

SURF's response to Green Paper on Copyright in the Knowledge Economy

I. Introduction

Researchers and teachers make use of the achievements of their predecessors. Being able to build on other people's knowledge is, after all, essential for progress in science and scholarship. The interest that scientists and scholars have in the dissemination of their knowledge and research results therefore differs from that of publishers.

Scientists/scholars are both reusers and right holders. As right holders, their primary aim is for their name to be mentioned so that their achievements will be recognised, while for publishers it is primarily economic interests that count.

SURF notes that the Green Paper has been written from a rather one-sided perspective – that of right holders, in particular publishers – and that it clearly expects a great deal from contractual arrangements. In actual fact, educational and research institutions, scientists and scholars, consumers, and other re-users of knowledge products would be better served by clearly formulated exceptions than by contractual arrangements, not least because of the weak negotiating position in which they find themselves.

It is also notable that the Green Paper takes the old traditional publisher's model as its starting point, i.e. with the author transferring his copyright to the publisher. By doing this, the Green Paper disregards the new developments that have been underway for quite some time as regards alternative business models in which there is no such transfer of copyright from author to publisher. Open Access can be facilitated, for example, by the publisher being granted a "Licence to Publish" such as those for which models have been drawn up by SURF (in collaboration with JISC) and Creative Commons. One positive trend is that an increasing number of articles and dissertations are being lodged – sometimes after an embargo period – in the "repositories" of research universities and universities of applied sciences, where they are then freely accessible.

Older material, however, is still to a large extent subject to the traditional publisher's transfer model, which means that educational and research institutions cannot avoid having to negotiate with publishers about licensing contracts.

Against this background, SURF is pleased to respond to the general questions posed in the Green Paper. Where the more specific questions are concerned, SURF will restrict itself to questions 19 to 23 regarding the distribution of works for educational and research purposes.

II. General issues

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

No. Researchers and teachers would benefit from the applicable exceptions being clear, so that they would not need to be specified any further in contractual arrangements. It is, after all, the specific feature of an exception that someone else's work can be reused without (contractual) consent being necessary. A wide-ranging exception is justified for users in the fields of teaching and research, given that both these fields greatly benefit the public interest.

(2) Should there be encouragement, guidelines or model licences for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

Yes. Model licences should be developed that take proper account of the specific (online) practices of teachers and researchers and the weak negotiating position in which they find themselves. Such model licences are particularly desirable for situations in which access to material belonging to publishers is only possible through licensing contracts. A good example of balanced model licences is provided by the NesLi2 Model Licences developed by JISC.

Another example of arrangements for the use of material outside the existing exceptions are the reader arrangements between the publishers and the sector organisations representing research universities and universities of applied sciences. These arrangements allow educational and research institutions to use material for educational publications and electronic learning environments.

One promising trend is that towards national licences that are partly financed by the government or by national educational and/or research organisations. New business models created through the use of such national licences allow not only scientists/scholars and researchers but every citizen of a country – or in some cases of several European countries – to access a publisher's material. This links up with the aim of allowing everyone to acquire knowledge. People do not only learn at educational institutions; they also learn through independent study.

Matters are complicated, however, by the advent of new types of re-use made possible by new technologies. These are hampered by existing licences, quite simply because those licences do not permit them. One good example is the data mining of large numbers of scientific or scholarly articles; having computers analyse articles can reveal relationships that humans could not possibly have discovered. Such previously hidden relationships can then open up new solutions to research problems.

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

No; that is undesirable for two reasons. For one thing, a limitative list of exceptions cannot take account of future developments. It must therefore be possible to extend the list at a later date. Secondly, non-mandatory exceptions are insufficiently proof against the monopoly position that right holders have on the basis of their copyright. In order to protect the interests of users such as those in the teaching and research sectors, it is necessary for certain specific exceptions to be made obligatory. SURF believes that two aspects are involved here:

1. It must be made mandatory for the provisions of the exceptions concerned to be implemented in all Member States, thus achieving harmonisation at European level.
2. A contractual provision that runs counter to the exception must be deemed null and void,¹ and the exception must not be thwarted by technical protection measures.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

(5) If so, which ones?

Yes. The exception in favour of teaching and research must be made mandatory in the dual sense that we referred to in 3(1) and 3(2) above. We make the same recommendation as regards libraries, museums, and archives because of the importance of their collections for teaching and research.² We will deal below with the desirable substance and scope of the teaching and research exception.

III. Distribution of works for teaching and research

The Copyright Directive provides that Member States may introduce an exception for:

“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 and to the extent justified by the non-commercial purpose to be achieved.”³

The Green Paper notes that the Directive does not provide any definition of the terms “illustration”, “teaching”, or “scientific research”. Recital 42 to the Directive states that this

¹ Compare the mandatory nature of Article 6(1) and (8) of the European Database Directive via Article 15.

² For more exceptions that should be made mandatory, see Institute for Information Law, University of Amsterdam, *Study on the implementation and effect in Member States' laws of the Directive 2001/29/EC*, February 2007, pp. 65-66, at

http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf

³ Article 5(3)(a)

exception also covers distance learning, but this is not stated in the text of the exception itself.

In short, the precise scope of this exception is not clearly defined, thus giving Member States significant freedom as regards implementing it. This applies both to the choice of what should and should not be adopted and to the manner in which that should be done: a broader scope is not permitted but a more restricted one is. The European Commission notes that there are major differences in implementation between Member States.⁴ Some Member States, for example, have not actually implemented the exception. Others have done so with reservations, allowing, for example:

- Only duplication and not publication. This is undesirable because illustration in the context of teaching in fact implies publication, while publication is inherent to carrying out research; after all, the intention is for other people to learn from these activities.
- Only the production of analogue copies;
- Only publication in an on-site network that cannot be consulted outside the educational institution's building;
- The extent and length of what one is permitted to reproduce differs: either only parts or also complete works;
- Only educational institutions – which may be either closely or broadly defined – can benefit. The question here is whether this also covers libraries, museums, or archives that produce educational products or services;
- Only for educational purposes and not also for research (as in the Netherlands);
- Some Member States require fair payment to be made, while others do not.

The consequence of these differences is inadequate harmonisation and therefore a great deal of legal uncertainty between Member States. This forms, firstly, a major problem for the provision of distance learning for students in different countries. Secondly, it acts as a barrier to international cooperation between educational and research institutions because this exception is not harmonised. One example of this is the StreamTeam project, an attempt by SURF (The Netherlands) and JISC (UK) to investigate the sharing of stage plays in higher education using streaming media.⁵ SURF was hampered in this objective because the relevant exception in the United Kingdom applies only to on-site networks that can only be consulted within an educational institution's building and not by means of remote access.

SURF therefore recommends the introduction of a harmonised teaching and research exception with a clearly defined scope; it should be mandatory for all Member States to implement this exception. This exception should also be made mandatory in the sense that a contractual provision that runs counter to it must be deemed null and void,⁶ and it should not be thwarted by technical protection measures.

We will now consider the necessary substance and scope of the teaching and research exception on the basis of the questions in the Green Paper.

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?

SURF's answer to the first of these questions is yes. For an explanation, we refer to our answer to question 2. In addition, however, to licensing contracts with publishers for all existing material, SURF favours more being made possible "at source", namely at the point when the information is created.

⁴ See also Institute for Information Law, University of Amsterdam, *Study on the implementation and effect in Member States' laws of the Directive 2001/29/EC*, February 2007, pp. 49-51, at http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf

⁵ <http://video.surfnet.nl/info/streamteam/streamteam.html>

⁶ Compare the mandatory nature of Article 6(1) and (8) of the European Database Directive via Article 15.

SURF adopts the position that scientific and scholarly information and research data generated by researchers should be freely accessible for the general public, specifically when the research has been publicly financed.⁷ This principle does not conflict with the economic interests of authors at research universities and universities of applied sciences. They, after all, receive a salary from the institution where they work and do not receive royalties from the publishers because their work will never become a bestseller; they therefore do not enjoy income from copyright. Their interest is in fact in acquiring a reputation by their works being read as much as possible; in that respect, it is the Internet that offers them the largest audience.

In contrast to this, one has the economic interests of the publishers. Traditionally, they have protected those interests by requiring authors to transfer their copyright, thus ensuring themselves of an exclusive monopoly to information, including on the Internet. They only make information available in return for payment. The teaching and research exception in the Directive is of no benefit in this situation because someone who does not actually have the content at their disposal cannot legally reuse it. Technical protection measures or contracts thus make it impossible to reuse work on the basis of the teaching and research exception.

Publishers are dependent, however, on the content provided by scientists and scholars and they are increasingly acceding to their wish for Open Access. Rather than arranging this subsequently by means of licensing agreements, it is more efficient (and also cheaper) to tackle the problem at source by doing away with the information monopoly enjoyed by the publishers. This can be done in a number of different ways:

- The author does not transfer his copyright but grants the publisher a non-exclusive licence, a "Licence to Publish". SURF and JISC have developed a model for this, with associated principles.⁸
- Information can be made available online free of charge via a number of sources, for example via repositories operated by universities.

The Creative Commons licensing system is an example of an effective system in which it is the author himself who determines the conditions under which his work may be reused, for example for non-commercial purposes such as teaching and research. SURF is not in favour of Open Access models which require the author to pay the publisher in order for his articles to be accessible solely on the publisher's website; such a system still does not make the content available for everyone free of charge.

20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Yes, the exception should be independent of technology and therefore also comprise online educational use, including distance learning.

21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Yes, the exception should also apply to studying at home. One needs to remember that the mobile media on which material is provided mean that where and when someone studies no longer plays any role.

22) Should there be mandatory minimum rules as to the length of excerpts from works which can be reproduced or made available for teaching and research purposes?

No. It should continue to be possible to determine this on a case-by-case basis, with minor *de minimis* use and "fair use" being permitted. Apart from the fact that minimum rules are undesirable, it is very unlikely that agreement can be reached on this matter.

⁷ Note 11 to the Green Paper points out that Elsevier currently offers access for 10 million researchers. The 2005 UNESCO Science Report notes, however, that there are 5,521,400 researchers worldwide. This means that only a small proportion of those researchers have access to the Elsevier material. The world's population is 6 billion; the very great majority of them therefore have no access to information which is essential for them.

⁸ See <http://copyrighttoolbox.surf.nl/copyrighttoolbox/authors/licence/>.

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

Yes, the exception should cover both teaching and research. It should also apply not only to educational and research institutions but also to museums, archives, and libraries which develop products and services for educational and research purposes. The exception should preferably not involve any payment obligation.

As we already pointed out in section II above, it is also important for implementation of the entire teaching and research exception to be mandatory, so as to achieve harmonisation at European level. This exception should also be made mandatory in the sense that a contractual provision that runs counter to it must be deemed null and void and the exception should not be thwarted by technical protection measures.

Finally, it is also important for the teaching and research exception in the Copyright Directive to be included, without alteration, in the European Database Directive.

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