

Max Planck Institute for Intellectual Property, Competition and Tax Law



MAX-PLANCK-GESELLSCHAFT

EUROPEAN COMMISSION – GREEN PAPER: COPYRIGHT IN THE KNOWLEDGE ECONOMY – COMMENTS BY THE MAX PLANCK INSTITUTE FOR INTELLECTUAL PROPERTY, COM- PETITION AND TAX LAW

**Prof. Dr. Reto M. Hilty, Sebastian Krujatz, Benjamin Bajon, Alfred Früh, Prof. Dr. Annette Kur,
Prof. Dr. Josef Drexl, Prof. Dr. Christophe Geiger, Dr. Nadine Klass**

The Max Planck Institute for Intellectual Property, Competition and Tax Law is a research institute within the Max Planck Society for the Advancement of Science. For several decades, the Institute has been one of the leading institutions in the area of intellectual property rights. With its expertise in these areas of law, the Institute contributes to answering fundamental legal questions and provides impulses for legal developments on the national, European and international levels. In the following, members of the institute give their comments on the Green Paper on “Copyright in the Knowledge Economy”.

EXECUTIVE SUMMARY

This paper focuses on an important subset of the knowledge economy: the area of scientific research. Wide dissemination and accessibility of scientific information in the online environment are at the core of today’s knowledge economy. To a large degree, scientific information is embedded within scholarly works, such as journal articles, which are subject to copyright protection.

Limitations most relevant to scientific research provided for in Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (**InfoSoc Directive**) are important tools to ease access to relevant information for purposes of scientific research on the end-user level. They need to be preserved and, where possible, adequately extended.

However, even if widely introduced in all Member States and made immune against technological protection measures, these limitations alone may not guarantee wide dissemination and accessibility. The more publications become available in electronic form only, the greater the risk that libraries and scientific end users will face a *single-source* situation, forcing them to pay unreasonable prices or accept unreasonable conditions for accessing (for the most part publicly financed) scholarly contents, or to desist from using the relevant contents at all. Contractual arrangements

between rightholders and users – as addressed in the Green Paper – are likely to benefit rightholders more than users. Limitations allowed for in the InfoSoc Directive cannot cope with these problems since they only take effect at the user level, i.e. when the content has already been procured. Wide dissemination and accessibility may need to be addressed also on the level of the intermediaries, e.g. by securing the existence of multiple sources and fair competition among publishers and other intermediaries with respect to the *individual* piece of scholarly work, such as an individual journal article.

In this paper, we suggest certain elements that should be considered in the course of a legislative reform on the EU level, following a two-tier approach:

- (1) At the end-user level, limitations most relevant to scientific research should be mandatory, immune towards contractual agreements and technological protection measures, and should be construed as providing a bottom line, which national legislation should not fall below. In return, original rightholders should receive adequate compensation.
- (2) At the level of intermediaries, it is strongly recommended to follow up closely the developments in the scientific publication market¹, in particular concerning the situation of (publicly funded) research institutions vis à vis publishing companies and database producers. If certain negative effects cannot be mitigated otherwise, additional legal measures may have to be considered, which may be based on copyright or competition law, or even combine elements of the two, as will be addressed in part 2 of this paper.

GENERAL REMARKS

INTRODUCTION

In the Commission's own words, the Green Paper "aims to set out a number of issues connected with the role of copyright in the 'knowledge economy'" and "to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment". The Max Planck Institute welcomes the Commission's endeavour to address the specific requirements of scientific research in an online environment. These pressing demands have long been ne-

¹ Further to, and in observation of the recommendations made in, the Study on the economic and technical evolution of the scientific publication market in Europe, available at http://ec.europa.eu/research/science-society/pdf/scientific-publication-study_en.pdf (last visited 22 Nov. 2008).

glected by national legislators, particularly in previous debates on copyright in the information society.²

Scientific Research and the “Fifth Freedom”

In the Green Paper, the Commission refers to an earlier single market report³ circulated in 2007, in which the Commission already highlighted the need to promote the free movement of knowledge and innovation as a “Fifth Freedom”. By that, the Commission rightly took into account that the European economy is increasingly reliant on knowledge as a resource and its free circulation within the single market.⁴ Currently, the EC Treaty only comprises four freedoms, namely the freedom of establishment, the freedom of providing services, the free movement of goods and the free movement of capital, representing values of fundamental importance for the constitution of the EC. Although further clarification with regard to its more specific implications seems necessary, a Fifth Freedom, once implemented, would set a new paradigm for law-making in areas connected to the dissemination of information and knowledge, namely their free circulation. This would become particularly relevant for scientific information and knowledge, since those are the core source material for future scientific and technological innovation. Although a Fifth Freedom would probably only apply to actual information or knowledge, and not to copyrighted works as such, the impacts on EC copyright policies would be considerable. Scientific information and knowledge is by and large embedded in scholarly works and databases. Scholarly works are subject to copyright; databases are protected by either copyright or *sui generis* right protection. In short, copyright law is an essential part of the infrastructure of the flow of scientific information. Therefore, to acknowledge the free movement of knowledge and innovation as a new paradigm for EC policy making in the area of copyright law is definitely the correct approach.

While the Green Paper apparently acknowledges the strong link between the free movement of knowledge and copyright policy, it does not address the question of how copyright law would need to be designed in order to foster the free movement of knowledge and innovation. Although the “Fifth Freedom” has not been construed in detail yet, what can be said already is that at its core, this emerging freedom would be about encouraging access to essential information and knowledge for any individual at any organisation in any of the EC Member States, who might build upon that knowledge to innovate. Future copyright policies in the EU would need to serve these overriding ends. In line with these ends, the freedom to disseminate scholarly content could be regarded the default rule rather than the exception. Any restriction in disseminating scholarly content imposed by copyright law would then require its specific justification.

A Distinct Set of Rules for Scientific Research

This would mean a paradigm shift in the case of scientific research. The previous approach taken by the EC and national rightholders, who responded to the emerging opportunities and challenges of the online environment by merely strengthening the position of rightholders, would hardly hold up against the Fifth Freedom. More care is required to guarantee the free movement of scien-

² RETO M. HILTY, “Copyright Law and the Information Society – Neglected Adjustments and Their Consequences”, 38 IIC 135 (2007).

³ “A single market for 21st century Europe”, 2007 COM 724 final.

⁴ *Ibid*, at 9.

tific knowledge. For example, as things stand in the academic journal sector, the free flow of scientific knowledge may be impeded if the exclusive right enjoyed by a few academic publishers is exercised in an excessive manner; whereas the authors, by whom the content has been generated, usually care more about reputation and impact as important factors for their personal careers.

The answer to these problems should be a partially distinct set of rules for scientific research, fostering wide and efficient dissemination, e.g. by securing competitive market conditions and thereby encouraging innovative dissemination models. Copyright law as part of these market conditions should provide for a wide array of limitations to copyright, keeping market entry barriers low for new providers and their technologies and avoiding that scientific knowledge becomes “privatised” by publishers.

Current regulations on the European and national levels do not fulfil these requirements because they follow a different paradigm. For example, the InfoSoc Directive is based on the general assumption that, particularly in the online environment, rightholders need effective and rigorous control over widespread forms of mass usage. This conjures up an image of an enemy to the interest of rightholders, which does not subsist in the realities prevailing in the scientific research sector. There, not unauthorised mass usage, but cost-effective and efficient communication of research findings needs to be the focal point of discussion.

The paradigm shift would not need to be extended to copyright law for other sectors of content production, namely entertainment and the arts, since those contents rarely become the source material for future scientific and technological innovation, which the concept of the Fifth Freedom refers to. Hence copyrights are currently more adequately employed in the areas of art and entertainment, by providing the author and subsequent rightholders with the necessary means to recoup their investments for the overall purpose of incentivising future creation, while accepting certain restrictions with regard to their widest dissemination and accessibility. The approach followed in the InfoSoc Directive, according to which a high level of copyright is “crucial to intellectual creation”⁵ may be more justified in these sectors, while it is mistakenly applied in an unmodified way to the area of scientific research in the Green Paper.⁶

Given these disparities, the result would be a partially **distinct copyright law for science and research**.

CONSIDERATIONS

The call for a distinct copyright regime for science and research is legitimate on the grounds that the relevant stakeholders’ interests significantly deviate from the interests in other sectors of content production. In order to design a well-balanced copyright framework for science and research in the EU, the following particularities need to be considered.

Publicly-Financed Contents

Since both the production as well as the acquisition of scholarly contents is for the most part publicly financed, there is a legitimate public interest in a highly efficient and cost-effective publi-

⁵ See Recitals 9, 10 and 11 of the InfoSoc Directive.

⁶ 2008 COM 466/3, at 4.

cation process. Taxpayers in Europe need to be guaranteed that the relevant funds are not used to subsidise excessive profit margins of some commercial publishers, whose business models are based on the commodification of scientific information or knowledge.

Researchers as Producers and Users of Information

Researchers necessarily draw from a significant amount of earlier research results in the course of their own productive activities. Re-use of knowledge and knowledge sharing are at the heart of scientific methods. For the first time, the Internet now offers the technological opportunities to constitute a comprehensive representation of knowledge. European copyright legislation has both to take account of the amplified importance of scholarly contents as input for follow-up scientific research and technological innovation as well as the new technological opportunities promising unexpected dimensions to scientific discourse.

Shared Interests of Authors and the Public

Scholarly authors – the main producers of scholarly contents – are typically not driven by incentives provided by copyright law under the traditional incentive rationale, which aims at securing royalties earned through selling copies of their publications. Scholarly literature is predominantly royalty-free literature. As a rule, scholars' financial rewards do not depend on a "rigorous and effective"⁷ system of copyright protection. They write for reputation and impact, which are inseparably linked to publications in the current scientific system, not necessarily for financial rewards. Scholarly authors want their publication to be *highly visible* among their peers and the public, a goal that perfectly corresponds with the demands of the general public. *Visibility* requires wide dissemination and accessibility of works. The necessary elements of integrity and attribution, important rights of the original scientific author, are guaranteed by moral rights stipulated in the relevant copyright laws as well as in relevant ethical norms of science, which are going to remain intact in a partially distinct copyright law for research and science as proposed herein.

Divergent Interests of Intermediaries

The interests of commercial publishers and other information providers deviate from the interests of scholarly authors. They usually follow a profit-maximizing strategy. Non-commercial services aim to at least refinance their expenditures, or seek to cross-finance expenditures in other areas. Both non-commercial as well as commercial intermediaries share the interest of refinancing their monetary investments. In order to stimulate investments of these stakeholders, sufficient protection to encourage investments into the provision of value-added services is needed (e.g. organisation of peer-review, linking, cross reference, machine searchability and readability, long-term stor-

⁷ Cf. the Green Paper, 2008 COM 466/3, at 4.

age etc). In the area of scientific research, hence, the primary rationale for copyright protection from the publishers' point of view is the adequate protection of investments made by publishers or other kinds of information providers.

Lack of Substitutability of Scientific Information

From the perspective of the relevant user, scientific information is barely substitutable. Small deficits in the representation of previous scientific knowledge can be decisive for the success of any research project. Since users thrive on a comprehensive set of pre-existing information, there is no truly viable substitute adequately available. The lack of substitute goods severely diminishes competition between information providers. The worst case will arise if technological protection measures (TPMs) are applied. TPMs are technological tools embedded in digital documents and are usually employed to restrict the use of or access to a work. In a situation where the relevant scholarly work is published electronically only, the application of TPMs may lead to a privatisation of the actual scientific information or knowledge, since the electronically protected document would be the single source of access to the required information. This would secure publishers a monopolistic position not only with regards to the scholarly work but also to the actual information contained therein.

Lack of Competitive Market Conditions for Journals

In many scientific disciplines, scholarly journals are today's most important carriers of research findings and other kind of scientific information. As the Commission's "Report on the scientific publication markets in Europe" of 2006 illustrates, journal markets lack sufficient competition and, therefore, do not function properly.⁸ This situation does not only result from the ingenuity of scientific information and knowledge as discussed above, but also follows from the distinct, impact-driven publishing system inseparably linked to the reputation of scientific authors which is pre-eminent in today's science and research. In exchange for the reputation that is connected with publication in a prestigious journal, scientific authors are willing to freely give away their exclusive rights in a work under copyright law, which clearly diminishes the bargaining power of the parties involved. Reconsidering citation rules as well as current mechanisms of evaluating research and scientific careers within the scientific community may have a considerable impact on the scientific publication system. However, a well-balanced copyright law for science and research can mitigate some of the detrimental effects of these market conditions.

⁸ Available at http://ec.europa.eu/research/science-society/pdf/scientific-publication-study_en.pdf (last visited 2 Dec. 2008).

OBJECTIVES

Given these particularities, sector-specific copyright legislation in the area of scientific research should be enacted in order to achieve following objectives:

Creating a Common Level Playing Field for Publication Models

Today's scholarly publishing environment is comprised of two publication models: namely, the "traditional proprietary" model, and the emerging "open access" model.

In the traditional model, the costs of publishing, e.g. the costs for operating an editorial office that organises the *peer-review* of submitted articles, are covered by subscriptions paid by libraries or the individual end user. To secure necessary investments, these publishing models are apparently reliant on a certain kind and degree of protection. In the absence of a genuine protection regime for publishers, the traditional model of scholarly publishing relies on the protection of copyright.

The open access model distributes scholarly contents under *open content* licenses, making the publications virtually free of most copyright restrictions. In this model, the author himself or the university, funding agency or research institution behind the author, covers publication expenditures.

Open access mandates, as adopted by the European Research Council⁹ for instance, usually require that peer-reviewed publications from publicly-funded research projects need to be deposited for publication into an appropriate research repository and made open access after a fixed embargo, e.g. six months after the first publication. Hence, those mandates postulate a two-tier publishing model, also called the "Green Road to Open Access".

Although several open access publishers have launched successful publications and high-end databases, forcing scholarly authors to *open access* publishing has not yet proved to be superior in providing sustainable and cost-effective platforms for disseminating scientific information and knowledge. *Open access* mandates for peer-reviewed publications arguably undermine reasonable investments of publishers, and constitute a two-tier publication mode with ambiguous interdependencies. Besides the economic and organisational uncertainties, from a legal perspective it is still unclear whether mandates such as those adopted by the European Research Council comply with the fundamental freedom of scientific research as is found in the respective constitutions of several Member States. Whereas this seems desirable, it is also not sufficiently clear how the established mechanisms of building reputation within the scientific community will adapt to these new publication models, which seems crucial for their success.

Given these uncertainties, and without damaging the competition between different systems overall, further avenues should be explored in order to provide for competitive market conditions, which would allow the most promising publication model to emerge. Competitive market conditions would also promise long-term improvement in publishing technologies securing an unobstructed, efficient and cost-effective process of disseminating and storage of information and knowledge. Finally, only fair competition will guarantee reasonable prices for scientific publications.

Protecting the Public Domain for Scientific Information and Knowledge

The ideas and research findings underlying scientific and scholarly writing belong to the public domain. This “raw material” should not be subject to exclusive rights, taking into account the lack of substitutability of relevant information and knowledge, which would severely diminish competition among information providers. It is an illusion that simply adhering to the idea-expression dichotomy doctrine in traditional copyright theory would guarantee that fundamental ideas and research findings are freely accessible. Although not copyright protected, the fundamental ideas and concepts are clustered in scholarly works or databases, which need to be distributed and read in order to gain access to the ideas and findings they convey. The freedom of fundamental ideas and knowledge is best served in a copyright framework providing effective exceptions or limitations privileging uses necessary to gain access to embedded information and knowledge.

Protecting Necessary Investments of Intermediaries

Academic publishing is not without costs. Expenditures of managing an editorial office, which organises some quality control (e.g. peer-review), provides for copy-editing and typesetting, are “*first copy*” costs, i.e. these costs are independent of the number of copies produced. These investments as well as expenditures relating to the mere production and diffusion of replications of works, e.g. printing, shipping, setting up databases, should be in the scope of adequate forms of legal investment protection, such as the *sui generis* database protection. However, it is at least not the genuine purpose of copyright law as such to provide this kind of investment protection since the aim of copyright law is to protect the individual creation of the author.

Providing for Sustainable and Flexible Solutions for Emerging Technologies

European copyright legislation needs the flexibility to adapt to evolving and future methods of disseminating knowledge, instead of being fixed to specific forms of use based on a temporary snapshot of ongoing developments. A copyright regime in the information economy, in particular

⁹ ERC Scientific Council Guidelines for Open Access of December 17, 2007, accessible at http://erc.europa.eu/pdf/ScC_Guidelines_Open_Access_revised_Dec07_FINAL.pdf (last visited 22 Nov. 2008).

the design of relevant exceptions or limitations, should be neutral towards the specific actors and technologies involved in the process of disseminating, refining and long-term storage of scholarly contents. Not all of these current and future developments fit into the narrow pigeonholes that the exhaustive list in Art. 5 InfoSoc Directive provides today.

Eliminating Disparities within the IP Law System

Only coherence between the different bodies of law guarantees a free and unobstructed flow of scientific information. Therefore, limitations should also apply to a *sui generis* right in unoriginal databases, which has been stipulated by Directive 96/9/EC on the legal protection of databases. This would avoid disparities between the two most relevant protection regimes that are closely linked in the information society.

Common Market for Information Provision

Markets hosting a great variety of services to meet the needs of a diverse group of users may be the best answer to the technological opportunities the Internet provides for science communication. Some of these services are expected to generate low business margins. Harmonisation will allow those businesses the provision of services that generate low profit margins by providing entry to a larger European market and creating necessary synergies. Further, harmonisation would reduce transaction costs for businesses stemming from different legal frameworks within the European Community. Harmonisation will also lower barriers for cross-border interaction between libraries.

CONCRETE MEASURES: A TWO-TIER APPROACH

As has already been stated, the particularities in the area of the production and dissemination of scientific information compel a partially distinct, sector-specific copyright law for science and research, rather than the continuation of the traditional “one-size-fits-all” approach. As mentioned above, a two-tier approach is suggested:

- (1) At the end-user level, exceptions or limitations for the benefit of end users play an important role in guaranteeing sufficient access to information embedded in copyright-protected works for scientific and research purposes. Those exceptions or limitations that are most relevant to scientific research should be mandatory, immune from contractual agreements and technological protection measures, and should be construed as providing a bottom line, which national legislation should not fall below. In return, original rightholders should receive adequate compensation. As an accompanying measure, Art. 6(4) InfoSoc Directive needs revision so as to follow such a sector-specific approach, making relevant limitations and exceptions in the field of science and research immune against TPMs.

- (2) At the level of intermediaries, it is recommended to explore concepts that will help mitigate certain negative effects of the exclusivity granted by copyright in the rather specific context of scientific publishing.

The following legislative measures should be considered in the course of a reform of European copyright law in the knowledge economy in order to achieve the objectives set out above.

Exceptions or Limitations for the Benefit of End Users

We recommend the revision of relevant existing limitations, as follows:

Design by Category or Purpose of Use

The ongoing developments in information technology call for a design of the relevant limitations by category or purpose of use, rather than a design which strictly determines the relevant beneficiaries (e.g. publicly accessible libraries, archives, etc.), locations (e.g. “within library premises”), media or technologies to be applied or quantities of usage.¹⁰

No Restriction to Uses for Non-Commercial Purposes

In order to provide a level playing field for information providers and to avoid harmful distortions, limitations should generally also apply to the use of works for commercial scientific purposes, especially including the use of works for commercial research. The law should differentiate between uses for commercial and non-commercial purposes only with regards to compensation. In order to further promote the emergence of viable business models, limitations should also allow the use of a work by a third party on behalf of and for the benefit of the beneficiary.

Enhancing Compensation for Rightholders

Where certain uses are carved out by limitations, fair compensation for rightholders needs to be secured. Fair compensation would mean compensation at virtual market price. The virtual market price would be deemed to be the price that a scholarly work would yield in the marketplace if market conditions were competitive. Hence, uses for commercial purposes will result in a higher compensation rate. The market price would arguably exceed the sum of historical costs of editing, taking into account the need to make provisions for the possibility that a publication fails in the market. It is acknowledged that the current systems of compensation, where established, do not necessarily meet these conditions.

¹⁰ For a similar approach on the design of educational exceptions or limitations, see “Gowers Review of Intellectual Property”, 2006, para. 4.15.

Making Exceptions or Limitations Mandatory

These revised limitations most relevant for scientific research should be made mandatory for each individual Member State, not only in order to further increase the level of harmonisation, but also in the light of their importance as such.

Preventing Circumvention of Exceptions or Limitations

With regard to contractual arrangements or TPMs, those mandatory and revised limitations should be implemented as *peremptory provisions*. The relationship between limitations and TPMs is not explicitly addressed in the Green Paper. Even mandatory limitations, which would have to be implemented in all Member States, lose a great amount of their effect if their application is massively impeded in practice by the use of TPMs. Article 6(4), 4 of the Directive gives TPMs general “one-size-fits-all” prevalence over limitations in the important case of online on-demand services. Such prevalence may have its benefits in some specific sectors such as the entertainment sector, but strongly disfavours general public interests in the area of scientific information. Other jurisdictions such as Switzerland follow a generally favourable approach. They use the leeway that Art. 11 of the WIPO Copyright Treaty has left in this regard and give exceptions and limitations prevalence over TPMs.¹¹ While this seems like a preferable solution overall, the EU should at least adapt Art. 6(4), 4 in a sector-specific way and restrict the privilege for online on-demand services to areas where such a solution may seem more apt than in the area of scientific information. In this context, it also seems desirable to address the issue of effective enforcement mechanisms in favour of exceptions and limitations on the European level, instead of leaving this complex question to the individual Member States as in the InfoSoc Directive.

Alignment of database protection with exceptions or limitations applicable in copyright

In order to diminish disparities between legal frameworks that are closely linked in the information society, we propose to enable and oblige Member States to extend exceptions or limitations provided under copyright to the *sui generis* protection of databases,¹² particularly the exceptions or limitations proposed herein.

Drafting Suggestions

We propose the following additional or amended provisions to the InfoSoc Directive (with new or changed wording emphasised in **bold** print):

¹¹ Cf. Art. 39a Sec. 4 of the Swiss Copyright Act (URG), according to which the prohibition to circumvent TPMs may not be enforced against those who circumvent TPMs only in order to enable a use permissible by law.

Article 5:

3a. Member States **shall** provide for **peremptory** exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (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, **on condition that the rightholders receive fair compensation;**
- (b) with respect to necessary acts of reproduction **of scholarly works for the purposes of long-term storage, archiving, data extraction, linking and the like;**
- (c) use by communication or making available, for the purpose of research or private study, to **registered users ~~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, **on the condition that the rightholders receive fair compensation;**
- (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, **to an extent required by and sufficient for the specific purpose.**

The concluding clause, which requires Member States to implement mandatory exceptions or limitations in a way and “to an extent both required **and sufficient** for the specific purpose”, tries to ensure that such mandatory limitations will not be rendered useless by impractically restrictive limits to the extent of a work that may be copied or made available. Instead of a definite but inflexible minimum rule, it is favourable to achieve the underlying goal by such a more function-oriented provision. Such a provision constitutes a corridor, providing both for a bottom line and an upper limit for Member States’ legislation.

The formerly optional provisions in Art. 5(3) lit. a, Art. 5(3) lit. d and Art. 5(3) lit. n InfoSoc Directive should be removed correspondingly.

Moreover Art. 5(4) InfoSoc Directive would need revision as follows:

¹² Cf. KUR, HILTY, GEIGER & LEISTNER, “First Evaluation of Directive 96/9/EC on the Legal Protection of Databases – Comment by the Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich”, 37 IIC 551, 556 (2006).

Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

*Where the Member States **are obligated** to provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they **shall** provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.*

With regards to preventing circumvention of most relevant exceptions or limitations, the catalogue of exceptions or limitations in Art. 6(4), 1 InfoSoc Directive should be revised so as to include herein the proposed exceptions or limitations. The important issue of appropriate measures to ensure that the beneficiary can actually benefit from these exceptions or limitations should be specified on a European level instead of leaving this complex question to the Member States. Second, Art. 6(4), 4 InfoSoc Directive should be revised as follows:

*The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them, **unless such use is subject to the mandatory exceptions and limitations provided for in Article 5, paragraph 3a.***

Measures to Mitigate Negative Effects of Exclusivity on the Disseminators' Level

Problems

Although the limitations proposed herein would adequately address the pressing demands by the public for long-term, functional and efficient accessibility and usability of scientific information and knowledge on the end-user level, they do not address the detrimental effects of insufficiently competitive market conditions pre-eminent in the market for scientific publication, which have also been identified in the Commission's study on the economic and technical evolution of the scientific publication markets in Europe¹³.

In the process of scholarly publication notably in natural sciences, three distinct production levels are involved:

¹³ *Supra* note 1.

- (1) The first level involves the **author's draft** ready for submission. On this level, authors compete intensely for publication in reputation-yielding journals and journals compete for excellent drafts.
- (2) On a second level the article is possibly **peer-reviewed and – if approved –** accepted for publication. At this point in time, competition is eliminated by contracts between authors and publishers, usually restricting further publication of the same article (content) by another disseminator.
- (3) The third level involves the publisher's **technical preparation and refinement** of the article to be disseminated exclusively by the publisher.

Problems occur from the combination and the interaction of several effects on these production levels. Initially, copyright law grants exclusive rights to the original rightholder, providing for exclusive control over the exploitation of the individual scholarly work on all these production levels. In the environment of scientific publication, however, this basic rule of copyright law risks to be at odds with the highly informational degree of the contents in question, notably when the availability of the individual information is indispensable for further research. Further on, dissemination tends to be impeded by the fact that the original rightholders – the scholarly authors – regularly are urged to grant exclusive licenses to one publisher. Such licensing practises perpetuate exclusivity to the disseminator's level, narrowing the number of potential sources of scholarly works for users, Especially where insufficiently competitive market conditions are present, the combination of these mutually reinforcing effects may allow for excessive pricing or inferior technical preparation and refinement of scholarly articles by disseminating publishers.

Options

Several options should be considered in order to alleviate the negative effects of exclusivity on the disseminator's level, i.e. the *single-source situation*, which will be outlined in the following:

- One option could be to consider constraining exclusivity on the second production level already, for example by means of binding rules of copyright contract law, limiting the possibility for scientific authors to give away exclusive rights to a single publisher. This would allow such authors to provide further intermediaries with non-exclusive licenses of the same work, which could then serve as alternative sources of the respective work. Whereas in theory, authors are able to deny exclusive rights under current copyright laws, this freedom is severely impeded in practice by their disparate bargaining powers.

Such an approach might turn out to be even more promising if some administrative support and guidance were provided by the scientists' respective research organisations. At

the same time, it has to be considered to what extent the freedom of scientists can be restrained, and which degree of autonomy necessarily has to remain with the author himself.

- A rather different option could be to address negative aspects of exclusivity on the disseminators' level and to introduce an element of price control in cases of exploitation. Such a – probably undesirable – solution outside the scope of copyright law might require the establishment of some kind of expert body, which would be involved when disputes about pricing arise in individual cases.
- One option might be specific limitations of exclusivity, not for the benefit of the end user, but rather for the benefit of alternative disseminators, allowing for parallel dissemination of the same content, subject to a predetermined, collectively administered compensation to safeguard the legitimate interests of rightholders.
- Another option could be to restrain the exercise of exclusive rights, subject to negotiations between the parties involved. Such negotiations would provide further intermediaries with a license for parallel dissemination under adequate, competition-oriented terms and conditions. In case of a dispute between the parties on the adequacy of these terms and conditions, it could be up to an expert body and/or the national courts to determine their adequacy. Effective procedural measures, including effective interim measures to avoid inhibitory delays, would have to be established by Member States. An advantage of such an approach would be that it could be expected to encourage voluntary agreements if seen as fallback positions that could be applied in case no agreement can be reached otherwise.

Both the limitation and the outlined restraint could turn out to be too broad in shape with regard to the rather diverse market conditions within the overall area of scientific publishing. Whereas efforts to identify specific segments might be one pursuable, albeit very intricate approach, another solution could be to link such limitations or restrictions to the condition that market conditions are not sufficiently competitive in the respective area in question. Such limitations or restrictions of the exclusive position of scientific publishers would obviously be hybrid solutions at the borderline between classical copyright law and classical competition law, and would require further detailed analysis.

In comparison, all of the outlined options have their advantages and disadvantages, and are meant as starting points for further discussions and refinement in the course of the legislative developments following the Green Paper on Copyright in the Knowledge Economy. While the option of price control takes a different approach, focusing only on the third level of production, the other options aim to mitigate negative effects of exclusivity on the second and subsequently on the third

level of production. The intention is to allow competing content providers (e.g. secondary publishers, database providers, indexes, archives, information brokers, etc.) to enter into competition with the original publisher with respect to the same content, but with differently prepared and refined products (e.g. layout of the document, machine-readability, file size, etc.) or services (citation linking, data extraction, information broking, etc.). As a result, the specific added value should be invested by any disseminator independently, which leads to freedom of choice on the side of the user with regard to which kind of refinement he wants to pay for.

COMPLIANCE WITH INTERNATIONAL CONVENTIONS

With regard to the measures outlined above and the implementation of a partially distinct copyright law for science and research, the autonomy of European legislation is to some extent limited by international conventions, namely the “Berne Convention for the Protection of Literary and Artistic Works”, the “Agreement on Trade-Related Aspects of Intellectual Property Rights” (TRIPS) and the “WIPO Copyright Treaty”, according to which scientific works are generally subject to copyright protection like any other work of authorship.

While it seems important to point out that these conventions are by no means laws of nature, and that the EC should aim to take necessary steps to change them if consensus can be achieved that certain restrictions within these conventions have developed a rather detrimental effect – e.g. compared to the goals outlined in the Green Paper on Copyright in the Knowledge Economy – the EC should of course respect the binding principles and specifications laid out in these conventions.

When implementing **exceptions or limitations as outlined *supra* 2.4.1.**, the European legislature needs to take special account of the constraints imposed by the Three-Step Test as one of the most prominent restrictions in these Conventions. With regard to the measures proposed to mitigate the negative effects of exclusivity on the disseminators’ level as outlined in *supra* 2.4.2., it would depend on the specific measures as to whether they would also be subject to the Three-Step Test, particularly because it is questionable which of them would have to be considered an “exception or limitation” in the meaning of the relevant provision.

Concerning, however, those areas where the Three-Step Test has to be applied, the “Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law”, which was co-initiated by the Max Planck Institute,¹⁴ explains in far more detail than is appropriate in this specific Comment on the Green Paper how the Three-Step Test should be and can be interpreted in a way that not only takes into account the interests of rightholders, but also gives equal consideration to third-

¹⁴ “Declaration On a Balanced Interpretation of the Three-Step Test in Copyright Law”, at 2; available at www.ip.mpg.de/shared/data/pdf/extranet/declaration_three_step_test_final_english.pdf; see also 39 IIC 707 (2008). The

party interests. The Declaration also stresses the importance of taking into account existing restraints of competition when considering the decisive question whether a limitation does conflict with the “normal exploitation” of a work. Especially where limitations or restraints to exercise exclusive rights are linked to the existence of insufficiently competitive market conditions, the Three-Step Test provides more leeway for specific legislation that is intended to improve the dissemination of knowledge for research and science than an overly restrictive reading of the test seems to imply.

These and related questions should be addressed in more detail in the further course of the legislative activities following the Green Paper.

3. SPECIFIC COMMENTS ON RELATED QUESTIONS IN THE GREEN PAPER

In the following, we will focus on matters connected to the dissemination of scholarly works. Issues not closely related thereto have not received any comment. For the sake of precision and clarity related questions have been grouped.

- Q 1: Should there be encouragement or guidelines for contractual arrangements between rightholders and users for the implementation of copyright limitations?
- Q 2: Should there be encouragement, guidelines or model licenses for contractual arrangements between rightholders and users on other aspects not covered by copyright limitations?
- Q 7: In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?
- Q 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? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

Balanced agreements between stakeholders (authors, publishers, information providers, libraries and end users) can only emerge on a sustainable basis if the relevant bargaining powers are equally distributed. Otherwise, parties with sufficient bargaining power will deviate from model licences.¹⁵ Only if bargaining powers are adequately allocated among the relevant stakeholders by way of legislative reform as proposed above, can model licenses and guidelines be effective and useful.

Further, encouragement or guidelines for contractual arrangements should only be implemented for the sake of rendering the freedoms provided by a specific limitation more precisely and unless those guidelines happen to foster existing tendencies to prohibit the use of existing limitations that exist in the public interest. European copyright legislation must adhere to the principle that exceptions or limitations most relevant for scientific research should not be circumvented, either by contractual arrangements or TPMs.

Q 3: Is an approach based on a list of non-mandatory limitations adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

declaration was jointly initiated by the members of the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich, and faculty members of the School of Law at Queen Mary, University of London.

¹⁵ E.g. the “German Model Licenses for Scholarly Works” (*Vertragsnormen für wissenschaftliche Verlagswerke*), intended to adjust the varying interests of scholarly authors and publishers through a number of model contracts; these were seldom applied in practice.

Q 4: Should certain categories of limitations be made mandatory to ensure more legal certainty and better protection of beneficiaries of limitations?

Q 23: Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Exceptions or limitations are based on different underlying and justifying principles; while some limitations are to some extent based on a market failure argument, others reflect fundamental freedoms and core general public interests. The more public interests are involved, the greater the rationale to establish mandatory exceptions or limitations in order to safeguard these values within a balance-oriented copyright system.

As stated in the general remarks, limitations most relevant for scientific research should be drafted along a function-oriented design, i.e. the directive should only stipulate the respective purpose of usage and should rather not determine beneficiaries, location, technologies to be applied or number of copies, etc. See draft *supra* 2.4.1.7.

Q 5: If so, which ones?

The implementation of additional and revised exceptions or limitations proposed in *supra* 2.4.1.7 should be made mandatory for each Member State.

On the strict condition that this is not achievable, and based on the current exhaustive list of exceptions or limitations, at least those that currently reflect the pressing needs for efficient dissemination and widest accessibility should be made mandatory, namely:

- Limitation for research purposes (Art. 5 Sec. 3a));
- Limitation for quotations (Art. 5 Sec. 3d));
- Limitation for libraries and archives (Art. 5 Sec. 2c));
- Limitation for on-the-spot consultations in Art. 5 Sec. 3 n)); and
- Limitation with respect to reprography (Art. 5 Sec. 2a)).

As with mandatory limitations, a European approach also seems necessary with regard to the implementation of the outlined measures aiming at mitigating the detrimental effects of exclusivity on the disseminators' level.

Q 6: Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

No, the exception should nevertheless be revised, allowing online access to the catalogues of libraries and archives for the sole purpose of research or private study.

Investments of publishers into online access to their catalogues via electronic databases are considerable. A range of small and medium-sized publishers may not even be able to afford providing such a service on their own. The revised limitations take account of the significant size of those investments. However, as explained in the general remarks above, this comment favours the necessary functional approach to exceptions and limitations and acknowledges that each restraint of free competition by granting copyright or neighbouring rights needs its justification. The mere fact that publishers have built a proprietary system of online knowledge dissemination does not diminish the need to allow other providers to enter that market, since the interests of publishers are not entirely in line with the public interests in the dissemination of information and knowledge, and sound competition will lessen this disparity of interests.

Q 8: 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?*

The revision of limitations as described in *supra* 2.4.1.7, would provide for the necessary freedoms to permit format shifting, necessary replications and the scanning of entire collections. EC legislation should refrain from stipulating the conditions of replication for long-term storage and long-term accessibility purposes (with regards to the numbers of copies allowed, the respective beneficiaries, technologies to be applied, etc.), as this would congeal the snapshot of today's technological opportunities to the detriment of innovation in the field of publishing and archiving. In fact, limitations need to be diligently worded as to be clear which forms of usage are privileged. Further interpretation needs to be provided by courts.

Q 9: Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current limitations to copyright?

Current limitations do not legitimate libraries to make their content searchable on the Internet. Proposed limitations as drafted in *supra* 2.4.1.7, will allow libraries to make their content searchable on the Internet for their registered users, subject to fair compensation of rightholders. It seems rather anachronistic against the background of a highly connected and mobile communication environment to limit research by the old physical boundaries instead of utilizing the opportunities of theoretically ubiquitous access to knowledge.

Q 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?

In line with the general position that effective limitations need to be constructed in a function-oriented way, it is of course also important that those mandatory limitations are not rendered useless by impractically restrictive limits to the extent of a work that may be copied or made available. Instead of a definite but inflexible minimum rule, it is favourable to achieve the underlying goal by a more function-oriented provision that requires Member States to implement mandatory exceptions or limitations for research purposes in a way and to an extent both required **and sufficient** for the specific purpose.

For the proposed wording, see *supra* 2.4.1.7.

Questions 10–18, 20, 24 and 25: No comments provided.