

Kluwer Copyright Blog

A research-friendly copyright system is a flexible copyright system

Felix Reda (GFF (Society for Civil Rights)) · Thursday, November 17th, 2022

Knowledge Rights 21 (KR21) is a programme by European library and research associations IFLA, LIBER and SPARC Europe to mobilise the potential of Europe's knowledge institutions, particularly libraries, to engage with others across the spectrum of the access to knowledge movement to build momentum towards long term copyright reform that benefits library users and researchers in the 21st century. In this blog post, originally published on the KR21 blog, KR21 policy committee member Felix Reda analyses the potential for copyright reform in Germany, where the government has included a promise to "promote a more research-friendly copyright" in its coalition agreement.



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It has been a year since the German Social Democrats, Greens and Liberals formed the German government and published their coalition agreement, which promises to make Germany's copyright law more research friendly.

Since then, in-depth assessments into the copyright law for research and education conducted by the [Ministry of Justice](#) and the [Ministry of Education and Research](#) have concluded that recent simplifications of those provisions, which were heavily criticised by publishers at the time, were justified and have largely stood the test of time. Moreover, research practitioners surveyed for the Ministry of Education study described those provisions as highly relevant for research and higher education activities.

However, despite the promise of the coalition to promote research-friendly copyright, there are no signs as of yet that the German government is planning to put forward the necessary legislative

initiatives to break down barriers to research and education.

1. Flexibility for researchers in a rapidly changing environment

The COVID-19 pandemic has revealed many shortcomings of existing European copyright exceptions for research and education. In a crisis situation, when schools, libraries and universities had to rapidly switch from in-person offers to remote activities, it became clearer than ever that copyright law provisions which require users to be physically present in a given location, such as the dedicated terminals exception of Art. 5 (3) (n) of the InfoSoc Directive, are woefully outdated. The situation is made worse by the CJEU jurisprudence which has thus far denied the application of fundamental rights as an external limit to copyright law, instead insisting that the balance between different competing fundamental rights is already considered in the closed list of EU copyright exceptions. Nevertheless, [a more flexible interpretation](#) of the existing exceptions in light of emergencies such as the COVID-19 pandemic is possible.

The need for flexible rules became apparent once more when Ukrainian researchers, students and teachers had to flee Russia's war of aggression and attempt to resume their research and education activities abroad. The Ukrainian government took what appears to be a pragmatic approach to copyright issues by [making school books available online](#) – a move that would be unthinkable under the very rigid German copyright system for school books that relies heavily on licensing.

If the last few years have taught us anything, it is that drastic, unforeseen changes to our everyday lives are to be expected. Not only could researchers, students and teachers be forced to stay home and conduct their activities online, or become displaced due to a war or natural disaster, they could just as well be barred from using digital tools as the consequence of a power outage, a cyber-attack or over-reliance on a single commercial vendor. A resilient copyright system that allows research and education to resume even in extreme crisis situations is a copyright system that incorporates open norms that can be adapted to new developments without the need for legislative intervention. This is why the demand for open norms in EU copyright law is central to a research-friendly copyright system.

2. A legal right to lend e-books is overdue

The most eagerly awaited and most overdue element of a research-friendly copyright system in Germany is the introduction of an e-lending provision. The demand to allow libraries to lend out e-books is explicitly mentioned in the coalition agreement of the current German government (N.B. both of the previous government coalitions promised to look into the issue as well – and never delivered any solutions). Now it looks like another government may be kicking the can down the road with no legislative proposal for e-lending in sight.

Ensuring that libraries may continue to fulfil their public-interest mission of providing access to books in the digital environment is a cornerstone of a research and education friendly copyright framework. Negotiations between German associations of publishers and libraries over a licence agreement on e-lending have proven not only unsuccessful, but also fundamentally incompatible with competition law. Based on the current German copyright law, which includes a legal right to lend only for works whose distribution right has been exhausted, it has become clear that a

legislative reform is necessary to clarify that the public lending right applies to e-books held by libraries as well.

3. Compensation requirements hinder the practical application of exceptions

There need to be fewer compensation requirements associated with the use of exceptions, and more, clearer rules that enable the use of exceptions when compensation agreements have not been reached.

For example, a current area of uncertainty is around sending copies digitally to library patrons instead of requiring the library to hand out a physical copy. There is no compensation agreement in place between the state and collecting societies for such digital copies (only for analogue ones), with the effect that sharing such digital copies has been frozen since the phasing out of emergency provisions introduced because of COVID. It is only logical that the government should cover the costs of compensation for uses of works undertaken by public institutions as part of the mission given them by government. The absence of provisions or solutions here gives the impression that in fact, lawmakers don't really want the exception to be used, and so don't want researchers and students to have access to the literature they need.

4. End special treatment of press publishers

The effort to invent ways to create new revenue streams for press publishers was a major feature of the EU's copyright reforms in the second half of the last decade. Ignoring the lack of evidence that these delivered the positive outcomes promised, the press publishers' right was part of the final text of the Directive on Copyright in the Digital Single Market.

However in Germany, efforts to provide special treatment to the newspaper sector do not end there. Newspapers are excluded from some research and education exceptions in Germany, although they are extremely important research material, offering vital insights into the past. Such provisions seem more likely to suffocate research – especially for those less able to negotiate access – rather than generate any meaningful new revenue streams.

There is no good reason to set more restrictive rules for use of such works compared to other materials, and so this anomaly should end.

5. No more inflexible rules around the percentage of a work that can be used

German law as it currently stands has a fixation for establishing figures for the share of a work that can be used under an exception. At first sight, this can look helpful, in that it provides a clear rule that can be used in applying the law. However, in reality, it is anything but!

Such provisions can often make little sense when read alongside the goals that the law is looking to pursue, or more meaningful considerations around proportionality or impact on the market. Defining what the 'whole' of a work can be far from simple. The logic behind such provisions is

also put into question by the fact that there are also different percentages for different but similar use cases (some exceptions are limited to 10% of a work, while others seemingly arbitrarily to 15%).

Rather than using such rules as a shortcut for assessing what is possible, it would make far more sense to focus on what actually matters – the fairness of the use made.

The five actions set out above would represent a great way of ensuring that Germany's government delivers on its promise to promote a science-friendly intellectual property system during its term.

However, this is not only a question for national governments. We need, also, reform at the EU level, where, despite the commitment to supporting the development of high-quality research in Article 179 of the Treaty on the Functioning of the European Union, there is still no general, mandatory research exception. Introducing this would be a major step towards achieving Treaty goals, as well as triggering much-needed reform in Germany and beyond.

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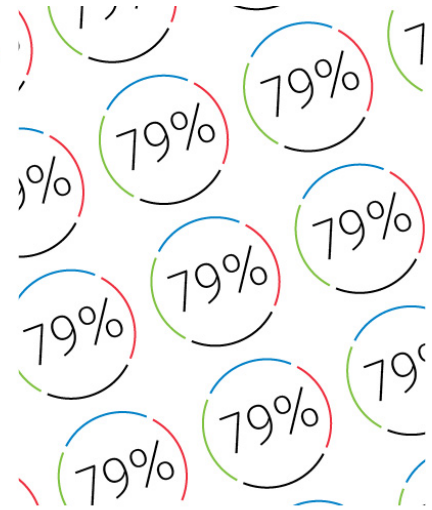
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