In accordance with Article 5, Section 1, of the German Constitution (Grundgesetz), access to knowledge to participate in the scientific findings of others and to share this information with other researchers or students is an essential condition for research and teaching. In view of the extensive usage of electronic, especially net–based information and communication media at universities not only for research cooperation or distance learning but also in traditional “face–to–face” teaching, the question to what extent access to electronic works will be guaranteed in the future is critical.

At present, the Council Directive 2001/29 EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society which is supposed to adapt copyright laws to the developments in digital technologies, is at the centre of the discussion. The Law Governing the Copyright in the Information Society passed by the German Parliament on 11 April 2003 will implement significant parts of this Directive. This amendment of the copyright law is likely to have noticeable consequences for the work of researchers, students and university services in the area of information, communication and media. Nevertheless, universities have so far been very reticent with regard to their participation in the legislative procedure and have, with some exceptions, not actively expressed their position. Even the rather aggressive publicity campaign on the part of publishers, especially the German Booksellers and Publishers Association has had not changed this rather passive attitude.

The copyright law is not easily accessible even for lawyers and thus even more complex for laypersons and it is not surprising that a broad discussion on this law and its amendment develops very slowly at universities. More importantly, present copyright laws have so far presented only few noticeable restrictions for everyday work at universities. Of course there have been certain uses of works

1370 Universität Dortmund.
1371 See: Gesetzentschluss “Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft”, BT Dr. 271/03, 02.05.2003.
1372 See the letter of the President of the Association of Universities and other Higher Education Institutions in Germany (HRK) to the Ministry of Justice of 23 October 2002, the joint declaration of the “Bundesvereinigung Deutscher Bibliotheksverbände e.V.” and the “Deutscher Bibliotheksverband” of 06 September 2002, and the statement of the “Deutsche Initiative für Netzwerkinformation e.V. (DINI)” of 28 November 2002. Detailed evaluation of the Draft Act can also be found in the statement of the “Institut für Rechtsfragen der freien und Open Source Software (ifrOSS)” of 11 December 2002.
1373 See the letter of the President of the Association of Universities and other Higher Education Institutions in Germany (HRK) of 28 March 2003.
which have incurred claims from collecting societies in the past. University libraries, especially, had to negotiate licenses and fees for their on-demand services. For the most part, however, for university research, the past years have been characterized by a continuous expansion in the area of information and communication and thus also by an ever-expanding availability of works of third parties.

The amendment of the copyright law will now result in fundamental changes. In the future, it will not be the holders of the copyright or exploitation rights who will have to safeguard their claims for injunction or compensation. Rather, it will be the potential user who will have to gain access to the protected work. At that time, when resources which are today routinely used will not only be protected by legal provisions but actually be made inaccessible through technical measures, the copyright question will become a major question also for the day-to-day operations of universities and other institutions of research and learning. In addition to the so-called limitations which define the users’ rights in research and teaching, the regulations on technical protection measures will receive special attention.

This contribution will discuss the question whether the amended law seems adequate to the needs of research and teaching, especially with regard to the limitations of the copyright law in the new § 52 a UrhG and the instruments for the enforcement of these limitations. In addition to a brief look at recent developments in U.S. legislation relating to distance education, the potentially changing role of universities with regard to the questions of copyright will be addressed.

I Access to Electronically Available Works for Research and Teaching

As stated initially, the work of researchers depends on the unimpeded use of information in order to base their own research on this information and to share it with third parties. The amended law recognizes this need in § 52 a UrhG by permitting the use of published works in teaching or by making it available for a certain defined group of individuals for their own scientific research.

The question of whether the limitations defined in § 52 a UrhG establish an appropriate balance between the interests of research with regard to the use of electronically available works and the interests of copyright holders and publish-


1375 German Copyright Act.


1377 In the legislative proceedings the regulation has been clarified in the sense that it comprises teaching at schools and universities.