

## German Parliament Passed EUCD Implementation

On Friday, April 11, 2002 the German parliament has passed its implementation of the EU Copyright Directive (EUCD) with the votes of the social-democratic / green government and the christian-democratic opposition, and against those of the small liberal opposition party. Next, the second chamber representing the German federal states will be debating the law again. This is slated for May 23. It does not need to consent to the law but does have a veto power, in which case the law would be sent back to parliament where no changes are to be expected.

The law has translated the obligatory provisions of the EUCD into German copyright law. Authors are granted a new exclusive „right of making available“, i.e. the right to control the online use of their works. „Technical measures“, i.e. digital restrictions management systems (DRM) are protected against circumvention. In accordance with the EUCD, there is not a single exception in which circumvention would be legal. Circumvention for non-commercial personal use does not incur criminal or penal charges, as is the case for commercial use, but rightsholders can sue for damages.

The limitations to copyright in the public interest that existed in German copyright law before have been translated into the digital realm. Two new limitations for transient copies and for the benefit of people with a disability have been added from the finite catalog of the EUCD.

The educational and scientific limitation has been at the center of controversy during recent weeks. It allows making published works available to a delimited group of class members, e.g. in an intranet, for the sole purpose of teaching, or to a delimited group of persons for their own scientific research to the degree necessary by a given purpose and only for non-commercial use. The kind of material concerned has subsequently been limited to small parts of published works, works of small extent, and single articles from newspapers and magazines. Schoolbooks were excluded completely. Film works, until two years after the beginning of their regular exploitation in movie theaters, may be used only with the consent of the rightsholder.

The lobby of the scientific publishers had started a campaign for abolishing this limitation, calling it an „expropriation“, suggesting that libraries would purchase one copy of a book and make it available on the Internet to all the world. These non-sensical claims caused a storm of reactions from scientists and educational institutions, and they were immediately refuted by the minister of justice.

The private copy limitation states that single reproductions of a work by a natural person for private non-commercial use on any, i.e. including digital, medium are permitted. This like most other limitations is bound to the condition that rightsholders receive fair compensation, i.e. a levy paid on copying devices and empty media to a collecting society.

How can teachers, researchers, disabled people, the press, and other beneficiaries of limitations make use of them when exploiters prevent unlicensed usage through DRM? The EUCD for this case envisioned voluntary measures by rightsholders. The German government apparently did not put much hope in voluntary industry action. The law therefore gives beneficiaries of certain limitations the right to demand access from the rightsholders under the threat of a fine of 50,000 Euro. E.g. a blind person who purchased an e-book that technically prevents output via a text-

to-speech software has the right to demand the means to perceive the work. Enforcing their rights in court in order to be able to make use of them two to three years later is not an acceptable solution for beneficiaries.

In the case of the limitation for private copying, the enforcement mechanism is available only for analog copies. Without any enforcement, the digital fair use copy for personal purposes, though explicitly guaranteed, is in fact abolished.

For works marketed online, the enforcement mechanism is not granted at all. This part of the German law is a literal rendering of the respective obligatory provision of the EU CD. In the reasoning section, the law states laconically: „Therefore, granting use of limitations in this area is left to the discretion of the respective rightsholder.“ The introduction of the law defines limitations as „determining in which cases rightsholders have to accept that their works are being used without their explicit permission.“ If online, the limitations are made dependent on the permission of the rightsholders they are, in fact, abolished. The Internet is at the core of this „copyright in the information society.“ Throughout Europe, copyright on the Internet is regulated by doing away with all limitations. By choosing one distribution channel over others for the works they exploit, media companies are allowed to abolish fundamental information freedoms.

All in all, the German copyright law is a fair attempt to make the best out of a bad directive. But in the end, as various statements by legal scholars and societal groups have pointed out, it fails to achieve the constitutionally required balance of interests of authors, exploiters and users of digital works.

But the copyright lawmaking process is not over yet. The second round starts right away. The enforcement mechanism for the digital private copy limitation, the lump-sum levies to collecting societies, and digital press clipping services are among the regulations not demanded by the EU CD and therefore left intentionally open by the German government in this first round. Not only these issues, but all the regulations of the current law are up for re-negotiation. Lobbying by the publishers and efforts by library associations, consumer rights organizations, initiatives like [privatkopie.net](http://privatkopie.net), and other parties championing an open digital knowledge environment will continue.

[privatkopie.net](http://privatkopie.net) is an initiative set up in April 2002 after the initial ministerial draft of the German implementation of the EU Copyright Directive of 2001 was released. The initiative started a petition for preserving the right to make private copies in the digital age which has been signed by more than 41.000 individuals (April 2003). Through events like the Alternative Hearing on Copyright Law in January 2003, through press releases, e-mails, personal conversations, and background information on its website <http://privatkopie.net>, it addresses the German government, members of parliament, and the public at large, working towards information freedoms in general.

[privatkopie.net](http://privatkopie.net) can be reached at [info@privatkopie.net](mailto:info@privatkopie.net)