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What's the size of small parts? (Germany)

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"Since its introduction in 2003, the provision marks the centre of a controversy between schools and institutions of higher education and copyright holders, especially publishing houses marketing a scientific – educational portfolio."

About the right to make available small parts of a work for illustration purposes for teaching in schools and higher education and how it is interpreted by OLG Stuttgart in Alfred Kröner Verlag GmbH & Co. KG v Fernuniversität in Hagen (4 U 171/11).

The dispute between the parties centres on the question of whether Fernuniversität Hagen shall be permitted under § 52a German Copyright Act (CA) to make a work, to which Kröner Verlag is the right holder, publicly available through its e-learning platform. Kröner Verlag v Fernuniversität Hagen is the first case revolving around § 52a CA that was brought before a higher German court. It was therefore labeled a test case by legal commentators as well as affected institutions and businesses. One may not be surprised to learn that the decision has been – based on the ground of fundamental significance- appealed. A final judgment by the Federal Court of Justice (BGH) is not expected until 2013.

The Claimant is a publishing house and copyright holder of the book "Meilensteine der Psychologie" (Milestones of Psychology), providing information on life and work of eminent pioneers of modern psychology. It is subdivided into certain periods and persons which makes it a particularly suitable reference book for psychology students.

The defendant, Fernuniversität Hagen, a state-maintained distance teaching university, operates an e-learning platform, which can be accessed by its students via

a personal account. Throughout the academic year 2008/2009 parts of the book (91 out of 515 pages = approx. 18 %) have been made available to approximately 4.000 bachelor students enrolled in the course psychology. The excerpt was made available as a pdf-document that could be downloaded and printed. After the defendant had been served a cease and desist letter by the claimant, the excerpt was made available through the programme flashplayer, which eliminated the possibility to download and further disseminate the excerpt whereas a printout was still possible.

Whereas the court of the first instance (Landgericht Stuttgart) was of the view that the small-parts-criterion is met if not more than 10% of the work is made available, the Court of Appeal took a different stand. Despite considering it permissible to determine a maximum limit of material (three pages in the case at hand), the question what constitutes "small parts" cannot solely be determined based on a certain percentage. It rather needs to be interpreted case-by-case and by that balancing the copyright holder's right to property enshrined in Article 14 Basic Law and the conflicting interests to make use of a work for teaching and research purposes. In this regard, the Court of Appeals also pointed out that the three-step-test can easily be carried out within the scope of the requirements of § 52a CA. The German legislator has refrained from introducing the three-step-test explicitly into the Copyright Act, but rather observed its requirements by defining limitations and exceptions to copyright itself. In the case at hand that means, making publicly available those parts of the work, which are relevant for the examination of the course subject, conflicts with a normal exploitation of the work as it will not be necessary to purchase the work. Hence, the copyright holder's legitimate interests are unreasonably prejudiced.

The court further concluded, that the criterion "illustration purposes" is fulfilled, if the work, by using it as an example, helps to further explain or illustrate what is being taught and thus makes the curricular subject itself comprehensible. In the present case however, the material did not serve that purpose, it rather complemented the content of the lecture and helped to adopt a different perspective, as it partly or entirely replaced the lecturer's explanations on the subject. Furthermore, the criterion "limited circle of participants" is not precluded by a large number of authorized persons, as long as an effective control mechanism ensures that the work can only be accessed by course participants. Furthermore, the circle of participants must not be limited to persons located in Germany.

The right to make the work publicly available for teaching and research purposes in accordance with § 52a CA does not permit the work to be printed out or otherwise reproduced (read-only). In accordance with recital 24 2001/29/EC, § 52a CA needs to be construed narrowly and does only permit those acts of reproduction, which are immediately necessary to make the work publicly available.

§ 52a CA allows for a work to being made publicly available for teaching purposes and scientific research. It distinguishes between three kinds of works: small parts of a work, works of minor extent and contributions taken from newspapers and magazines. § 52a CA is based on Art. 5(3)(a) InfoSoc-Directive. Since its introduction in 2003, the provision marks the centre of a controversy between schools and institutions of higher education and copyright holders, especially publishing houses marketing a scientific – educational portfolio. Publishers call for its abolition or at least restriction as they fear

the loss of market share which follows the assumption that fewer students will purchase a certain book if the relevant parts are made available electronically. In an attempt to alleviate the conflict during the legislative process, § 52a CA has been made subject to a "sunset clause" (§ 137k CA) according to which it shall expire after a two years (trial-)period. This initial period has since been extended twice and at present is bound to expire on 31 December 2012. A further extension –for another two year term- is recommended by a commission report by the Ministry of Justice and currently under negotiation. German Universities see the current legal framework as flawed and a real barrier to a large-scale shift toward electronically supported teaching and learning. § 52a CA should be revised or as a minimum objective at least be extended beyond 31 December 2012.

Hopes were high that the OLG Stuttgart would seize the opportunity to set some boundaries and provide guidance as to what shall be permitted under § 52a CA. Admittedly, it is quite appealing to interpret the individual elements of § 52a CA in accordance with the Three-Step-Test. It certainly is just when each case is considered individually and decided on its own merits. It does not however, provide for guidelines or enhance legal certainty among educational institutions. It is fair to assume that in an effort to avoid potential conflicts with copyright holders, Universities will be rather timid to distribute electronic material and in a case of doubt rely on a traditional paper-based knowledge transfer.

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