

Towards a commons-based copyright

IFLA Gothenburg 10-15 August, 2010

Rainer Kuhlen

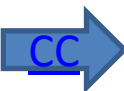


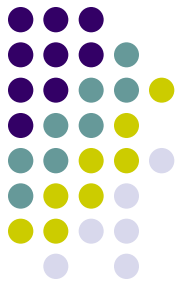
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Science

University of Konstanz, Germany

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Towards a commons-based copyright– IFLA 08/2010





University
of
Konstanz



Master of Science Information Engineering

BREITES
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MIT ZUKUNFT

www.inf.uni-konstanz.de

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Benutzungsklasse:
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www.lib.uni-konstanz.de

Master of Science Information Engineering

Informationswissenschaft

WISSEN ZUGÄNGLICH MACHEN

Die Herausforderung:
Zugang zum digital publizierten Wissen schaffen

Studienschwerpunkte:

- Informationsmärkte
- Wissensmanagement im kooperativen Arbeiten
- Elektronisches Publizieren
- Informationspolitik, -ethik, -recht

Einsatzfelder:
Management Digitaler Bibliotheken, Berater im Bereich E-Business und Informationswirtschaft, Organisatorisches Informationsmanagement

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Telefon +49 (0)7531 98-4100
E-Mail: lib@uni-konstanz.de

make knowledge freely available



Coalition for Action

"Copyright for Education and Research"

Aktionsbündnis „Urheberrecht für Bildung und Wissenschaft“



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The Göttingen Declaration on Copyright for Education and Research of 5 July 2004

Göttingen Declaration for printout: [\[PDF-file\]](#) [\[RTF-file\]](#) [\[DOC-file\]](#)

Preliminary Remarks

The answer to the question 'How accessible are knowledge and information?' will determine the opportunities for education and development open to every citizen in the information society and the opportunities future generations will have to build on existing knowledge. The legal provisions set out in German copyright law will determine whether open, networked communications structures will continue to develop in our society in the long term. They will also affect the quality of our education system, the inventiveness of the sciences and the innovative capacity of trade and industry. In a global, competitive environment, they play a vital role in promoting social, cultural and economic development and hence in securing the future of our society.

With regard to the implementation of Directive 2001/29/EC in Germany, the legislature has so far mainly addressed the concerns of rightholders regarding the commercial use of digital media and networks as additional distribution channels. The prime concern here has been to minimise the risks related to private copying rather than to encourage exploiting the opportunities afforded by the new technical media to the public at large. The latter point is particularly important for the fields

News RSS 0.92

July 15th 2010:
Aktionsbündnis zieht positives Resümee der 2. Anhörung, sieht aber weiteren Handlungsbedarf für Bildung und Wissenschaft [\(more...\)](#)

July 6th 2010:
Aktionsbündnis stellt seinen Entwurf einer Wissenschaftsschranke im Urheberrecht vor [\(more...\)](#)

June 30th 2010:
Mit ENCES (European Network for Copyright in Support of Education and Science) wurde eine wichtige Interessenvertretung gegründet. [\(more...\)](#)

June 29th 2010:
Ein Leistungsschutzrecht ist für Presse- und Schulbuch-Verlage ist nicht zu rechtfertigen, wie die Anhörung des BMJ am 28. Juni 2010 [\(more...\)](#)

In a digitised and networked information society, access to global information for the purposes of education and science must be guaranteed at all times from any place.

Infrastructure Copyright for Science and Education

Funded by the German Research
Community (DFG)

Zum Dritten Korb

Aktuell:

- 13.06.2010 Anhörung zu Open Access, Kabelweitersendung und Kneipenrecht - [Materialien zur Anhörung](#) - [Materialien zu Open Access](#)
- 28.06.2010 Anhörung zum Leistungsschutzrecht für Verleger - [Materialien zum Thema im Infopool](#)
- [Liste mit Publikationen zur Berliner Rede zum Urheberrecht](#)
- [Aufzeichnung und Manuskript der Berliner Rede zum Urheberrecht vom 14.06.2010 bei carta.info](#)

[Weiterlesen](#) >

in [Dritter Korb](#)

Abstracts wissenschaftlicher Texte erstellen ist in der Regel urheberrechtlich unbedenklich

Verfasst von Thomas Hartmann am 15. Juli 2010 - 17:10

Eine Verhandlung heute vor dem Bundesgerichtshof (BGH) zeigt: Werden vor allem die Zitierregeln eingehalten, dann sind Inhaltswiedergaben wissenschaftlicher Texte (so genannte Abstracts) urheberrechtlich zulässig.

Suche



[Erweiterte Suche](#)

IUWIS Infrastruktur Urheberrecht für Wissenschaft und Bildung

IUWIS bietet Information und Diskussion zum Urheberrecht in Wissenschaft und Bildung sowohl für Produzenten wie für die Nutzer von Inhalten.

[Weiterlesen](#)

Aktuelle Themen

- × [Publikationen zum Dritten Korb](#)
- × [Termine zum Dritten Korb](#)

<< August 2010 >>

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Informationsseiten zum Urheberrecht - Deutschland Links

Content - Topics



- **Questions – Objectives – Assumptions**
- **Some remarks on the Wittem proposal and/or a need for a reinterpretation of the three-step-test**
- **A science-friendly copyright privilege – a proposal of the German Coalition for Action Copyright for Science and Education**
- **A paradigm shift -from a private-based copyright towards a commons-based copyright regulation**
- **Models for a co-existence between commercial and open/free information markets**



Content - Topics



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- **Some remarks on the Wittem proposal and/or a need for a reinterpretation of the three-step-test**
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Questions – Objectives – Assumptions

Questions – Objectives – Assumptions

Is a **strong copyright** an appropriate means to
further progress in science and education?



Questions – Objectives – Assumptions

What is a strong copyright?

(a) One that makes knowledge and information a scarce

good – a commodity ?

or

(b) One that supports open free access to knowledge and

information ?

Questions – Objectives – Assumptions

The **enforcement of strong copyright regulations** (in Europe and North America in the last 20 years), which heavily **supports the commercial exploitation** of knowledge and information (not necessarily creators' rights), makes it **more and more difficult to freely access the world-wide information resources** in principle available on the world-wide information markets.

Questions – Objectives – Assumptions



There is **no special copyright privilege** for science and education (or for libraries)

The interests of science and education **are only taken into consideration by exception and limitation** to exclusive rights of the right-holders

Exceptions and limitations are only allowed if and when they comply with a **strong interpretation of the three-step-test**

Limitations and exceptions

Limitations and exceptions

disabling?



English: A barrier, restricting the access for cars for a nature reserver

Deutsch: Eine Schranke, die die Einfahrt von Kraftfahrzeugen in ein Naturschutzgebiet verhindert

http://commons.wikimedia.org/wiki/Image:Moderne_Schranke.jpg

enabling?



www.gristede.de/assets/images/a_Schranke.jpg

Always under the control of the three-step-test

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Exceptions for science, education (§ 52a German copyright law)



Only small parts of works

Only for use **in** classroom

Time limit end of 2006, then 2008, now 2012

For the use of **defined research** groups

UrhG § 52a Öffentliche Zugänglichmachung für Unterricht und Forschung

§ 52a: Nicht mehr anzuwenden gem. § 137k (F 10. September 2003) mWv 1.1.2007

(1) **A reasonable fee needs to be paid to collecting societies in**

1. **any case**

einzelne Beiträge aus Zeitungen oder Zeitschriften zur Veranschaulichung im Unterricht an Schulen, Hochschulen, nichtgewerblichen Einrichtungen der Aus- und Weiterbildung sowie an Einrichtungen der Berufsbildung ausschließlich für den bestimmt abgegrenzten Kreis von Unterrichtsteilnehmern oder

Only for registered students in classes

without any direct or indirect commercial interest

2. veröffentlichte Teile eines Werkes, Werke geringen Umfangs sowie einzelne Beiträge aus Zeitungen oder Zeitschriften ausschließlich für einen bestimmt abgegrenzten Kreis von Personen für deren eigene wissenschaftliche Forschung

Use of copyrighted material in schools only with special permission of rightholders

öffentlich zugänglich zu machen, soweit dies zu dem jeweiligen Zweck geboten und zur Verfolgung nicht kommerzieller Zwecke gerechtfertigt ist.

(2) Die öffentliche Zugänglichmachung eines für den Unterrichtsgebrauch an Schulen bestimmten Werkes ist stets nur mit Einwilligung des Berechtigten zulässig. Die öffentliche Zugänglichmachung eines Filmwerkes ist vor Ablauf von zwei Jahren nach Beginn der üblichen regulären Auswertung in Filmtheatern im Geltungsbereich dieses Gesetzes stets nur mit Einwilligung des Berechtigten zulässig.

Use of movie/video material only 2 years after public performance

Limitations and exceptions - three-step-test



Everything depends on a balanced liberal flexible interpretation of the three-step-test

Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which

do not conflict with a normal exploitation of the work

and do not unreasonably prejudice the legitimate interests of the right holder.

Limitations and exceptions - three-step-test

Everything depends on a balanced liberal flexible
interpretation of the three-step-test

DECLARATION

A BALANCED INTERPRETATION

OF THE “THREE-STEP TEST” IN COPYRIGHT LAW

(Geiger, Hilty, Griffiths, Suthersanen 2008)

The Three-Step Test **does not require limitations and exceptions to be interpreted narrowly**. They are to be interpreted according to their objectives and purposes.

Limitations and exceptions - three-step-test

**Everything depends on a balanced liberal flexible
interpretation of the three-step-test**

DECLARATION

A BALANCED INTERPRETATION

OF THE “THREE-STEP TEST” IN COPYRIGHT LAW

(Geiger, Hilty, Griffiths, Suthersanen 2008)

In applying the Three-Step Test, account should be taken of the **interests of original rightholders, as well as of those of subsequent rightholders.**



Limitations and exceptions - three-step-test



Everything depends on a balanced liberal flexible

interpretation of the three-step-test

DECLARATION

A BALANCED INTERPRETATION

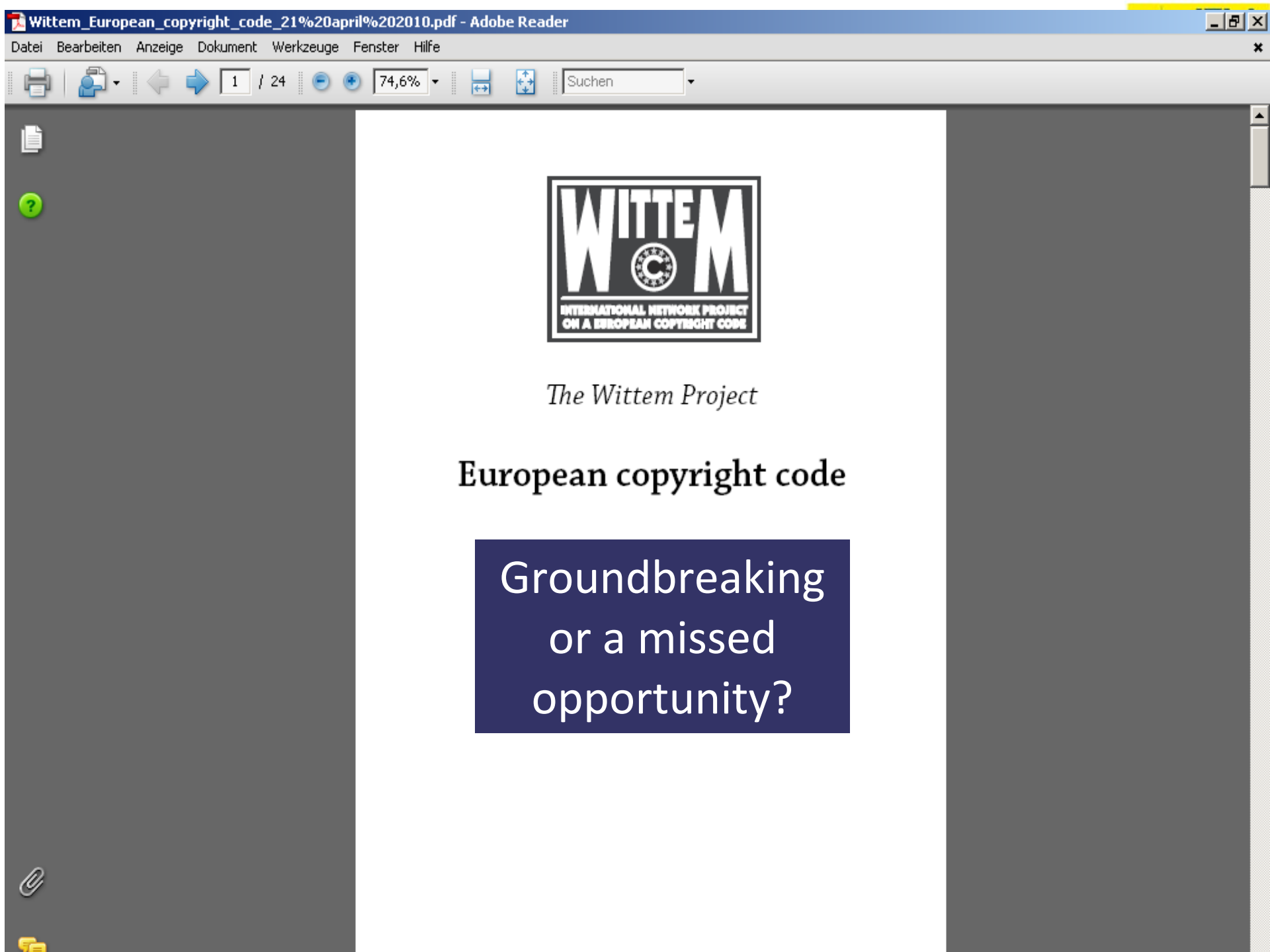
OF THE “THREE-STEP TEST” IN COPYRIGHT LAW

(Geiger, Hilty, Griffiths, Suthersanen 2008)

The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including

interests deriving from **human rights** and fundamental freedoms;
interests in competition, notably on secondary markets; and

other public interests, notably in **scientific progress** and **cultural, social, or economic development**.



The Wittem Project

European copyright code

**Groundbreaking
or a missed
opportunity?**

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Art. 5.2– Uses for the purpose of freedom of expression and information

(2) The following **uses** for the purpose of freedom of expression and information are **permitted without authorisation**, but only against payment of **remuneration** and to the extent justified by the purpose of the use:

- (a) use of single articles for purposes of internal reporting within an organisation;
- (b) use for purposes of **scientific research**.

Art. 5.3 – Uses permitted to promote social, political and cultural objectives

(2) The following **uses** for the purpose of promoting important social, political and cultural objectives are permitted without authorisation, but only against payment of remuneration, and to the extent justified by the purpose of the use:

- (a) reproduction by a natural person for **private use**, provided that the source from which the reproduction is made is not an obviously infringing copy;
- (b) use for **educational purposes**.

Art. 5.4 – Uses for the purpose of enhancing competition

- (1) The following uses for the **purpose of enhancing competition** are permitted without authorisation and without remuneration, to the extent justified by the purpose of the use:
- (a) use for the purpose of **advertising public exhibitions** or sales of artistic works or goods which have been lawfully put on the market;53
 - (b) use for the purpose of **reverse engineering** in order to obtain access to information, by a person entitled to use the work.

Art. 5.4 – Uses for the purpose of enhancing competition

- (2) Uses of news articles, **scientific works**, industrial designs, computer programs and databases are permitted **without authorisation**, but only **against payment of a negotiated remuneration**, and to the extent justified by the purpose of the use, provided that:
- (i) the use is indispensable to **compete on a derivative market**;
 - (ii) the owner of the copyright in the work has **refused to license** the use on reasonable terms, leading to the elimination of competition in the relevant market and
 - (iii) the use does not unreasonably prejudice the **legitimate interests of the owner** of the copyright in the work.

The Wittem proposal – a breakthrough in copyright?

The approach of the Wittem group is both
traditional and conservative (although realistic)



focus on a set of
exceptions

betting on the
wrong horse?

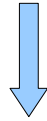


focus on single author
and unitary closed work

neglecting collaborative
paradigm

The Wittem proposal – a breakthrough in copyright?

The approach of the Wittem group is both
traditional and conservative (although realistic)



Considering knowledge as a
private property

Ignoring the character of
knowledge as a commons



focus on single author
and unitary closed work

neglecting collaborative
paradigm

A generic clause for science and education

§ 45b Education and Science

(1) Copying, distributing and making published works available to the public is permitted for personal use in science and for educational purposes in schools, institutions of higher education (such as universities), and other non-commercial institutions dedicated to education, continuing and professional training. The right to make works publicly available (and to use these works) is restricted in each case to a well-defined group of people in science and education. Sentence 1 is also valid for scientific and educational purposes in documentation, archiving and preservation, in particular for services provided by publicly financed libraries, archives, documentation centers and museums which support scientific usage and serve educational purposes.

§ 45b Education and Science

(1) Copying, distributing and making published works available

to the public is permitted for **personal use in science** and for educational purposes in schools, institutions of higher education (such as universities), and other non-commercial institutions dedicated to education, continuing and professional training.

provided that the source from which the reproduction is made is not an obviously infringing copy from a **legitimately acquired** copy only, e.g. from a **library** or bought from a **commercial provider**

not restricted to publicly financed science

§ 45b Education and Science

(2) The usage of published works according to para (1) requires remuneration.

Remuneration can only be claimed by a **collecting society or by another legitimized institution.**

(3) **Contractual agreements which rule out para (1) are invalid.**

§ 45b Education and Science

... The right to make works publicly available (and to use these works) is restricted in each case to a well-defined group of people in science and education. ...

- **Scientists within a research group (local but also remote)**
- **Members (students) of a course (local but also remote - e-learning)**

§ 45b Education and Science

... Sentence 1 is also valid for scientific and educational purposes in documentation, archiving and preservation, in particular for services provided by publicly financed libraries, archives, documentation centers and museums which support scientific usage and serve educational purposes. ...

Knowledge a commons

What are commons?

Commons

- water
- natural resources
- public spaces
- air/sky
- knowledge

....

Figure 1.1
THE THREE FORKS OF THE COMMONS RIVER

Nature

Air...water...dna...photosynthesis...seeds...topsoil...airwaves...minerals...
animals...plants...antibiotics...oceans...fisheries...aquifers...quiet...
wetlands...forests...rivers...lakes...solar energy...wind energy...

Community

Streets...playgrounds...the calendar...holidays...universities...libraries...museums...
social insurance...law...money...accounting standards...capital markets...
political institutions...farmers' markets...flea markets...craigslist...

Culture

Language...philosophy...religion...physics...chemistry...musical instruments...
classical music...jazz...ballet...hip-hop...astronomy...electronics...the internet...
broadcast spectrum...medicine...biology...mathematics...open source software...



The
Commons

Aus: Peter Barnes: Capitalism 3.0

Knowledge – a commons



res nullius

res privatae

res publicae

res communes

What is
knowledge?



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Knowledge – a commons



Who owns knowledge?

Those who have produced knowledge?

Yes

but nobody owns knowledge
exclusively

according to Thomas Jefferson

The Letters of Thomas Jefferson: 1743-1826

NO PATENTS ON IDEAS

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To Isaac McPherson *Monticello, August 13, 1813*

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; **but the moment it is divulged, it forces itself into the possession of every one**, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. **He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.**

Knowledge – a commons



**knowledge is a commons
but only usable when accessible**

**knowledge needs to be institutionalized appropriately
In order to become a common property**

**Open access is a form of institutionalization of knowledge as a
commons**

What needs to be done?

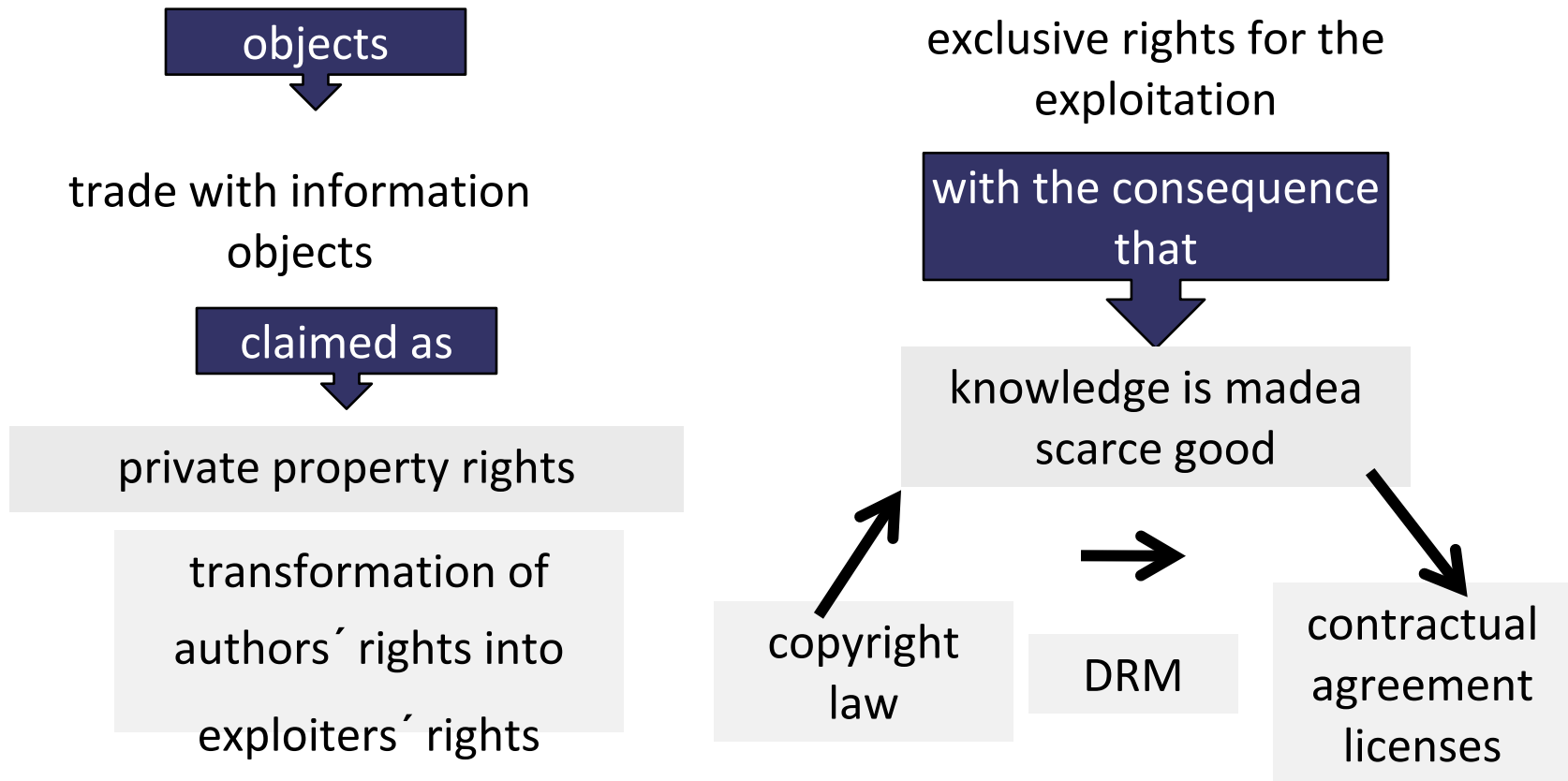
develop and implement a new understanding of property

New models for knowledge and information

Models for the institutionalization of knowledge and information on the information markets

Institutionalization of knowledge and information on the markets

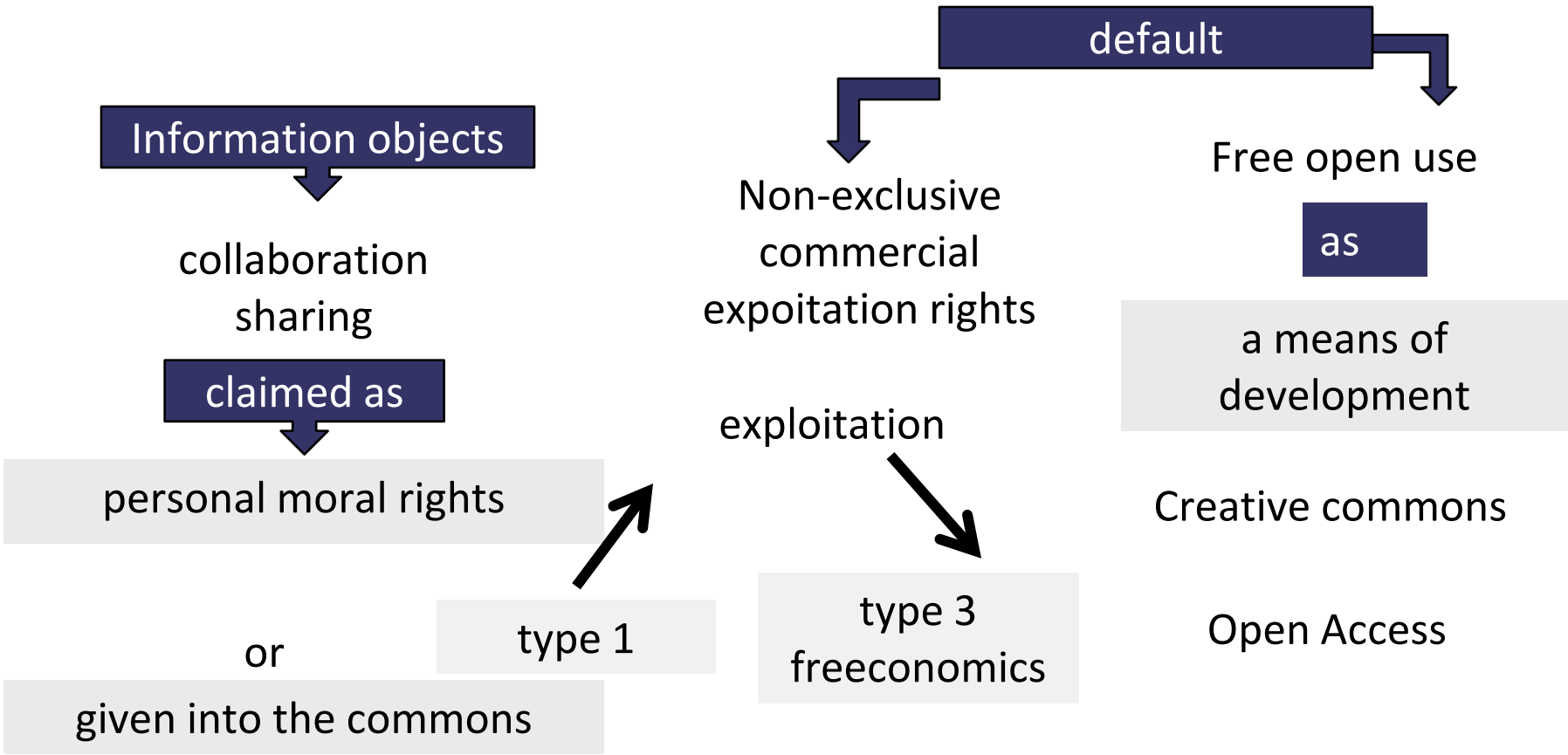
(1) Proprietary commercial information markets



Institutionalization of knowledge and information on the markets



(2) Open free markets



Institutionalization of knowledge and information on the markets

(3) Freeeconomics markets – prototpye Google

objects

Information objects
search engines

as

private property rights

but

free use

profit

Not by information itself

but

using user search profiles
for advertisement

merchandizing
cross financing

Institutionalization of knowledge and information on the markets

(4) commons-based information markets

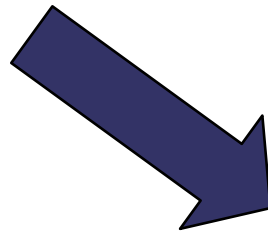
Commons

air/sky
water
natural resources
the public space
knowledge

....



**today – widely privatized
without any or very limited
compensation to the public**



but only

A property of mankind

but

**private rights for
exploitation possible and
often necessary**

with non-exclusive exploitation rights

**and with sufficient compensation to
the public**

Consequences

needed

a new understanding of intellectual property

a new understanding of copyright
free access → the default
commercial exploitation → the exception

New business models for knowledge and information in recognition of the free access paradigm

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attention***

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