

Copyright law and the access to education and knowledge in the digital age

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Executive Summary

Copyright Law and the Access to Education and Knowledge in the Digital Age

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Matching Limitations and Exceptions in Portugal, Brazil and Mozambique

Philipp Maximilian Usadel

The present study aims essentially at exploring one question: Do limitations and exceptions to copyright law adequately promote the access to education and knowledge in the digital age?

To come straight to the point, the results of the study altogether lead to the conclusion that access to education and knowledge in the digital age is not adequately promoted by limitations and exceptions to copyright law. Rather, the results show that especially in Brazil and Mozambique, but also in Portugal, the USA, the UK and Germany, limitations and exceptions promoting access to education and knowledge are not fit for coping with the challenges of the Internet and digital technologies.

Therefore, in many regards copyright law must be identified as an obstacle for the access to education and knowledge. This effect is particularly serious in developing and least developed countries, where access to education and knowledge is even more essential for social and economic development than in industrialised countries. Both copyright and the access to education and knowledge have underpinnings in fundamental rights. Authors and right holders on the one hand can invoke their right to property. Individuals and the general public as users of copyright protected works on the other hand can claim the fundamental right to education and to take part in cultural life. It is the task of international and national copyright law to fairly balance these conflicting interests. In that context copyright legislation must take into account appropriately that the Internet and digital technologies have fundamentally changed the possibilities to use copyright protected works, in particular as regards access to education and knowledge. According to the findings of the study this has been the case only to a very limited extent. Rather an overprotection of the rights of authors and right holders must be observed. Yet, the unilateral focus on the protection of authors and right holders in copyright law neglects the fundamental significance of access to education and knowledge and the possible benefits of the Internet and digital technologies for social and economic development. As a result, copyright law is out of balance.

However, the results of the present study also show that many countries are undertaking legislative efforts to adapt their copyright systems to the Internet and new digital environments, not only but especially with regard to copyright limitations and exceptions promoting access to education and knowledge. At the same time there are legislative initiatives both on international and European level to further harmonise copyright law and copyright limitations and exceptions. The study describes and explains the reform plans. Yet, it suggests that these reforms do not go far enough and further legislation, both on the international and national level is necessary to recalibrate the balance of interest in copyright law.

The issues described above are analysed with special focus on copyright legislation in Portugal, Brazil and Mozambique. These countries have in common not only colonial history but are also linked by the Portuguese language. All three countries belong to the *Droit d'Auteur* tradition of copyright, each one with its own specialities. Besides Portugal, Brazil and Mozambique find themselves in different stages of social and economic development. Portugal is an industrialised country and a member of the European Union. Brazil is a newly industrialising and developing country. Mozambique is a least developed country. It is pointed out if and how the stage of social and economic development of a country corresponds to issues of copyright law. It is further underscored that the need for access to knowledge and education is of particular importance in Brazil and Mozambique, where large parts of the population live in poverty and illiteracy is a major problem. Since the study concentrates on questions of copyright law and access to knowledge and education in the digital age, the respective national policies to implement information and communication technologies are of interest, too. In view of the Internet's global nature and the linkage of Portugal, Brazil and Mozambique by the Portuguese language, it is examined, if a common market for digital goods, especially for educational materials, exists between these countries and to what extent the principles of territoriality and exhaustion impact on the access to copyright protected works for educational purposes within such area.

The goal of this study is to highlight the role of copyright limitations and exceptions for the benefit of access to knowledge and education in the digital age. The findings show that the current systems of limitations and exceptions in the countries analysed here are not suitable in light of the importance of access to knowledge and education, especially in developing and least developed countries. These results are further underlined by the analysis of copyright provisions for the benefit of access to education and knowledge in the United States of America, the United Kingdom and Germany, which promote access to education and knowledge only to a rather limited extend, given the potentials of the Internet and digital

technologies to use copyright protected works in favour of access to education and knowledge. Especially in view of the underpinnings of access to education and knowledge in human rights the study advocates for reforming current frameworks of copyright limitations and exceptions.

The principal methodological approach the study pursues is the comparison of laws. Therefore the relevant legal sources are analysed, including historical legislative developments and philosophical justifications of limitations and exceptions to copyright law. To put the findings into context also the current political, social and economic situation in Portugal, Brazil and Mozambique, including educational and IT-related policies, is taken into account. In addition empirical data regarding e-learning activities and copyright limitations and exceptions in Portugal, Brazil and Mozambique is provided and evaluated.

The study comprises four chapters. Chapter 1 provides information on the background and the context of the study. Terminology is clarified and the positions of the relevant stakeholders, namely educational institutions and libraries, archives and museums, are described taking into account the changes brought about by digital technologies and the Internet as well as the effects of these developments on the work of the respective institutions, e.g. e-learning and digital libraries. Based on these findings the desiderata of the respective stakeholders are presented. Above that the area of conflict between copyright law and access to education and knowledge is outlined, including an overview of the situation of developing and least developed countries and the general significance of limitations and exceptions to copyright. Chapter 1 concludes with a short summary of international copyright policy, namely the developments before the WIPO Standing Committee of Copyright and Related Rights (SCCR).

Chapter 2 deals with the historical origins of copyright protection and explains the philosophical foundations of copyright law as well as the role of limitations and exceptions within the copyright system, in order to apply these findings to the ensuing analysis. This includes the description of the different rationales within the anglo-american Copyright and the continental-European *Droit d'Auteur* legal tradition. Moreover, justifications for limitations and exceptions to copyright law are analysed, namely fundamental rights, public interest and market failure.

Chapter 3 examines the international and European legal framework of limitations and exceptions to copyright law. The focus is laid on the provisions of the Berne Convention, the European Information Society Directive 2001/29/EC and the Orphan Works Directive

2012/28/EU. With regard to the EU the actual copyright reform plans are scrutinised. Also the human and fundamental rights dimension of access to education and knowledge on the one side and of copyright on the other side and the entrenchment of these positions in international law is analysed in detail. Special attention is paid to the Three-Step-Test, which is contained in the Berne Convention, the TRIPS Agreement, the WIPO Internet Treaties (WCT and WPPT) and the Information Society Directive. The provisions of the Three-Step-Test must be considered by legislators in case of introducing limitations and exceptions into national law. In the context of the Three-Step-Test the study argues in favour of an interpretation taking into consideration the fundamental rights to education and to take part in cultural life.

Chapter 4 contains the analysis of national copyright laws. In Part 1 of Chapter 4 the limitations and exceptions for educational purposes and libraries, archives, museums and similar institutions in the USA, the United Kingdom and Germany are examined. These countries have elaborate copyright systems and a high level of copyright enforcement. Due to this fact and their economic situation the USA, the UK and Germany are examples for other countries in the field of legislation in general and in particular in the field of copyright law. At the same time these countries have different copyright traditions and provide different legal solutions to the challenges of the digital age. In particular the pros and cons of the US and UK fair use respectively fair dealing provisions are explained. National limitations and exceptions are examined in detail, taking into account international and European obligations, constitutional underpinnings and relevant court decisions. The findings show that national systems of copyright limitations and exceptions in the USA, the UK and in Germany are mostly not able to provide adequate solutions for the challenges of the digital age. Relevant stakeholders, namely educational establishments, libraries, archives and similar institutions find themselves in considerable legal uncertainty. However, in contrast to the rigid German system of statutory limitations, copyright law in the USA and the UK is more flexible, because, in addition to statutory limitations and exceptions, the fair use doctrine respectively fair dealing, which is applied from case to case, may cover certain uses of copyright protected works not explicitly foreseen by the law. The findings suggest that such open clauses are one possible means to adapt copyright to the challenges of the digital age.

Part 2 of chapter 4 subsequently examines limitations and exceptions for educational purposes and libraries, archives, museums and similar institutions in Portugal, Brazil and Mozambique. For background information the analysis of each country starts with a short profile, providing historical, geographical and statistical information. Afterwards the educational policies and the educational system as well as the integration of information

communication technologies in education and in libraries, archives and similar institutions are explained. An overview of national copyright law is given before limitations and exceptions for educational purposes and libraries and archives are examined. Finally, empirical data regarding e-learning activities of educational institutions as well as the respective policies and legislative initiatives is evaluated in order to put the law into practical context. In addition, it is explored whether the common Portuguese language as well as historical, political and economical linkages between Portugal, Brazil and Mozambique, especially through the Community of Portuguese Speaking Countries (CPLP), provide for common copyright policies and legislation with regard to the promotion of access to education and knowledge. It is further examined, whether in this context the advantages of digital technologies and the Internet can be made useful in terms of providing cross border (remote) access to educational materials and library collections. Special focus is therefore laid on the question of exhaustion of copyright. In general, the results of the analysis of national laws show that only Portugal has addressed digital issues regarding copyright at all. Yet, it mainly suffers from the rigidity of statutory limitations and exceptions. In Brazil limitations and exceptions in favour of access to education and knowledge hardly exist. Digital issues are neglected by the current code of copyright. However, there are significant reform efforts in Brazil, which unfortunately have come to a stillstand. Finally, in Mozambique there are some provisions privileging educational establishments and libraries and archives. However, digital issues are not explicitly addressed in that context. Both in Mozambique and partly also in Brazil the enforcement of copyright law is problematic. In this regard the study argues that reformed copyright systems may lead to improved enforcement, which could stimulate domestic production of copyrighted works and thus also be favourable to access to education and knowledge.

Based on these findings the main issues in the area of copyright limitations and exceptions for educational purposes and libraries and archives are summoned in the Conclusion. Considering the differences and similarities of the countries under analysis possible solutions for improving the access to knowledge and education through limitations and exceptions to copyright law are outlined. The findings suggest that both international and national copyright systems must be reformed. The study concludes with concrete proposals for legislative amendments of international copyright law, namely a proposal for an international copyright treaty privileging educational institutions and libraries, archives and similar institutions. The proposed treaty sets forth mandatory limitations and exceptions for both educational establishments and libraries, archives and similar institutions. It applies to non-profit institutions acting in public interest only. With regard to the Three-Step-Test the treaty makes explicit mention not only of the legitimate interests of authors and right holders but also of

other legitimate interests of stakeholders, such as fundamental and human rights, in particular the right to education and culture and promotion of social and economic development, in order to guide the interpretation and application of the test into a more balanced direction. Further, changes of national copyright law are proposed. In view of the findings of the study it seems favourable to introduce provisions, which contain both open clauses like the fair use doctrine for the purpose of flexibility and non-exhaustive lists of examples of explicitly permitted uses for the purpose of legal certainty. In addition, it is advocated to include references to the human right to education and to take part in cultural life in national copyright laws in order to highlight the overall importance of these issues for society and to interpret and apply copyright law along these guiding principle in practice. The proposed amendments to national laws are measured against international and European standards, in particular the Three-Step-Test. Finally, the study provides an outlook for future developments.