specialized in international and comparative copyright law, and at least the latter one will be difficult to find as well as difficult to compensate adequately for their legal advice.

The exception for virtual research environments in Germany

I would like to deepen a bit more into the example of a cross-border virtual research environment. Not being very sure about copyright legislation of other EU Member States, I still dare to analyse the legal situation of the German researchers working in our imaginary research network.

In German copyright law, article 52a would regulate the making available of works to the public for the purposes of education and science.



Germany: § 52a
UrhG



“Öffentliche Zugänglichmachung für Unterricht und Forschung.

(1) Zulässig ist,

1. [...]

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.
[...]"

This is the text of the article in English:

Article 52a German Copyright Act:

“Making Available for Educational and Scientific Purposes”

(1) It shall be permissible to make available to the public, to the extent this is necessary for the respective purpose and justified for the pursuit of non-commercial purposes,

1. [...]

2. parts of published works, small works and single contributions to journals and newspapers only to a clearly distinguishable group of persons for their own scientific research.

[...]

For the making available of a work to the public according to sentence (1) the author or rights holder shall be entitled to payment of equitable remuneration. Remuneration can only be claimed by a collecting society.

Article 52a UrhG is the implementation of article 5(3)a of the InfoSoc Directive.¹

Analysis

Let us analyze this article:

First of all: Its validity will run out by the end of 2012.

Next: It is valid for members of a well-defined group of researchers only.

Thirdly: Your research project must not serve any direct or indirect commercial interests.

Next: Each use will have to be remunerated to the rights holders.

And lastly: Permission of use given by this article only refers to **parts of published works, small works** and **single contributions** to journals and newspapers. So monographs are excluded from this exception right from the start.

¹ Article 5(3)a: “Member States may provide for exceptions or limitations to the [reproduction right and the right of communication to the public / right of making available to the public] in the following cases: [...] 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;” Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. L 167/10, 22.6.2001.

The article was explicitly intended for small research groups by the legislator. It does *not* allow the use and dissemination of in-copyright works in a university intranet by all staff and students.

Conclusions

I don't dare to analyse the Portuguese, Finnish, Hungarian and UK law. Doing some research you can find the texts of these laws and study the exceptions for scientific research. Guido Westkamp has gone to the trouble of doing this on behalf of the EU Commission for all EU Member States.² I shall skip the discussion of the question of which acts the Portuguese, UK, Finnish and Hungarian laws would permit with regard to the use of works in cross-border virtual research networks. I leave this to your own study and imagination.

We have seen before that article 52a of German copyright law is limited itself as it is subject to many different conditions: Clause 52a is "limited to non-commercial purposes [...]." It only applies for parts of published works, small works and single contributions to journals and newspapers and only to a clearly distinguishable group of persons for their own scientific research.

Such detailed limits of the limitations make them appear confusing, complicated and difficult to understand for scholars who have not specialized in copyright law. And article 52a is by far NOT the most complicated exception in German copyright law!

Other issues / topics for discussion

Not only for cross-border research networks the complicated system of European copyright laws would constitute a barrier. Difficulties with copyright occur with regard to the Open Access publishing of research outputs, mass digitisation of orphan works in libraries, museums and archives, the long-term preservation of Europe's cultural heritage, online delivery services by libraries for the purpose of education and research, use of works in higher education etc. You have probably come across an example of these in your own job.

² Guido Westkamp, The Implementation of Directive 2001/29/EC in the Member States, *Queen Mary Intellectual Property Research Institute*, Centre for Commercial Law Studies, Queen Mary, University of London, February 2007. URL: http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf; last visited on 23 November 2010.

A mandatory general clause for education and science in Europe?



- 27 EU Member States
- 6 different exceptions for scholarly communication issues



$27 \times 6 = 162$ exceptions !

Actually, there are 27 different copyright laws with an exception for every single issue I mentioned above. This would make altogether 162 different exceptions to copyright law only for the education and research sector in Europe!

Therefore we suggest to introduce a mandatory general exception for education and research into the EU Directive and, subsequently, into all national laws.



Proposal



One **general exception**
for education and research?!

We would like to suggest to the ENCES partners to consider whether there is such a general clause in their national copyright law, whether they see a need for it or consider it useful, and whether it would be a good idea to insist vis-à-vis the EU authorities that such a general exception for education and research should be introduced all over Europe into any national as well as common EU law.

End

Let me sum up, and I hope I could make this clear: We need to lobby for our interests in good copyright exceptions for the education and research sector, on national levels as well as vis-à-vis the EU bodies. ENCES will do this. It is the international representation of the interests of European scholars in a scholarship-friendly copyright.

Therefore, I would appreciate it very much if you or the institution you represent would consider becoming a partner or even a member of ENCES!

Please contact me if you wish any further information:

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<http://www.ences.eu>

Thank you very much!

