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# Q246

## Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

**Responsible Reporters: by Sarah MATHESON, Reporter General John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General Yusuke INUI, Ari LAAKKONEN and Ralph NACK Assistants to the Reporter General**

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| National/Regional Group | Germany |
| Contributors name(s) | Benjamin LUECK, Heiko ULLRICH, Dr. Sabine KOSSAK and Prof. Dr. Jan Bernd NORDEMANN |
| e-Mail contact | j.nordemann@boehmert.de |
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### I. Current law and practice

| | |
|---|---|
| 1) | Does your law provide for exceptions or limitations to copyright protection for libraries and archives? |
| | yes |
| | If so, please provide details of such exceptions or limitations, including in relation to the following activities:: |

| | |
|---|---|
| a) | reproduction and/or distribution for the purpose of preservation or replacement; |
| | yes |
| | Please comment: |

Libraries are permitted to reproduce damaged parts of works if this is necessary to repair the copy already owned by the library. E.g. if a book or magazine is missing pages because they were torn out or damaged, the library is allowed to copy these pages to repair the book/magazine (§ 53 (2) sentence 1 no. 4 lit. a) and § 53 (6) sentence 2 GCA [German Copyright Act, Urheberrechtsgesetz]). Another exception for the case of preservation or replacement relates to orphan works (see question I. 13))

It is important to mention that an archive encompasses any collection of works, i.e. not only books or printed works, but also films or phonograms may be reproduced for archiving purposes under this provision. However, it is not permissible to reproduce a work under this exception if the piece of work to be copied has been borrowed, as only the reproduction of own copies is permitted. For the same reason the display and communication of those copies to third parties is not allowed. With regard to digital copies they may only be produced by libraries or archives, which are acting in the

public interest and do not pursue any direct or indirect commercial or economical gain (e.g. public libraries). For all other libraries the exception is restricted to analogous copies and analogous use. This exception does further not allow to reproduce the stock of digital databases.

b) reproduction and/or distribution for the purpose of interlibrary lending;

no

Please comment:

There is no such exception in German copyright law. If libraries want to lend a work to another library they have to give away their own hardcopy of the work and are not allowed to reproduce another copy for this purpose.

c) reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or

yes

Please comment:

According to § 53a GCA, libraries are permitted to send small scanned parts of works to a user who requested them. However, this is only permitted, if the user himself is allowed to reproduce the work in the library according to the private copy exception.

This provision is not a transformation of a European Directive but a reaction to German case law (Federal Court GRUR 1999, 707 - *Kopienversand*). The exception allows the reproduction provided that the person ordering himself would have been entitled to reproduce the articles or works for private or other personal use (e.g. because of the exception in § 53 GCA). This includes digitization and electronic delivery – but only as a graphic file – for the illustration of teaching or for scientific and non-commercial purposes. It is remarkable that the exception allows the library to reproduce works, while it depends on the research or study purposes of the user requesting the copy. Again this exception is dependent on the non-existence of a respective offer from the publisher. If the work by contrast is made available to the public in an accessible manner and at reasonable contractual conditions by the publisher, reproduction and making available is not permitted. Most interestingly, the market behavior and the scope of the exception in this case are directly interconnected. Therefore the decisive question is, whether an offer is reasonable. This for instance is not the case, if the user only has the option to achieve the desired part or work in connection with a subscription or a package with other works.

d) any other activities, and if so, what activities?

yes

Please comment:

§ 58 (2) GCA, which relies on Art. 5 (2) lit. c) Copyright Directive 2001/29/EC, allows reproducing and distributing artistic works and photographic works which are exhibited in public or intended for public exhibition or public sale by public libraries, educational institutions or museums in connection with an exhibition with respect to content and time, or to take inventory, and with which no independent gainful purpose is served. The exclusion of archives from the scope of the exception is being criticized, especially in regard to the broader scope of Art. 5 (2) lit. c) Copyright Directive

2001/29/EC (Schricker/Loewenheim/*Vogel*, 4th ed., 2010, § 58 margin no. 23).

2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

§ 53 (2) sentence 1 no. 2 GCA privileges private individuals, legal persons and corporations and thus, in particular, libraries, whereas under § 53 (1) GCA only natural persons may rely on this exception.

§ 52b GCA directly addresses publicly accessible libraries, museums or archives. Further, as mentioned above, this exception only applies to institutions which do not pursue any direct or indirect commercial or economical gain.

§ 53a GCA only privileges publicly accessible libraries.

3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.

Under § 53 (2) sentence 1 no. 2 GCA, it is only allowed to reproduce the work for internal purposes to secure the stock of the institution. Display and communication of those copies is not allowed. The making of digital copies is further only allowed if the institution relying on the privilege does not pursue any direct or indirect commercial or economical gain and is acting in the public interest. Otherwise only analogous copies are allowed.

As a general rule, the institution relying on § 52b GCA is only allowed to offer the same number of copies on a reading station which it owns as a hardcopy. However, in case of a load peak it is allowed to offer more, but no more than four copies per solid copy. The reading stations have to be set up in the institution itself. Further this exception is restricted to making available works for research or private study purposes of the user.

The same applies with regard to the exception of § 53a GCA. The person ordering only can request a copy, if he himself would be permitted to reproduce it under § 53 GCA (e.g. private use, studies). Only separate articles or small parts of works are allowed to be sent to the person ordering. A part of a work qualifies as “small”, if it covers less than 12% of the pages and at most 100 pages are reproduced (Federal Court GRUR 2014, 549 - *Meilensteine der Psychologie*).

4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.

Concerning § 53 (2) sentence 1 no. 2 GCA and § 52b GCA, only the reproduction or the making available of a work owned by the very person reproducing or making it available is permitted.

Only published works, which are owned by the institution can be made available on electronic reading stations in the institution itself under § 52b GCA. This exception was introduced in 2008. According to

this rule, it is permissible to make available published works from the stock of publicly accessible libraries, museums or archives if three requirements are met: first it must be on the institution's own premises, second it must be accessible only from specially equipped reading stations for research or private study purposes, and third it may not contravene any contractual stipulations. Again, this exception does only apply to institutions that do not pursue any direct or indirect commercial or economical gain. The works made available must belong to the library and, as a general rule, the number of digital copies at the stations must not exceed the number of copies owned by the library. However, in order to cope with load peaks, it is permissible to make each owned copy available at four reading stations (Bundestag document, BT-DS 16/5939, p. 44).

It is worth mentioning that the provision only allows the making available of the works as such and does not cover the right of reproduction by the reader. It comes as no surprise that until 2014 it was unclear, whether the reader was allowed to reproduce the copy made available (e.g. print or save it to an USB-stick). In 2014, the Court of Justice of the European Union (CJEU) stated that reproduction is not allowed under the exception of Art. 5 (3) lit. n) Copyright Directive 2001/29/EC (which was introduced to German law in the form of § 52b GCA). However, the court at the same time clarified that the reader may be permitted to reproduce the work based on another exception, if his use meets the respective necessary requirements (CJEU Case C-117/13 - *Eugen Ulmer*; basically of provision § 53 GCA). In the course of these preliminary proceedings the CJEU in addition shed light on a further highly disputed issue, whether the privilege is only excluded by an offer or only in case that a licensing agreement actually has been concluded. A mere offer does not suffice.

The reproduced articles and works have to have been published beforehand. Unlike in § 53 and § 52b GCA, it is allowed to use a work not owned by the library to make the copy as provided by § 53a GCA.

5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) performance and/or display for educational purposes;

yes

Please comment:

The German law indeed provides for an exception for the performance and display of a copyrighted work. § 52 GCA, which mainly goes back to Art. 3, 5 (3) lit. g) and lit. o) Copyright Directive 2001/29/EC, has a general scope of application that is not limited to educational purposes. It refers to the author’s right of communication to the public as the exclusive right to communicate his work to the public in non-material form (§ 15 (2) GCA). Yet, § 52 (3) GCA limits the scope of the exception and weakens its practical impact (Fromm/Nordemann/*Dustmann*, Urheberrecht, 11th ed., 2014, § 52 margin no. 3) by excluding from its scope public stage performances, making available to the public and broadcasting of a work, as well as public screenings of a cinematographic work. § 52a (1) GCA provides for an exception to the right of making the work available to the public (see below I. 5) lit. d) ).

The scope of the exclusive right to communicate the work to the public decisively depends on the understanding of the term “public”. If the performance or display of the work does not take place in the public, the use is not within the scope of copyright. § 15 (3) GCA defines communication to the public as a communication intended for a plurality of members of the public, which consists of persons who are not connected by a personal relationship. The quantitative criteria “plurality”

depends on the concrete situation but might already be fulfilled by two persons (Federal Court GRUR 1996, 875, 876 – *Zweibettzimmer im Krankenhaus*). The more important criterion is the "personal relationship". Within regular school classes most of the time there will be a relationship between teacher and students personal enough that the use cannot be classified as public (Dreier/Schulze/*Schulze*, Urheberrecht, 4th ed., 2013, § 52 margin no. 45; Schricker/Loewenheim/*v. Ungern-Sternberg*, op. cit., § 15 margin no. 85 with further references). Since university courses are attended by a greater number of (changing) students, within such courses the relationships are generally not personal enough; the use cannot be classified as non-public (Koblenz Higher Regional Court NJW-RR 1987, 699, 700). Therefore a school teacher may sing a song, play music or read literature to his/her students in the class without even touching the scope of copyright whereas a university professor would at least need an exception allowing him/her to do so (Koblenz Higher Regional Court NJW-RR 1987, 699, 701). The exception in § 52 GCA is therefore relevant for any special event within the school, i.e. presentations by the students or the performance of a school play with audience from inside and outside of the school, and generally for teaching at universities (Schricker/Loewenheim/*v. Ungern-Sternberg*, op. cit., § 15 margin no. 83 with further references; critically *Rehbinder/Peukert*, Urheberrecht, 17th ed., 2015, margin no 655).

b) reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);

yes

Please comment:

§ 46 (1) GCA (which implements Art. 5 (3) lit. a) Copyright Directive 2001/29/EC) provides for an exception to the right of reproduction, distribution and making works available to the public and allows under certain conditions the incorporation of limited parts of works and specific works in a collection intended exclusively for instructional use, like course packs, compilations or anthologies.

§ 53 (3) GCA distinguishes between making (or having made) copies for the purpose of illustration for teaching in schools etc., and making copies for state examinations, and examinations in schools, higher education institutions etc.

§ 47 GCA (which implements Art. 5 (3) lit. a) Copyright Directive 2001/29/EC) allows reproducing works within so-called school broadcast by transferring such works to video or audio recording mediums, which may only be used for teaching purposes.

c) making translations;

yes

Please comment:

There does not exist an exception that refers explicitly to making translations for educational purposes. However, whereas § 62 (1) GCA generally prohibits alterations of the work when its use is permissible because of an exception, § 62 (2) GCA indeed allows translations and such alterations to the work if they only constitute extracts or transpositions into another key or pitch where necessitated on account of the purpose of the use. Therefore the law allows translations as long as the use is generally allowed under an exception such as §§ 46, 53 (3) GCA, i.e. to translate a short story and incorporate it in a collection for instructional use, or to reproduce a translated poem for a school class. Whether the translation would not be necessary if there existed an authorized translation is being discussed (permissible: Schricker/Loewenheim/*Dietz*/Peukert, op. cit., § 62 margin no. 19; prohibited: Munich Regional Court ZUM 2009, 678, 680; Fromm/Nordemann/*A.*

*Nordemann*, op. cit., § 62 margin no. 9). The purpose of the use in case of the exceptions in §§ 46, 52, 52a (1), 53 (2), (3) GCA might be an educational purpose; yet as a general provision § 62 (2) GCA is not limited to such purposes.

d) making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);

yes

Please comment:

§ 46 (1) GCA additionally allows making works available to the public within a collection (see above I. 5) lit. b) ). § 52a (1) no. 1 GCA provides for an exception to the right of making works available to the public pursuant to § 19a GCA. The exception encompasses under certain conditions the act of uploading copies of the work and making them available in digital networks for illustration in teaching at certain educational institutions. The exception allows educational institutions and their teachers to use modern communication networks (RegE, BT DS 15/38, p. 20). Therefore teachers may upload copyrighted works on servers. But they have to ensure that only the students of the specific class may access (and download) the works (see only *de la Durantaye*, Allgemeine Bildungs- und Wissenschaftsschranke, 2014, p. 105 f. with further references). As long as this is guaranteed, the absolute number of students enrolled in this course is irrelevant, which provides for –like stated in a Federal Court decision– distance educational programs of more than 4000 students (see Federal Court GRUR 2014, 549, 553 – *Meilensteine der Psychologie*).

Like mentioned above, the general scope of the exclusive right to communicate the work in the special form of making it available to the public (§§ 15 (2), 19a GCA) depends on whether this communication or making available addresses the “public”. If it is a non-public communication, there is no need for an exception. There is a debate whether the mere existence of the exception proofs that the legislator considered such activities as “public” (Schricker/Loewenheim/*Loewenheim*, op. cit., § 52a margin no. 4) or whether the understanding of “public” and therefore the application of the GCA depends on the concrete situation. Given one follows the latter understanding, for teaching at schools the communication of a work (and therefore also the making available to the public) within the regular class would be considered non-public (Dreier/Schulze/*Schulze*, op. cit., § 15 margin no. 45; *de la Durantaye*, op. cit., p. 104).

e) reproduction and/or distribution for research purposes; or

yes

Please comment:

§ 53 (2) sentence 1 no. 1 GCA allows to make single copies of a work or to have these made for one's own scientific use if and to the extent that such reproduction is necessary (“geboten”) for the purpose and it does not serve a commercial purpose. Pursuant to § 53 (6) sentence 1 GCA these copies may neither be distributed nor communicated to the public. The exception does not allow re-using works in another form, i.e. by compiling or quoting them.

For scientific purposes – without addressing those purposes explicitly – § 51 GCA might be the most important exception of the GCA. It provides for an exception to reproduce, distribute and communicate to the public a published work for the purpose of quotation. In particular this shall be permissible where subsequent to publication individual works are included in an independent scientific work for the purpose of explaining the contents (§ 51 sentence 2 no. 1 GCA). Generally speaking the exception allows researchers to use existing works within their own scientific work, and

such scientific works may either be distributed or communicated to the public, i.e. by uploading it to a server.

§ 52a (1) no. 2 GCA allows making works available to the public exclusively for a specifically limited circle of persons for their personal scientific research to the extent that this is necessary for the respective purpose and is justified for the pursuit of non-commercial aims. The conditions of this exception are almost the same as in § 52a (1) no. 1 GCA (see above I. 5) lit. d) ).

f) any other activities, and if so, what activities?

yes

if so, what activities?:

§ 58 (2) GCA also applies to educational institutions (see above I. 1) lit. d) ).

6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

The exceptions for educational institutions mostly differentiate between schools and universities, sometimes allowing the latter the use of the work, sometimes not and almost all of them exclude the use for commercial purposes. But § 46 GCA is not limited to a use by certain institutions. Either editors with profit-making purposes or teachers and professors may use works to incorporate them in collections. The instructional use of the collection has to take place in schools and in non-commercial basic and further training facilities. Whereas it does not matter whether the schools (or pre-schools) are public or private, all kind of universities and other institutions of adult education are excluded (see only Schricker/Loewenheim/*Melichar*, op. cit., § 46 margin no. 10 with further references). § 52 GCA also applies to all kind of institutions and users as long as, amongst other conditions, the communication of the work serves a non-profit-making purpose for the organizer. It does not matter whether the organizer pursues an indirect or a direct profit-making purpose or whether he/she pursues such purposes besides others; the use is strictly limited to a non-profit one (see only Fromm/Nordemann/*Dustmann*, op. cit., § 52 margin no. 11 ff. with further references).

§ 47 GCA applies only to schools, teacher training and further training institutions as well as youth welfare institutions and state image archives or comparable institutions under public ownership. § 52a (1) no. 1 GCA applies to schools, universities, non-commercial institutions of education and further education, and vocational training institutions. The use must be justified for the pursuit of non-commercial aims. By allowing universities to make works available to the public the exception significantly differs from the exception to the right to make copies in § 53 (3) no. 1 GCA which has a similar structure. § 53 (3) no. 1 GCA applies only to schools, non-commercial training and further training institutions, as well as vocational training institutions. The exclusion of universities is being criticized (see *Rehbinder/Peukert*, op. cit., margin no. 652). Therefore university classes do not profit from the exception to the right to make copies for the purpose of illustration for teaching. Compared to the exception of § 52a (1) no. 1 GCA this might lead to inconsistent results: A university professor is therefore not allowed to send copies of a text per email (§ 53 (1) no. 1 GCA does not include universities), but pursuant to § 52a (1) no. 1 GCA she is allowed to upload the copy to the university's intranet so that her students can download it and as a result, have their own copy (*de la Durantaye*, op. cit., p. 221). § 53 (3) no. 2 GCA applies to schools, higher education institutions, non-commercial training and further training institutions, as well as vocational training institutions, which constitutes the great difference between those two exceptions.

§§ 53 (2) sentence 1 no. 1 and 52a (1) no. 2 GCA that allow reproducing works for one's own scientific use and making available to the public for a specifically limited circle of persons for their personal scientific research do not refer to certain institutions. But the reproduction must not serve a commercial purpose and the making available to the public needs to be justified for the pursuit of non-commercial aims. Consequently it is debated whether private research institutions are generally excluded from the scope of the exception (critically Schricker/Loewenheim/*Loewenheim*, op. cit., § 53 margin no. 43). Since the prohibition of commercial purposes is based on Art. 5 (3) (c) of the Copyright Directive 2001/29/EC, pursuant to recital 42 the non-commercial nature of the activity in question should be determined by that activity as such, not by the organizational structure. As a result private institutions are not per-se excluded from the scope of the exception as long as they pursue a non-commercial purpose (Dreier/Schulze/*Dreier*, op. cit., § 52a margin no. 13).

7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

The collection pursuant to § 46 (1) GCA must combine the works of a considerable number of authors and be intended, by its nature, exclusively for instructional use in schools, in non-commercial basic and further training facilities. The publisher has to state this purpose clearly on the copies, or when making them available to the public.

§ 47 (1) GCA provides only for an exception to reproduce works to be used as part of a school broadcast. The exception does not encompass the communication to the public of the copies. However, as long as the teacher just performs the work within the class, this use would not be considered to be “public” and therefore would not fall within the scope of the exploitation rights pursuant to § 15 (2) GCA (see Dreier/Schulze/*Dreier*, op. cit., § 47 margin no. 5; Fromm/Nordemann/*Dustmann*, op. cit., § 47 margin no 2).

§ 51 sentence 2 no. 1 GCA (which implements Art. 5 (3) lit. d) Copyright Directive 2001/29/EC) requires the work that contains quotations to be an independent scientific work, which means that the quoting work has to be a copyrightable work itself and further, that it has to be independent from the quoted works (Schricker/Loewenheim/*Schricker/Spindler*, op. cit., § 51 margin no. 20 ff. with further references). The quotation is only permissible for the purpose of explaining the contents of the work that quotes, not the quoted work (Dreier/Schulze/*Dreier*, op. cit., § 51 margin no. 3).

§ 52 (3) GCA excludes public stage performances, making available to the public and broadcasting of a work, as well as public screenings of a cinematographic work from the scope of the exception.

Both § 52a (1) no. 1 and 2 GCA (which implement Art. 5 (3) lit. a) Copyright Directive 2001/29/EC) only allow teachers or scientists making available the work to a specific public. It must be exclusively for the specifically limited circle of those taking part in the instruction (no. 1) or of persons for their personal scientific research (no. 2). They therefore have to ensure by installing passwords or other controlling mechanisms that no one outside of the addressed circle of students or other scientists may access the work (Schricker/Loewenheim/*Loewenheim*, op. cit., § 52a margin no. 10/12). Even though the exceptions do not allow the students to download and/or print the work, they may use the work made available under § 52a (1) GCA insofar as they are allowed to do so by any other exception, especially § 53 (2) sentence 1 no. 1 GCA (Federal Court GRUR 2014, 549, 555 – *Meilensteine der Psychologie*; a comparable question arises at § 52b GCA (see above I. 1) ). § 53 (2) sentence 1 no. 1 and § 53 (3) GCA allow the users to make copies or to have these made. § 53 (6) sentence 1 GCA, which applies to all of the exceptions in § 53, states that the copies may neither be distributed nor communicated to the public.

§§ 47, 53 (2) and 53 (3) GCA restrict the number of copies that may be made. For one's own scientific use it is allowed to make “single copies” of a work. Pursuant to § 47 (1) GCA, educational institutions may only make “individual copies” (this might be an error in the official translation of the GCA since in German both § 53 (2) and § 47 (1) use the wording “einzelne”, which should be translated uniformly) by transferring the works to video or audio recording mediums. The allowance to make “single copies” should not exceed – pursuant to a famous dictum of the Federal Court – the number of seven (Federal Court GRUR 1978, 474, 476 – *Vervielfältigungsstücke*), but indeed depends on the actual use and pursued purpose (see only Schricker/Loewenheim/*Loewenheim*, op. cit., § 53 margin no. 17). The number of copies in case of § 47 GCA for example depends on the need of the institution: Is the copy of a school broadcast supposed to be used just at one class at a time, there would be no need to make more copies than just one (Schricker/Loewenheim/*Melichar*, op. cit., § 47 margin no. 15). For the purpose of illustration for teaching copies may be made in quantities required for the persons receiving instruction. Copies for examinations may be made in the required quantity. Each student of a class or the group that receives instruction plus the teacher may obtain one copy (see only Schricker/Loewenheim/*Loewenheim*, op. cit., § 53 margin no. 62). § 52a (3) GCA allows producing copies also needed for making the work available to the public, i.e. scanning the work and uploading the copies, in a quantity that is justified by the exception’s purpose (see Fromm/Nordemann/*Dustmann*, op. cit., § 52a margin no. 19).

§ 46 (1) GCA allows the reproduction, distribution and making available to the public of limited parts of works, of small scale literary works and of musical works, individual artistic works or individual photographs. For the purpose of illustration for teaching and for examinations § 53 (3) sentence 1 GCA allows making copies of small parts of a work, of small-scale works or of individual articles released in newspapers or periodicals or made available to the public. § 52a (1) no. 1 GCA allows to make available to the public for the purpose of illustration in teaching small, limited parts of a work, small scale works, as well as individual articles from newspapers or periodicals. It also limits the use to the extent that this is necessary for the respective purpose. § 53 (2) sentence 1 no. 1 GCA itself does not restrict the portion of a work that may be used lawfully; however, the portion is limited: § 53 (4) lit. b) GCA does not allow the reproduction of a book or a periodical, in the case of an essentially complete reproduction, insofar as this does not occur by means of manual transcription. Furthermore the condition that the use must be necessary (“if and to the extent that such reproduction is necessary for the purpose”) also refers to the scale of the use (Fromm/Nordemann/*Wirtz*, op. cit., § 53 margin no. 32). § 52a (2) no. 2 GCA differs from no. 2 and allows making available to the public limited parts of a work (and not only small, limited parts of a work), small scale works, as well as individual articles from newspapers or periodicals. It also limits the use to the extent that this is necessary for the respective purpose.

Especially the interpretation of “limited parts of a work” (§§ 46 (1), 52a (1) no. 2 GCA) and “limited, small parts of a work” (§§ 52a (1) no. 1, 53 (3) GCA) is being discussed (see only Fromm/Nordemann/*Dustmann*, op. cit. § 52a margin no. 7, 12 with further references). The Federal Court ruled, referring to § 52a (1) no. 1 GCA, that “limited, small parts of works” refers to a relative amount of the work, which is a maximum of 12% of the printed pages, but that the wording also stands for an absolute limit of the usable part of a work, which is a maximum of 100 pages (Federal Court GRUR 2014, 549, 551 f. – *Meilensteine der Psychologie*). “Limited parts of a work” could then be the relative amount of 33%, with an absolute limit of 100 pages (Munich Higher Court ZUM-RD 2011, 603, 617 – *Gesamtvertrag Hochschulen*; see also Fromm/Nordemann/*Dustmann*, op. cit., § 46 margin no. 6; § 52a margin no. 12 with further references).

Comparably to the condition that the use in its extent must be “necessary”, § 51 GCA generally limits the usable amount of a work so far as such exploitation is “justified” to that extent by the particular purpose. It has to be considered that § 51 sentence 2 no. 1 GCA allows the use of a whole work by using the wording of “individual works” (Schricker/Loewenheim/*Schricker/Spindler*, op. cit., § 51 margin no. 37). “Individual works” is then also interpreted in a way that the number of works that may be quoted is limited, a limitation that is relative to all of the works of the quoted author and to the size and scope of the independent work, and absolute in the number of quoted works (Schricker/Loewenheim/*Schricker/Spindler*, op. cit., § 51 margin no. 34 with further references). There is

a disagreement about the question whether “individual works” are solely “some single works” (Federal Court GRUR 1968, 607, 611 – *Kandinsky I*) or whether the quotation is permissible depending on the circumstances of the concrete use, and especially depending on how many different authors are quoted (Schricker/Loewenheim/*Schricker/Spindler*, op. cit., § 51 margin no. 34 with further references).

Besides § 47 GCA, which refers only to schools and other institutions (but allows teachers to do the reproduction, see only Fromm/Nordemann/*Dustmann*, op. cit., § 47 margin no. 4), none of the exceptions limits its scope to certain persons who may engage in such activities as long as the use serves the privileged purpose (in case of §§ 52a (1) no. 1, 53 (3) GCA this would mean that the use takes place at/in schools etc., see *de la Durantaye*, op. cit., p. 223 f.). Therefore both, teacher and students, may use, i.e. perform, a work for the special purposes. § 53 (2) sentence 1 no. 1 GCA for example allows every single person, student, professor, even popular scientists, to reproduce or to let someone else reproduce copyrighted works as long as he/she reproduces the work solely for his/her own scientific research (see Fromm/Nordemann/*Wirtz*, § 53 margin no 31). In case of § 46 (1) GCA, both publishers *and* teachers are allowed to use existing works in course packs, compilations and anthologies.

Each of the exceptions in §§ 52a (1), 53 (2) sentence 1 no. 1, 53 (3) GCA only allows the use if and/or to the extent that is “necessary” for the respective purpose. This more general condition is not to be understood as “absolutely necessary” (see only Federal Court GRUR 2014, 549, 553 – *Meilensteine der Psychologie*). To determine what is “necessary”, the court may use the Three-Step Test (see below I. 10.).

8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

None of the exceptions in § 53 (2), (3) GCA demand for the use of an own original for the reproduction (Federal Court GRUR 1997, 459, 462 - *CB Infobank I*), nor do the other exceptions for educational or research.

Almost all of the exceptions apply only to published (§ 6 (1) GCA; see §§ 46 (1), 51 sentence 1, 52 (1) sentence 1, 52a (1) no. 1 and 2 GCA) or released works (§ 6 (2) GCA; see § 53 (3) no. 1 and 2). Since a work shall be deemed to have been published when it has been made available to the public with the consent of the right-holder (§ 6 (1) GCA), otherwise the use could infringe the author’s moral right of publication (§ 12 GCA). Even though § 53 (3) no. 1 and 2 GCA do not explicitly state that other works than *released* articles have to be published before being used, the same condition should apply to the reproduction of works for the purpose of illustration for teaching and for examinations (*de la Durantaye*, op. cit., p. 225 with further references).

Only the use under § 53 (2) sentence 1 no. 1 GCA (reproduction for one's own scientific use) does not require the work to be published since the use does not automatically coincidence with the publication (*de la Durantaye*, op. cit., p. 226). Unpublished manuscripts therefore might only be reproduced for one’s own scientific use.

Most of the exceptions do not apply to at least one certain kind of copyrighted work. §§ 46(1) sentence 2, 52a (2) sentence 1, 53 (3) sentence 2 GCA all forbid making available to the public or reproducing a work being intended for instructional use at schools/for use in instruction in schools without the consent of the copyright owner. Such use would otherwise conflict with a normal exploitation of these works and therefore considered incompatible with the second step of the Three-Step-Test (see Federal Court GRUR 2014, 549, 554 – *Meilensteine der Psychologie*). The exception of § 46 (1) GCA furthermore does not apply to musical works that are incorporated in a collection intended for use in musical instruction in schools of music. Within the first two years of normal regular utilization in film theatres, a

cinematographic work may not be made available to the public without the consent of the right-holder (§ 52a (2) sentence 2 GCA).

The reproduction of computer programs is not permissible (§§ 69a (4), 69c no. 4 GCA, which mainly implement to Art. 1 and Art. 4 Software Directive 2009/24/EG). Reproduction for examination is not allowed for database works the elements of which are individually accessible by electronic means, whereas the reproduction for one's own scientific use or for the purpose of illustration for teaching is permissible on condition that the scientific use or use in instruction does not serve commercial purposes (§ 53 (5) GCA). Databases (not database *works*) may be under certain conditions reproduced for personal scientific use and for purpose of illustrative teaching (§ 87c (1) sentence 1 no. 2 and 3 GCA). § 53 (7) GCA finally excludes the recording of public lectures, productions or performances of a work on video or audio recording mediums, the realization of plans and drafts of artistic works and the reconstruction of architectural works.

For the questions below, please provide an answer for each exception or limitation mentioned above.

| 9) | Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation? |
|---|---|

In German copyright law, all exceptions and limitations are provided by statutory provision.

The statutory provisions are §§ 52b, 53 (2) sentence 1 no. 2 and § 53a GCA.

| 10) | Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation? |
|---|---|

Art. 5 (5) of the Copyright Directive 2001/29/EC provides for a specific German adoption. But implementing this Directive, the Three-Step Test is not explicitly adopted in any statutory provision of the GCA, but is applied by the jurisdiction. However, the requirements in Art. 9 (2) Berne Convention and Art. 13 TRIPS can be applied directly without implementing legislation and have the status of a statutory law. Pursuant Art. 5 (5) of the Copyright Directive 2001/29/EC, the exceptions provided for in the Copyright Directive 2001/29/EC – and therefore the national measures of implementation – have to be in accordance with the Three-Step-Test. Accordingly the German legislator saw no need to implement the test in the form of a general rule. Nevertheless, two provisions in fact contain criteria corresponding to the Three-Step Test: § 69e (3) GCA and § 87b (1) sentence 2 GCA.

The Federal Court ruled in several decisions that the exceptions have to be interpreted with the help of the Three-Step Test (Federal Court GRUR 1999, 707, 712 – *Kopienversanddienst*; GRUR 2013, 503, 506 – *Elektronische Leseplätze*; see also Fromm/Nordemann/*Dustmann*, op. cit., before §§ 44a ff. margin no. 12 f.). The CJEU stated that the national exceptions have to be interpreted in the light of the Three-Step Test pursuant to Art. 5 (5) of the Copyright Directive 2001/29/EC (CJEU GRUR 2009, 1041 margin no. 58 – *Infopaq/DDF*; see also CJEU GRUR 2014, 1078 – *TU Darmstadt/Ulmer*). Practically the condition that the use must be "necessary" for the respective purpose allows the court to apply the Three-Step Test (Federal Court GRUR 2014, 549, 553 – *Meilensteine der Psychologie*; Stuttgart Higher Regional Court GRUR 2012, 718, 724 – *Moodle*).

| | |
|---|---|
| 11) | Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s). |

These exceptions apply ipso iure, accordingly the permission does not require any formalities.

As soon as the conditions of the exceptions are fulfilled the use is generally permitted automatically. The exceptions for educational and research purposes either allow using a work without the consent of the author and without payment (§ 51 GCA) or allow using a work without the consent but oblige to pay remuneration (§§ 46, 47, 52, 52a, 53 GCA); none of them requires to seek a compulsory license (see only Schricker/Loewenheim/*Melichar*, op. cit., before §§ 44a ff. margin no. 6). Pursuant to *Melichar* anyone who uses a copyrighted work under any exception shall have the (non-enforceable) duty to inform the right-holder about his use (Schricker/Loewenheim/*Melichar*, op. cit., before §§ 44a ff. no. 33).

§ 46 (3) GCA explicitly contains the duty to inform the author: The reproduction of the work or making the work available to the public may only begin after the intention to use the work in an anthology has been communicated to the author. This information about the scope of the planned use helps the author to control whether the requirements are fulfilled (Fromm/Nordemann/*Dustmann*, op. cit., § 46 margin no. 17) and gives him/her the chance for revocation of any existing exploitation right, which would at the same time give him the right to forbid the exploitation under the exception (see §§ 46 (5), 42 GCA). Furthermore, for an alteration of a literary work pursuant to § 62 (4) GCA the author has to be informed and has to contradict within one month, or otherwise the alteration would be permissible.

For the reproduction under the exceptions in §§ 51, 53 (2) sentence 1 no. 1, § 53 (3) no. 1 GCA, the source must in all cases be clearly acknowledged (§ 63 (1) sentence 1 GCA). For the communication of the work to the public pursuant to §§ 46, 51, 52a GCA the source, including the name of the author, must in all cases be acknowledged unless this is not possible (§ 63 (2) sentence 2 GCA). Regarding the remaining exceptions to communicate a work to the public (§ 52 GCA), the source shall be clearly indicated if and insofar as this is required by customary practice (§ 63 (2) sentence 1 GCA).

| | |
|---|---|
| 12) | Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made? |

Libraries and archives:

Concerning § 53 (2) sentence 1 no. 2 GCA, there are different ways in which remuneration is provided for by the law. The author has the right to demand an adequate remuneration from the producer of the devices, which possibly can be used to make reproductions of works, e.g. printers, copying machine, but also storage devices as USB-sticks (§ 54 (1) GCA). The author has the same right concerning the legal person, who imports or merchandises such devices (§ 54b GCA). Both of them are considered joint debtors concerning the right of the author. Furthermore the author can demand remuneration from the institutions, which use such devices, e.g. libraries, museums, schools or copy shops (§ 54c GCA). All such remuneration can only be claimed by a collecting society (§ 54h GCA), who distributes the proceeds to the authors.

A remuneration is also payable for the use of works on electronic reading stations (§ 52b sentence 3 and 4 GCA). Again, the adequate remuneration can only be claimed by a collecting society.

The same applies to the remuneration payable for copy delivery services (§ 53a (2) GCA).

Educational and research institutions:

Pursuant to § 46 (4) GCA , the author shall be paid equitable remuneration for the exploitation permissible in accordance with § 46 (1) and (2) GCA. Even though the claim must not be asserted through a collecting society this is in fact actual practice (*de la Durantaye*, op. cit., p. 77 with further references).

§ 47 (2) sentence 2 GCA states that unless the author has been paid equitable remuneration the video or audio recording mediums must be deleted at the latest at the end of the academic year following the transmission of the school broadcast. Therefore if the school wants to archive the recordings and use them in the following academic years, it has to pay equitable remuneration to the author. Even though the claim must not be asserted through a collecting society this is indeed actual practice (*de la Durantaye*, op. cit., p. 80 with further references).

The reproduction, distribution and communication to the public of a published work for the purpose of quotation under the conditions of § 51 GCA is permissible without the payment of equitable remuneration. Since the exception requires the quoting work to be “independent”, this independent work itself constitutes an own intellectual creation (§ 2 (2) GCA) that can be exploited separately (Fromm/Nordemann/*Dustmann*, op. cit., § 51 margin no. 46).

Whereas the use under the exception of § 52 (1) GCA generally requires the payment of an equitable remuneration, such school events are explicitly released from this obligation insofar as they are only available to a specific, limited group of persons on account of their social or educational purpose (§ 52 (1) sentences 2, 3 GCA). The literature disagrees whether the *whole* event must serve only the school’s educational purpose (see Schricker/Loewenheim/*Melichar*, op. cit., § 52 margin no. 34) or whether the educational purpose must be the event’s *main* purpose as long as the access to the event is limited by factual means (see only Dreier/Schulze/*Dreier*, op. cit., § 52 margin no. 14). If remuneration is payable, even though the claim must not be asserted through a collecting society this is indeed actual practice (Fromm/Nordemann/*Dustmann*, op. cit., § 52 margin no. 19-21).

§ 52a (4) sentence 1 GCA states that an equitable remuneration shall be paid for making works available to the public both for educational and research purposes in accordance with § 52a (1) GCA. § 52a (4) sentence 2 GCA states that such claims may only be asserted through a collecting society. Liable for the payment are the institutions themselves. Since most of the schools and universities are public the states contracted with the collecting societies (so-called inclusive contract (§ 12 of the Copyright Administration Law; see Fromm/Nordemann/*Dustmann*, op. cit., § 52a margin no. 20). There is an ongoing debate whether the equitable remuneration must be calculated on basis of the actual use (Munich Higher Regional Court ZUM-RD 2011, 603, 613 ff. – *Gesamtvertrag Hochschulen* (nicht rechtskräftig); affirmative: Federal Court GRUR 2013, 1220, 1227 ff. – *Gesamtvertrag Hochschul-Intranet*) or, by taking into account the effort the institution would have by documenting each single use, whether a more general basis would be preferable (Dreier/Schulze/*Dreier*, op. cit., § 52a margin no. 20).

§ 54 (1) GCA states that where the nature of a work makes it probable that it will be reproduced, pursuant to § 53 (1) to (3) GCA, the author of the work shall be entitled to payment of equitable remuneration from the manufacturer of appliances and of storage mediums, where the type of appliance or storage medium is used solely or together with other appliances, storage mediums or accessories, for the making of such reproductions. Pursuing § 54c (1) GCA not only the manufacturer owes the payment of equitable remuneration but also certain operators of such appliances including educational establishments, research institutions and public libraries. The reason for this regulation is that the single user who reproduces the work may not be controlled and therefore not be made liable whereas the manufacturer and operator of appliances used for the reproduction of copyrighted works are well known (Schricker/Loewenheim/*Loewenheim*, op. cit., § 54 margin no. 1). § 54a (1) GCA states that the amount of remuneration shall be determined by the extent to which the appliances and storage mediums are actually used as types for reproductions pursuant to § 53 (1) to (3) GCA. § 54h (1) GCA states those claims may be asserted only through a collecting society.

As a result it may be stated that besides § 51 GCA and in the special case of § 52 (1) sentence 3 GCA, all the exceptions for educational and research purposes oblige to pay equitable remuneration for the exploitation of the work. Since practically all of the exceptions require the payment to be made to collecting societies, their tariffs (§ 13 of the Copyright Administration Law) could be seen as starting point for the calculation (see Schricker/Loewenheim/*Melichar*, op. cit., Vor §§ 44a ff. margin no. 29). Usually the parties, and therefore mostly the states and the collecting societies, try to agree about the payment by concluding an inclusive contract (§ 13 of the Copyright Administration Law). If they cannot agree upon such contract, each of them can first apply to the Arbitration Board, and then assert his claim in court proceeding at Munich Higher Court, which shall determine the content of the inclusive contract, in particular the nature and the amount of remuneration, at its discretion (§§ 14, 16 of the Copyright Administration Law). If the amount of the remuneration is questioned the court can therefore rule upon it (§ 287 (2) of the Code of Civil Procedure; see Munich Higher Regional Court ZUM-RD 2011, 603, 616 – Ge*samtvertrag Hochschulen*; Federal Court GRUR 2013, 1220, 1227 – *Gesamtvertrag Hochschul-Intranet*).

13) Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.

Yes, there is a special treatment.

The German regulation is based on Art. 6 of the Orphan works Directive 2012/28/EC, dated 25 October 2012. The exceptions and limitations for orphan works in the GCA are a transformation of the EU directive into German law.

The reproduction and the making available to the public of orphan works is permissible for publicly accessible libraries, educational institutions, museums, archives and film or audio heritage institutions within the boundaries of § 61 (1) GCA. The reproduction and the making available to the public must be in the public interest and serve cultural or educational purposes and must not be for commercial purposes. These limitations are given in § 61 (5) GCA.

According to § 61a GCA, the exceptions only apply if a diligent search for the right-holder pursuant to § 61 (2) GCA has been carried out. The scope of a diligent search is also defined by law. In addition, the institution has to document the search and has to forward information about the use to the German Patent and Trademark Office (GPTO). The GPTO will forward this information to the Office for Harmonization of the Internal Market (HABM). No search is necessary if the works have already been recorded as orphaned in the database of the HABM (§ 61a (5) GCA).

If a right-holder is subsequently identified, the use must be ceased as soon as the institution learns about the right-holder. An equitable remuneration for the use already made of the item must be paid.

14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?

Libraries and archives:

As mentioned above (I. 1) ), the exception of § 52b GCA is only applicable if there are no contravening contractually agreed provisions. But these agreements have to be or at least contain specific agreements for the digital use of the works. Only if this is the case, the exception of § 52b GCA is not applicable.

The exception in § 53 (2) sentence 1 no. 2 GCA is mandatory and thus cannot be overridden by contract. Whether the use is not qualified as "necessary" if there exists an equivalent possibility to purchase a copy of the work is being discussed (see below).

The reproduction and sending of the copied part of a work or magazine article as provided for by § 53a GCA only is permitted if the work is made available to the public in an accessible manner and at reasonable contractual conditions. Accordingly, the libraries have to check if there are any offers concerning the work and if these offers are accessible at reasonable conditions. If case of such offer, the library cannot refer to the exception of § 53a GCA and reproduction and sending of the copy is not permitted.

Educational and research institutions:

Whereas there does not exist any explicit rule that contracts do override the exceptions regarding the activities of educational and research institutions courts decided that this might be the case. So far §§ 46, 47, 51, 52 GCA may not be overridden by contract. However, this is being discussed in the case of § 52a (1) and § 53 (2), (3) GCA.

By interpreting the wording "necessary" in § 52a (1) GCA in the light of the Three-Step-Test, and especially of its third step (whether the use under the exception does not unreasonably prejudice the legitimate interests of the rightholder), the Federal Court stated that the use is not necessary in such cases in which the rightholder offers a license with equitable conditions (Federal Court GRUR 2014, 549, 554 f. – *Meilensteine der Psychologie*; see also Schricker/Loewenheim/*Loewenheim*, op. cit., § 52a margin no. 14). Even though the Federal Court decided only to the interpretation of the wording in to § 52a (1) no. 1 GCA, there is no reason why this opinion would not be applicable to § 52a (1) no. 2 GCA and finally to § 53 (2) sentence 1 no. 1, (3) sentence 1 GCA, since each of these exceptions contains the condition that the use must be necessary. Conditions for such an override *by offer* are that the price is equitable, that he offer is easy to find and the work is available fast and without further problems (Federal Court GRUR 2013, 1220, 1225 f. – *Gesamtvertrag Hochschul-Intranet*; GRUR 2014, 549, 554 – *Meilensteine der Psychologie*). The Federal Court argued that the existence of those explicitly mentioned conditions would not have any effect on the interpretation of the general condition of "necessary" and that even if the Three-Step Test in Art. 5 (5) of the Copyright Directive 2001/29/EC did not demand for such an override, it definitely would not forbid it (Federal Court GRUR 2014, 549, 554 f. – *Meilensteine der Psychologie*; see also Munich Higher Regional Court ZUM-RD, 2011, 603, 614 f. – *Gesamtvertrag Hochschulen*). Without the possibility to override *by offer*, publishers and others would finally not have enough incentives to develop an equitable licensing schemes regarding the use of copyrighted works at educational and research institutions, which at the end could help to find the most equitable solution for both the user and the rightholder (see *de la Durantaye*, op. cit., p. 231 f.).

This is criticized in literature, first because of its bureaucratic effect since every school teacher or university professor would have to search for offers and determine whether those are equitable, an unaffordable effort for regular users (see only *von Ungern-Sternberg*, GRUR 2015, 205, 212); secondly because the Copyright law explicitly provides for an override of contract just in §§ 52b, 53a GCA (Dreier/Schulze/*Dreier*, op. cit., § 52a margin no. 12; Fromm/Nordemann/*Dustmann*, op. cit., § 52a margin no. 15; *Pflüger*, ZUM 2012, 444, 451 f.) for the interpretation of the override of contract in §§ 52b, 53a GCA); thirdly because the override *of offer* does not find a basis in the Copyright Directive 2001/29/EC, which makes such interpretation incompatible with EU law (*Grünberger*, ZUM 2015, 273, 289). Since the CJEU's decision upon Art. 5 (3) lit. n) of the Copyright Directive 2001/29/EC that an override of a mere offer would diminish the scope of its application essentially (CJEU GRUR 2014, 1078, 1079 margin no. 32), the interpretation of the Federal Court has to be questioned further.

Within the literature there is widespread consensus that the reproduction for one's own scientific use pursuant to § 53 (2) sentence 1 no. 1 GCA would not be considered "necessary" if there exists the possibility to purchase the used work without any problems and if the price is in balance with the extent of the use (see only Fromm/Nordemann/*Wirtz*, op. cit., § 53 margin no. 32 with further references). § 53

(3) GCA also demands for the reproduction to be “necessary”, which should be interpreted the same way so that the possibility to purchase copies of the work to a balanced price excludes the application of the exception (see Dreier/Schulze/*Dreier*, op. cit., § 53 margin no. 41).

15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?

yes

If so, please explain those efforts.:

In Germany, some private organizations are trying to address the needs of such users. This is in particular true for scenarios, where individual licensing solutions are not feasible or not sufficiently efficient.

For example, the company PMG Presse Monitor is a joint venture of relevant German press publishers. PMG Presse Monitor provides for all encompassing Licenses for newspaper article use for archiving, in particular for newspaper article archives of private companies. PMG Presse Monitor operates in fields covered by limitations to copyright law, where it acts for the collecting society (e.g. the German collecting society VG Wort), collecting the moneys due for legal use of newspaper articles coming under the relevant German statutory limitation to copyright law for the use of newspaper articles. Additionally, PMG Presse Monitor provides genuine licensing for uses not covered by any statutory German exception or limitation.

A similar company is the Dutch company RightsDirect, which is a fully owned subsidiary by the American Copyright Clearance Center (CCC). RightsDirect operates in the field of private research in the field of scientific publishing. In particular, RightsDirect provides rights for content sharing within or between private companies, doing research. RightsDirect provides for worldwide usage rights. It covers both rights usually managed by genuine collecting societies (for example in Germany by the collecting society VG Wort) and rights acquired directly from individual rightholders such as scientific publishers.

## II. Policy considerations and proposals for improvements of the current law

16) Should there be any exceptions or limitations to copyright protection for libraries and archives?

yes

If yes, in relation to what activities?:

There should definitely be exceptions permitting certain activities to publicly accessible libraries and archives. Libraries and archives are the most important institutions, when it comes to scientific work and research. Too narrow or no exceptions at all would hamper the scientific world in general. But of course the question which exceptions should be made, has to be the result of careful considerations and balance the rights of authors on the one hand and the concept of a scientific-friendly environment for researchers and alike.

Libraries should definitely be able to repair owned copies by replacing missing or damaged pages, as public use naturally can derange the copies. Otherwise it would be too much of a cost factor, to re-buy books just because pages are missing.

A copy delivery service as described above is also of significant importance. It allows research of people who are not able to visit the library themselves. Further it is a means of efficiency, as it often is just

faster asking for a scanned copy than to go and scan it yourself. In a high-tech digital world, this shouldn't hinder a person from studying or researching. Also the exception for electronic reading stations is a good instrument to react to the changing environment. First, it actually (digitally) doubles the stock of a library and therefore makes it possible that more users can access the stock. Further, this allows to react to load peaks in times of exam preparations and alike. But of course this factual doubling has to be taken into consideration when deciding the amount of remuneration the library has to pay for those stations. The archiving of the stock of a library or archive should also be permitted for safety reasons and internal purposes, e.g. having a back-up copy to use, when the institution has to replace missing or damaged pages.

| 17) | Should there be any exceptions or limitations to copyright protection for education and research institutions? |
|---|---|

yes

If yes, in relation to what activities? :

At least there should be exceptions or limitations in relation to the activities that are allowed under current law.

| 18) | Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection? |
|---|---|

yes

Why?:

Copyright is a property right to protect the author. It is meant to put him into a position to exploit the work and to protect his legitimate interests. Any exceptions and limitations from copyright must use this nature of a property right protecting the author as a starting point. According to the Federal Court of Justice, the Three-Step Test helps to make clear and confirm to legislators and courts that limitations and exceptions to copyright themself face limits (Federal Court GRUR 2014, 549 note 46 - *Meilensteine der Psychologie*). In particular, the Three-Step Test makes clear:

- "Certain special cases": Copyright as an exclusive right must not be wiped out by providing too general exceptions.
- "No conflict with normal exploitation of the work": Copyright must not be limited in a way that it impedes the normal exploitation of the work, as this would mean to take away the effect of the economic rights, linked to copyright. The Federal Court thinks that this step is missed, if the use allowed by the limitation directly competes with the normal exploitation/Federal Court GRUR 2014, 549 no. 50 – *Meilensteine der Psychologie*). That is why the German legislator did not include the publically making available of school books for school use into a limitation for education, as this would directly substitute the primary use of school books (see Government Draft BT-DS 15/837, page 34, available on fromm-nordemann.de; also Federal Court, op. cit., no. 51 – *Meilensteine der Psychologie*).
- "To not unreasonable prejudice legitimate interests of the rightholder": Finally, the test of legitimate interests of the author reminds legislators and courts that they must strike a balance of interests, which includes the interests of the author as holder of the property right. According to German case law, this may require to pay an equitable remuneration to the author in case of limitations of copyright, e.g. in the field of allowed use of newspaper articles (Federal Court GRUR 2002, 963, 967 – *Elektronischer Pressespiegel*). According to this case law, it is permissible in specific cases to honor limitations to the normal exploitation of the work by paying an equitable remuneration (Federal Court GRUR 1999, 707, 712 – *Kopienversanddienst*).

| 19) | Should the exception or limitation be capable of being overridden by contract? Why? Why not? |
|---|---|

Most of the exceptions should offer the possibility for autonomous contractual agreements. A contractual agreement is better adopted to cover all circumstances occurring in everyday life, than a general exception granted in a statutory provision. Another possibility would be to make it a condition, that the institution has to check the market, if there are reasonable offers for licensing and only if there are not, is allowed to rely on an exception (as in § 53a GCA). However, the additional workload for the libraries and the uncertainty, if an offer is reasonable or not, speaks against this option. To make this work, there would have to be strict guidelines, what conditions are reasonable and all offers would have to be easily accessible e.g. via a single website, where libraries could check them.

However, with regard to some exceptions, e.g. § 53 GCA („private copy exception“) establishing a possibility to be overridden by contract, does not seem adequate, because this exception in its essence privileges natural persons and only a few parts affect institutions as libraries. Therefore, and because it only serves internal and securing purposes, this possibility should not be adopted in this case.

| 20) | Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not? |
|---|---|

For all of the activities of libraries and archives (as mentioned above), there should definitely be a remuneration, as the digital copy available substitutes the purchase of a solid copy. In fact, all the activities permitted to libraries allow the libraries to avoid buying another copy of the respective work, they are using. Therefore the author doesn’t earn any money from sales turnover. His decrease of remuneration should be substituted.

Remuneration should also be payable for almost all activities of educational and research institutions. It would anyway be most probably classified as unconstitutional under German constitutional law if any of the activities was allowed without the author’s consent *and* without the obligation to pay an equitable remuneration (German Constitutional Court, BVerfGE 31, 229, 244 f. – *Kirchen- und Schulgebrauch*; BVerfGE 49, 382, 400 – *Kirchenmusik*).

The only exceptions where there is no remuneration payable are § 51 GCA (see above I. 12) for the reasons) and under certain conditions § 52 (1) GCA referring to the right to communicate the work to the public. The literature criticizes the latter harshly since it seems that its mere reason is the state’s institutions free use (Schricker/Loewenheim/*Melichar*, op. cit., § 52 margin no. 1, 5, 6; Fromm/Nordemann/*Dustmann*, op. cit., § 52 margin no. 2).

| 21) | How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved? |
|---|---|

Libraries and archives:

There are some requirements in the provisions which are not particularly transparent and thus should be clarified in order to allow for the proper and correct use of the exceptions for the libraries and archives (such as, e.g. „small part of works“).

Educational and research uses:

§§ 51 and 52 GCA are, as far as we can see, broadly accepted and at least the exception to use works for the purpose of quotation does not need any improvement.

The rest of the current law that provides exceptions for educational and research institutions might be easily improved by a clarification and purification of almost each exception, by using wordings neutral to technology and by choosing a more flexible approach by focusing on words like “necessary” instead of trying to regulate all the details, and finally re-systematizing the exceptions (see only *de la Durantaye*, op. cit., p. 191 f.). Especially § 53 GCA in its current form can be considered one of the most complicated paragraphs within the GCA (see *Sandberger*, ZUM 2006, 818, 825 f.; *de la Durantaye*, op. cit., p. 191).

For example the privileged educational institutions should be defined once (§ 54c (1) GCA already defines educational establishments) and then the other exceptions could easily refer to that definition; universities and their professors should anyways be given the same privileges as schools and their teachers either by changing the wording or by broadening the interpretation of “schools” (see *Rehbinder/Peukert*, op. cit., margin no. 655); the limitation of certain portions of a work should not be made by – unclear – statutory provision like “small parts” or “parts”, but on a case-to-case basis depending on the actual situation and therefore depending on what would be considered as necessary for the purpose (see *de la Durantaye*, op. cit., p. 228 ff.; for a different point of view see Federal Court GRUR 2014, 549, 552 – *Meilensteine der Psychologie*); the exceptions should be reformulated and use terms – especially in the context of converging media – neutral to the type of works (see *de la Durantaye*, op. cit., p. 224 f.).

## III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

They should apply to publicly accessible libraries or archives and such that do not pursue any direct or indirect commercial or economical gain and act in the public interest.

b) to what activities should these exceptions or limitations apply;

The exceptions should apply to archiving the stock of an institution for the purpose of repairing

damaged copies, to repairs of owned copies itself, to making available works on reading stations and copy delivery services (as mentioned above).

c) under what conditions should the activities be undertaken or the copyrighted work used?

For libraries and archives in most of the cases it should only be allowed to use own copies of works for reproduction or making available. Only in cases where the library itself does not profit from an activity (e.g. by sending a scan to a user requesting it and not to digitally increase its stock), it should be allowed to reproduce from a copy not owned by the library.

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;

The exceptions should apply to all kinds ofâ¨educational and research institutions as long as they do not pursue any commercial purpose with the use. Especially, the exceptions should be applicable for universities, as well as they are for schools. Therefore, the law should refer to a term like “educational establishments” as defined in § 54c (1) GCA. This would both clarify and shorten the law, and by being applicable to universities the exceptions would be less discriminating and (still) in accordance to European law, which does not differentiate between teaching at schools and at universities (*de la Durantaye*, op. cit., p. 220 f.). In accordance with Recital 42 of the Copyright Directive 2001/29/EC the use itself, not the financing of the institutions, should determine whether the criteria non-commercial is fulfilled (see above I. 6.).

b) to what activities should these exceptions or limitations apply;

The exceptions should generally apply to the right to reproduce the work and to the right to communicate the work to the public (only) for educational and scientific purposes. In some special cases it should be allowed to distribute the work, especially regarding exceptions for quotations in research and educational compilations. Regarding the right to make the work publicly available the exceptions should ensure that it only allows the use for a specific public, which means that the work may not be uploaded on a public server without access-controlling mechanisms.

c) under what conditions should the activities be undertaken or the copyrighted work be used?

The copyrighted work should only be used if and insofar as the use is necessary for the respective purpose. Of course “necessary” could be replaced by any other wordings like “justified” or even by a concept of “fairness” as long as permissible use under the exception is fair balanced with the author’s rights. Any broader approach than the current German law would allow the courts to rule about the conditions regarding the single case with all its specific details.

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

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| 26) | Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)? |

For all exceptions, there should be no further procedures required and the exceptions should apply automatically. Another possibility would be implementing a rule which states that the parties (e.g. libraries and author) should make an effort to close a licensing agreement.

| | |
|---|---|
| 27) | How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made? |

The determination or calculation of remuneration payments in regard to the uses permitted to libraries and archives should be as clear and foreseeable as possible. Ideally there would be a list displaying the payable amount for every activity (and device). This is probably easier said than done, because authors and libraries (and storage/printing device producers and importers) would have to agree on this. The remuneration should be equally distributed. If possible, everyone who earns money in that reproduction process should be paying remuneration to the authors. Those could be the device producers or importers. The question if libraries should also pay remunerations is highly disputed, considering that if they are buying printing devices etc. they already pay a part of the remuneration which the producer of the device has transferred to the buyers through the purchase price. But considering that such a device in a library is definitely used more often to make copies of other works than a device owned by a natural person who (statistically) copies more own works, libraries are also obliged to remunerate the author therefor. So libraries/archives, device producers and importers should make such payments. And because it would be impossible for both sides to let every single author collect his remuneration himself from various institutions, the practical and most efficient way would be to engage collecting societies.

The remuneration for use under the exceptions for educational and research institutions should be calculated on basis of the actual use whenever this is possible and does not lead to a bureaucratic overkill. If the institution or any other person who has to pay the remuneration has to put too much effort in the documentation and calculation of each single use, a more general basis would be preferable. The person who should be liable for making a payment of equitable remuneration should depend on the specific kind of use. The above-described system of remuneration paid by manufacturers and operators for reproductions under the private and personal copy exception (§ 53 GCA) should not be changed. All payment payable for the uses of (and in) educational and research institutions should be made to the collecting society.

| | |
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| 28) | What special treatment, if any, should there be for use of orphan works within such exception or limitation? |

The use of orphan works by libraries and archives as well as educational and research institutions should be guided by the same provisions which apply for other works. However, one special treatment is necessary to clearly identify a work as orphaned.

A diligent search should be carried out before the work is declared as orphaned. The burden of this search should be on the institution using the work. However, it may be in the public interest if the costs of these searches are refunded. Otherwise, educational and research institutions as well as Libraries

and archives may refrain from the reproduction or making available to the public of orphaned works for cost reason which would be a loss for the general public.

29) In what circumstances should the exception or limitation be capable of being overridden by contract?

Libraries and archives:

In view of German law that provides two possible modi operandi, it is rather difficult to choose which possibility is the better option. As shown above, there is the option the European legislator chose in Art. 5 (3) lit. n) Copyright Directive 2001/29/EC (resulting in the transfer to German law in § 52b GCA). Unless there is no actual contract between the library and the author of the work made available, the library can rely on the privilege. The other option -chosen by the German legislator in § 53a GCA- only requires that the work is not made available to the public in accessible manner and to reasonable conditions. The first option is easier to handle for the libraries. If there is an agreement (concerning digital use of copies), they are not allowed to rely on the exception. On the other hand, the library could get forced or at least put under pressure (as described above II. 19) ) to buy a package of works with non-desired works in order to get the actually desired one. The latter option is more difficult to handle for the libraries because they have to actually check the market for offers, check those offers for reasonability and further actually would have to check if the one requesting a scanned copy is allowed to order it under the private copy exception. The problem with the checking for reasonable offers is that libraries always would have to fear that they misjudged the offer and could infringe copyrights while thinking the offer was unreasonable. Vice-versa, they could contract in actual unreasonable agreements to avoid the danger of copyright infringement. Considering this, the first option seems more appropriate. Only an actual agreement should be able to override exceptions.

Educational and research institutions:

This first option seems also more appropriate for the exceptions for educational and research institutions. But any measure of harmonization should state clearly whether the exceptions could be capable of being overridden by contract. Right now, since the use should only be allowed if and insofar it is necessary for the educational and scientist purposes and the actual interpretation by the Federal Court is that this includes an override by *offer*, any exception with a broader approach could be capable of being overridden already by such offer.

30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

It does not seem necessary to reconcile such efforts with an exception or limitation provided by law. Rather, it is in the genuine interest of collecting societies and right-holders to establish such private organizations in order to provide sustainable licensing models, where individual licensing is not feasible.

Outside copyright law, however, it could be made more clear that collective licensing based on a voluntary cooperation by individual right owners is no problem under antitrust rules, as long as individual licensing is not feasible or at least not efficient. On the European level, still no block exemption Regulation exists in the field of collective licensing, which could provide for more legal certainty.

Summary

**Summary**

In German copyright law, all exceptions and limitations to copyright protection, which apply to libraries, archives, education and research institutions, are generally provided by statutory provisions. Case law interprets and clarifies the existing provisions.

In principle, all relevant German provisions implement the EU Copyright Directive 2001/29/EC. As the national legislator had certain options in implementing the Directive, it did not, however, achieve full harmonization within the EU.

In general, German law applies the Three-Step Test: limitations and exceptions to copyright face limits, namely they are limited to certain special cases, should not conflict with the normal exploitation of the work, and strike a balance of interests, which includes the interests of the author as holder of the property right. According to German case law, this may require to pay an equitable remuneration to the author in case of limitations of copyright, e.g. in the field of allowed use of newspaper articles.

In detail:

There are three exceptions relevant to libraries and archives. These are first the private copy exception (§ 53 (2) sentence 1 no. 2 GCA [German Copyright Act, Urheberrechtsgesetz]), which permits archiving the library's stock to a certain extent, second the electronic reading station exception (§ 52b GCA, which implements Art. 5 (3) lit. n) Copyright Directive 2001/29/EC) and third the exception in favour of sending copies of magazine articles or parts of works on request (§ 53a GCA, which implements Art. 5 (3) lit. a) Copyright Directive 2001/29/EC).

As regards educational purposes, German law provides for an exception for the performance and display of a copyrighted work, § 52 GCA, which mainly goes back to Art. 3, 5 (3) lit. g) and lit. o) Copyright Directive 2001/29/EC. This provision has a general scope and is not limited to educational purposes. Further, the German legislator has implemented Art. 5 (3) lit. a) Copyright Directive 2001/29/EC: § 46 (1) GCA provides for an exception to the right of reproduction, distribution and making works available to the public, and § 47 GCA allows reproducing works within so-called school broadcast which may only be used for teaching purposes. Further, § 53 (3) GCA contains a specific exemption allowing certain private copies for the purpose of illustration for teaching in schools etc., and making copies for examination purposes. There is no exception that refers explicitly to making translations for educational purposes, however, in the light of § 62 GCA, translations are allowed as long as the use is generally allowed under an exception such as §§ 46, 53 (3) GCA, i.e. to translate a short story and incorporate it in a collection for instructional use, or to reproduce a translated poem for a school class. § 52a (1) no. 1 GCA provides for an exception to the right of making works available to the public: Under certain conditions, copies of a work may be uploaded and made available in digital networks for illustration in teaching at certain educational institutions.

As regards research, § 53 (2) sentence 1 no. 1 GCA allows to make single copies of a work or to have these made for one's own scientific use if and to the extent that such reproduction is necessary for the purpose and it does not serve a commercial purpose. Pursuant to § 53 (6) sentence 1 GCA these copies may neither be distributed nor communicated to the public. However, § 51 GCA provides for an exception to reproduce, distribute and communicate to the public a published work for the purpose of quotation. In particular, this shall be permissible where individual works are included in independent scientific work for the purpose of explaining the contents (§ 51 sentence 2 no. 1 GCA). Generally speaking, researchers are allowed to use existing works within their own scientific work, and such scientific works may either be distributed or communicated to the public.

**Zusammenfassung**

Nach deutschem Urheberrecht sind sämtliche Schranken des Urheberrechtsschutzes, die auf Bibliotheken, Archive, Bildungs- und Forschungseinrichtungen Anwendung finden, in gesetzlichen Vorschriften enthalten. Die Rechtsprechung legt die geltenden Bestimmungen aus.

Im Prinzip setzen die maßgeblichen deutschen Vorschriften die EU-Urheberrechtsrichtlinie 2001/29/EC um. Da der nationale Gesetzgeber jedoch gewisse Spielräume bei der Umsetzung der Richtlinie hatte, hat die Urheberrechtsrichtlinie zu keiner vollständigen Harmonisierung innerhalb der EU geführt.

Grundsätzlich wendet das deutsche Recht den Drei-Stufen-Test an. Beschränkungen und Ausnahmen in Bezug auf das Urheberrecht sind danach nur in bestimmten Sonderfällen zulässig, sie dürfen die normale Verwertung des Werkes nicht beeinträchtigen und müssen einen gerechten Ausgleich der Interessen erreichen. Dies umfasst auch die Interessen des Urhebers als Rechteinhaber. Nach deutscher Rechtsprechung kann dies die Zahlung einer angemessenen Vergütung an den Urheber erfordern, wenn sein Urheberrecht z.B. durch eine zulässige Nutzung für Zeitungsartikel beschränkt wird.

Im Einzelnen:

Es gibt drei Schrankenregelungen, die für Bibliotheken und Archive relevant sind. Dies sind erstens die Schranke für Vervielfältigungen zum eigenen Gebrauch (§ 53 Abs. 2 Satz 1 UrhG), welche es erlaubt, die Bestände einer Bibliothek in gewissem Maße zu archivieren, zweitens die Schranke in Bezug auf elektronische Leseplätze (§ 52b UrhG, der Art. 5 Abs. 3 lit. n der Urheberrechtsrichtlinie 2001/29/EG umsetzt) und drittens die Schranke für Kopienversand auf Bestellung (§ 53a UrhG, der Art. 5 Abs. 3 lit. a der Urheberrechtsrichtlinie 2001/29/EG umsetzt).

In Bezug auf Bildungszwecke sieht das deutsche Recht eine Schranke für die Aufführung und Wiedergabe von urheberrechtlich geschützten Werken vor, § 52 UrhG, die im Wesentlichen auf Art. 3, 5 Abs. 3 lit. g und lit. o der Urheberrechtsrichtlinie 2001/29/EG zurück geht. Diese Vorschrift hat einen allgemeinen Anwendungsbereich und ist nicht nur auf Bildungszwecke beschränkt. Ferner hat der deutsche Gesetzgeber Art. 5 Abs. 3 lit. a der Urheberrechtsrichtlinie 2001/29/EG umgesetzt: § 46 Abs. 1 UrhG sieht eine Schranke für die Vervielfältigung, Verbreitung und öffentliche Zugänglichmachung von Werken in der Öffentlichkeit vor, und § 47 UrhG erlaubt die Vervielfältigung von Werken innerhalb von Schulfunksendungen, soweit diese für Unterrichtszwecke verwendet werden. Ferner enthält § 53 Abs. 3 UrhG eine spezielle Schranke, die bestimmte Kopien zur Veranschaulichung des Unterrichts in Schulen etc. sowie Vervielfältigungen für Prüfungszwecke zulässt. Es gibt keine Schrankenregelung, die ausdrücklich für die Herstellung von Übersetzungen für Bildungszwecke gilt. Allerdings ergibt sich aus § 62 UrhG, dass Übersetzungen erlaubt sind, solange der Benutzungszweck zulässig ist. Dies kann sich z.B. aus §§ 46, 53 Abs. 3 UrhG ergeben. Beispiel wäre die Übersetzung einer Kurzgeschichte und ihre Aufnahme in einer Sammlung für den Unterrichtsgebrauch oder die Vervielfältigung eines übersetzten Gedichtes für eine Schulklasse. § 52a Abs. 1 Nr. 1 UrhG enthält außerdem eine Schranke für die öffentliche Zugänglichmachung: Unter bestimmten Voraussetzungen dürfen Vervielfältigungen eines Werkes hochgeladen und in digitalen Netzwerken zur Veranschaulichung des Unterrichts bestimmter Bildungseinrichtungen veröffentlicht werden.

In Bezug auf die Forschung enthält § 53 Abs. 2 UrhG eine Erlaubnis der Herstellung von einzelnen Vervielfältigungsstücken eines Werkes zum eigenen wissenschaftlichen Gebrauch, wenn und soweit die Vervielfältigung zu diesem Zweck geboten ist und sie keinen gewerblichen Zwecken dient. Gemäß § 53 Abs. 6 Satz 1 UrhG dürfen die Vervielfältigungsstücke weder verbreitet noch zu öffentlichen Wiedergaben benutzt werden. § 51 UrhG erlaubt allerdings die Vervielfältigung, Verbreitung und öffentliche Wiedergabe eines veröffentlichten Werkes zum Zweck des Zitats. Insbesondere ist es zulässig, einzelne Werke in ein selbständiges wissenschaftliches Werk zu Erläuterung des Inhalts aufzunehmen (§ 51 Satz 2 Nr. 1 UrhG). Generell können Wissenschaftler Werke nach Veröffentlichung im Rahmen ihrer eigenen wissenschaftlichen Werke nutzen und diese wissenschaftlichen Werke dürfen auch verbreitet oder öffentlich wiedergegeben werden.

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.