

German reform on the use of copyright protected works in the fields of education and research will come into force soon

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Introduction



On 30 June 2017, the German “Bundestag” adopted the “Act to Align Copyright Law with the Current Demands of the Knowledge-based Society” (“Urheberrechts-Wissensgesellschafts-Gesetz- UrhWissG”).

It essentially reforms the terms of use of copyright protected works in the fields of education and research and will come into force on 1 March 2018.

This new Act attempts to address the repeated critiques of German Copyright Law, concerning its inflexibility for new technological evolutions and its complex

structure, which makes it difficult to understand for the layman and complicated to apply.

Therefore, in order to make the provisions easier to understand, the statutorily permitted uses of protected works, for which the prior consent of the author is not required, have been structured in new articles, each of which addresses a different category of users or a different form of use of the protected works. Furthermore, the specific issues of remuneration for the permitted use and the relationship between statutorily permitted uses and licensing agreements are, for their part, also governed separately (sections 60g and 60h of the German Copyright law).

Finally, section 60d of the German Copyright law introduces a new permission, enabling text and data mining for the purpose of scientific research.

The New Articles in more Detail

First, the previously undefined specifications of the permitted amount of a work that could be used, e.g. 'small parts', have been replaced by definite percentages in order to achieve greater legal certainty.

Thus, up to 15 percent of a work may now be reproduced, distributed and made available to the public for the purpose of non-commercial scientific research (section 60c of the German Copyright law) and illustration for teaching in educational establishments (section 60a). In addition, for personal scientific research, the part that may be reproduced amounts to 75 percent. Moreover, restrictive explicit references to means of communication, such as 'by mail or fax transmission' or 'exclusively as graphical data' have been removed.

Another novelty is the permission to use illustrations, individual contributions, other small-scale works and out-of-print works to their full extent for the purpose of teaching and scientific research.

Libraries, archives, museums and educational establishments shall now be allowed to reproduce works from their collections or exhibitions, including more than once and with technically necessary changes, provided that they don't, directly or indirectly, serve any commercial purpose. Unlike before, even archiving will be possible, if the original work is not part of the establishment's own collection. For the purpose of restoration, reproductions of a work may also be distributed to other libraries, archives, museums or educational establishments, including

restored works, copies of newspapers, and out-of-print or damaged works.

Libraries are to make a work from their collections available to their users for personal research or private studies at terminals on their premises. Libraries may further enable users, for non-commercial purposes, to reproduce up to 10 percent of a work per session and to make reproductions of individual illustrations, contributions from the same professional or scientific journal, other small-scale works and out-of-print works. In response to individual orders, reproductions of up to 10 percent of a published work and reproductions of individual contributions from professional or scientific journals shall be transmitted as digital copies.

Moreover, the German National Library shall be allowed to archive all cost-free online content that is not permanently accessible online, for example blog posts.

The initial bill stated that any online content could be archived by the German National Library and made accessible to anyone for free, a provision which was strongly criticised by major German newspapers (e.g. the German "*Frankfurter Allgemeine Zeitung - FAZ*"), who feared for their economic interests. Thus the bill was later amended by the German Bundestag to provide that press products shall be excluded from the German National Library's archives provided that such press products remain regularly and permanently accessible.

Furthermore, for the purpose of scientific research, a new permission has been introduced in order to enable text and data mining (section 60d of the German Copyright law). Addressing the demand for enabling repeated browsing and verifiability of scientific results and procedures, it allows the software analysis of large quantities of text and data through the creation of a corpus of source materials.

The various permitted uses of works without the prior consent of their author finally all give rise to an equitable remuneration in an amount to be determined on a flat-rate basis or via a usage-related calculation, based on a representative sample of usage. The adequate remuneration has to be collected by a collecting society.

Concerning the relationship between statutorily permitted use and licensing agreements, the new law provides for the predominance of the statutorily permitted use, as long as a licensing agreement on the use of the protected work has not been concluded. This means in practice that licensing agreements can be

concluded for every use exceeding the permitted percentage of a work to be used without prior consent of its author. Where a licensing agreement has been concluded, the remuneration is paid in accordance with the licensing agreement; the remuneration system provided for in the law does not apply. At the same time, the new law does not preclude the possibility for authors to allow the cost-free use of their work via open access.

Concluding Thoughts

Lastly, the choice of regulatory model can be examined. The suggestion of increasing the openness for new technological evolutions by a general clause or flexible clause combined with precisely regulated specific situations has not been accepted. Instead, the government has insisted on legal certainty, opting for only precisely regulated specific situations. The adequacy of the chosen model will of course be put to the test over the coming years. In this respect, according to section 142 of the German Copyright law, within 4 years of the entry into force of the new provisions, the government shall submit a report to the German legislator on the effects of these provisions, which in any case shall no longer apply from 1 March 2023.