

# Open Access and Competition Law

## Legal Restraints on the Competition between Electronic Products of Private Publishing Houses and University Press?

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### A. Introduction

1 On 15 July 2009<sup>1</sup> the German Research Foundation (*Deutsche Forschungsgemeinschaft, DFG*) declared that it would financially support a common platform for universities providing fast and effective access to electronic journals and repositories at a low cost of production whilst working closely with the authors, if it could be proven:

1. that the traditional market for such publications had either failed completely or at least failed with regard to certain academic disciplines
2. that there will never be a flourishing market for such services, as such publications are inherently uneconomical.

2 Market failure as described under point 1) can be said to exist as soon as the needs of academics wishing to be part of the international research community can neither be satisfied by commercial nor by non-profit service providers. Academics desire fast and easy access to highly specialised<sup>2</sup> low-threshold journals, hence, products with a very low profit margin.

3 If however, as point 2) proposes, there is no market due to lack of demand for such e-products then obviously there is no need for financial aid.

4 Without giving you any empirical evidence I would like to assume that there is an ever-growing demand for electronic journals and similar services, both nationally and internationally.<sup>3</sup> Before I will continue to speak about market failure, I would like to differentiate between different types of electronic products.

### B. Electronic publications that supplement print publications (with identical content)

5 As was stated by the president of the DFG (*German Research Society*),<sup>4</sup> one of the society's essential functions is providing open access scientific knowledge to a wide audience. Other large research organisations<sup>5</sup> in Germany have also united in their support for more open access media. Numerous German university professors, however, came together in March 2009, in what is known as the "Heidelberg Appeal"<sup>6</sup> to speak out against the growth of open access. They

believe that the publication of any article without the consent of the author is an illegal compulsory dispossession of his copyrights. The Heidelberg Appeal aims at defending copyright against open access, which is believed to rob the authors of the sovereignty over their work.<sup>7</sup> The research institutes on the other hand wish to achieve a faster and easier way for the entire scientific community to access new research results after a so-called “embargo period” of six months.

- 6 In the natural and engineering sciences digital publications have already become the order of the day.<sup>8</sup> But digital versions of traditional print media are becoming more popular in the social sciences as well. A revision of copyright law wishes to establish the right to a second electronic publication. Articles that appear in journals and anthologies could then be accessible in on-line repositories free of charge.
- 7 Only articles and papers that have already been published in print media would be made available in these repositories.<sup>9</sup> Hence, monographs would not automatically be included in these repositories. On-line access and archiving will only be the second step – following the traditional publication of a contribution in a journal. Such repositories will, therefore, not replace scientific journals, regardless of whether they will be operated either by universities or by other research institutions. Such repositories will also provide for more accurate statistics on the use, popularity and citation of certain papers.<sup>10</sup>
- 8 Reuß,<sup>11</sup> the initiator of the Heidelberg Appeal, disregards all these benefits of e-publishing with the argument that an author may and must always have control over his work and that this right includes the choice of and the control over the medium in which his work is published, as well as the choice of publisher or distributor. According to Reuß, no articles of an author may be published on-line without his explicit consent. Reuß therefore deems “the implications of the strife for more open access plainly unconstitutional”.<sup>12</sup> Rieble<sup>13</sup>, who is of the same opinion writes: “Academic as well as artistic freedom strives for an interaction between the author and his audience. Copyright secures that the communication of any author with his audience remains within his sovereignty over his work. Choice of medium and choice of audience is an elementary component of the control over this process. This is why freedom of information is not synonymous to all round access that serves only the interests of the consumers of these texts.”
- 9 I find this argument legally unconvincing. Artistic freedom as it is guaranteed by the German as well as most other constitutions gives an author the right of distribution. The fate of a text after distribution, however, is governed by a more complex and differentiated set of rules in copyright law.<sup>14</sup> Copyright is a human right – a right that must be protected and upheld by the state. It is essential that authors have the sole right to decide on the fate of their texts until they first decide to publish them. Once the text has been published, they have the right to be named as the author of the text.<sup>15</sup> To what extent an author has the right to participate in the commercialization of his or her text after publishing it, is a question governed by copyright law. Copyright law does not take an “all-or-nothing” approach to post publication rights, but instead regulates these rights in a differentiated manner by weighing up the interests on both sides, as the limitation of copyright in section 64 of the German Copyright Act (*UrhG*) shows.
- 10 Having said this, I would like to quote a ruling of the German Federal Constitutional Court of 7.7.1971<sup>16</sup> which states: “Artistic freedom is a human right that prohibits any infringement on the methods, content and tendencies applied by an artist, rules for the creative process and (either literal or figurative) restriction of the room needed by the artist for such a process to unfold.”<sup>17</sup> This does not apply to the replication of texts for tuition purposes or copies of the work that are offered to the public with the permission of the author (see sec. 6 para. 2 *UrhG*). The free reproduction of work does not infringe on the freedom of creation or the right to decide on whether one’s work is made accessible to the public. Reproduction only affects the financial interests of the artist. Therefore, the question that needs to be asked is whether the restrictions on commercial rights are in line with the constitution. These commercial rights, however, do not fall under the protection of artistic freedom, but rather constitute a property right. An author’s work must be seen as his property which is a right guaranteed by the constitution (see art. 14 of the German Constitution). In accordance with art. 14, sentence 2 of the German Constitution, property is constrained by its social relevance. Whilst sufficient commercial freedom must be given to an artist regarding his or her work, the contribution this work makes to society must also be taken into account. In this light, it seems just and fair to increase the above mentioned “embargo period” of protection to two years – a period after which the commercial use of essays, results, articles and papers would typically be exhausted. Anyone desiring earlier open access would have to pay a fee.
- 11 Copyright legislation may take into account that books constitute an essential and universal cultural good and should therefore be bound by obligations which are determined by public interest as is the case with books and essays needed for educational purposes (see sec. 52 a ff of the German Copyright Act *UrhG*).<sup>18</sup> Legislative intent may also take into account that many creative and scientific works have been made possible by public support – be it financial or intellectual influence and stimulation. Assigning it to the public domain – for the reasons men-

tioned above – after the short period of six months seems, however, quite biased. At this point I should like to quote the German Federal Constitutional Court<sup>19</sup> again: “Public interest in an access to cultural goods justifies displaying an author’s work in churches, schools and other institutions of higher education. This, however, does not necessarily imply that the author is forced to make his work available free of charge (sec. 46 of the German Copyright Act). The critique put forth by Rieble (and others), that the above mentioned research institutions are interested solely in the utility of science and that their goals undermine the interests of their own scientists and researchers, is a little far-fetched. Their idea of an undisturbed individual communication based on the ability to choose between different channels of communication, exaggerates the notion of copyright and ignores the fact that legislation shapes but also limits copyright. Intellectual property depends on its acceptance and recognition by the legal system.”<sup>20</sup>

- 12 Once a good protected by an intellectual property right – a patent or design – goes onto the market, the holder of this right no longer has full control over this good. Exhaustion occurs.<sup>21</sup> Any scientist or scholar may decide whether or not he wants to publish his article or paper. But once he has done so, it enters the free marketplace of ideas. His free choice in using a certain means of publication is governed by his academic freedom, but cannot – at least not for all time – restrict the marketplace of ideas and opinions, see sec. 52 a et seq. of the German Copyright Act (*UrhG*). What we need, is a more advanced understanding of the notion of copyright exhaustion, to better suit the needs of today’s academic and on-line community. Commercial rights are not rights ascribed to a person (the Hegelian “personality”, rather than the Lockean “labor” justification for copyright law), but are rather categorized as part of economic freedom. Whilst commercial rights may also not be dispossessed or undermined by law, there are certain social obligations that accompany them. This social aspect of property, art and science is also shaped by the law. Any person whose work is supported with public funds may be obliged by contract to publish his or her results in open access media. Even Rieble agrees that open access is acceptable “as long as it remains the choice of the author and this is made free of any undue pressure”.<sup>22</sup>
- 13 Considering the results of the debate, it seems to be common opinion that no necessity exists for open access to works which are easily attainable such as textbooks, handbooks, reference books and commentaries.<sup>23</sup> In my opinion, the sociologist Taubert<sup>24</sup> rightly concludes that such publications contain no original or new contributions to the various sciences and are therefore not of superior importance to scientific progress in the respective fields.
- 14 Open access is, however, becoming an increasingly important addition to contributions published in archives, journals and anthologies of natural and social sciences. These publications are seldom lucrative, which often makes articles and contributions hard to come by. As long as a “cooling-off” period of two years is upheld, I see no sincere arguments against the comfort, flexibility and greater distribution of knowledge made possible by open access.
- 15 If an author’s or artist’s work is used consecutively, permission has to be granted each time. There are three main rights of exploitation in copyright law: the right of reproduction, the right of distribution and the right of exhibition. The right of distribution is a material exploitation right. It does not include the right of reproduction in non-material form and is limited by the principle of exhaustion (sec. 17 para 2, of the German Copyright Act).<sup>25</sup> The other two exploitation rights are not limited by the principle of exhaustion.<sup>26</sup> The consumer does therefore not have the right to reproduce or exhibit the work he has purchased. A publication on internet-based databases falls under the right to communicate one’s work to the public (sec. 19 a of the German Copyright Act). A single distribution – as defined by sec. 17 of the German Copyright Act – does not exhaust the author’s right to reproduction (sec. 15 of the German Copyright Act) or his right to communicate his work to the public (sec. 17 of the German Copyright Act). The latter (sec. 19 a of the German Copyright Act) should be limited *de lege ferenda*.
- 16 In my opinion the notion of copyright exhaustion should be extended to imply that after the publication of a scientific paper and after a certain “cooling-off period” the author should not be allowed to oppose an on-line-publication by a university or other research institution.
- 17 For the benefit of research institutions, this exhaustion should not be restricted to the right of distribution, but apply to other rights of exploitation as well.

### C. Electronic publications that have not been published in printed media before

- 18 It is necessary to distinguish between scientific papers published in print media before they are published electronically and those initially published electronically (some of which are then later published in print media in extended versions). Especially in the natural sciences, recognition primarily goes to the first person to publish new results or inventions. As a result, a fast and unbureaucratic means of publishing is desired. open access is therefore widely-used in these fields. In contrast, because results in the social sciences cannot be as easily verified or fal-

sified, the reputation of the journal or the status of the publisher still plays a vital role. This occurs despite the fact that research has shown that such journals are reluctant to publish papers containing new ideas that contradict either established theories or the opinions of the journal editors.<sup>27</sup> Here open access could be helpful as well. Universities' electronic platforms, which would enable fast and effective distribution of research results, could also – under terms and conditions yet to be discussed – be used to store scientific journals and anthologies in one virtual place, ensuring easy access.

- 19 Let us now discuss the problems open access poses with regard to competition law, especially concerning commercial electronic products and services. It is important to keep in mind that we are not discussing competition between open source teaching material and textbooks funded by universities and those published for commercial purposes. Where there is no market failure, state aid for publications (also being offered by competitors) is not permissible.<sup>28</sup> We are discussing the other academic publications mentioned above under I.

## D. Electronic products and open access

- 20 Open access – enabling the universal and free distribution of information – has been considered a widely accepted principle of academic publishing (at least) since the “Berlin Declaration of Public Access to Scientific Knowledge” was signed by the DFG (German Research Society) and six other research institutes on 22 October 2003.<sup>29</sup> And yet, especially in the social sciences, academics still shy away from open access internet publications. While some small publishing houses still lack sufficient software to offer internet publishing, larger ones are often only prepared to offer the electronic publications, if these accompany print publications. University facilities such as the **CeDis** at the **FU Berlin** could fill these gaps.<sup>30</sup> The goal is to establish a sustainable and self-run server for publication of open access academic material, similar to projects such as **Euclid**, **Muse** and **HighWirePress**.<sup>31</sup>
- 21 **E.publishing.net** is such a service offered by the **CeDis**. It compiles academic publications and makes them accessible in electronic form. It uses the open source software **OJS** and was designed especially for academics working in specialised fields, whose work does not have the level of distribution commercial publishing houses require. These academics want to make their work available to the entire scientific community. Hence, **e.publishing.net** makes their research results available to the public free of charge. Because it is an open-source software, it cannot be sold for the sake of utilizing its contents

commercially. The knowledge is given to the public “allmende” and anybody can use the program. Only setup and service costs need to be covered by users or public organisations.

## E. Open access and the prohibition of state aid

### I. State funding of open access projects

- 22 In the declaration of the above mentioned research organisations signed on 25 March 2009, the research institutes demand redirecting of public funds in order to create new open access opportunities.<sup>32</sup> Systems such as **e-publishing.net** would make a universal, free and cost-efficient means of publishing and distributing results possible. It is in line with the aims and philosophy of open access, that research sponsored by public funds is also made available to the public free of charge.
- 23 Because scientists aim at using **e.publishing.net** as a means of publishing their results on-line without being required to publish the same results in the printed media as well, it seems to be a fully justified tool and I see no breach of competition law. Being state institutions, universities may publish their own scientific journals and thereby participate (perhaps as a “kingpin” player; *Hecht im Karpfenteich*<sup>33</sup>) in the market without breaching any constitutional prohibitions. This has been successfully done so for decades.<sup>34</sup>

### II. State funding of scientific research and the prohibition of state aid in Art. 107 of the Treaty on the Functionality of the European Union

- 24 Economic policy in the European Union aims at establishing a system of undistorted, fair and equal competition.<sup>35</sup> State funded publications may not distort existing competition between universities and private publishing houses. This causes a certain dilemma: If the aim of state funding to create faster and more cost efficient means of publishing – this being the need of the scientific community – was achieved, the position of commercial publishing houses which are not yet willing or able to enter the market of on-line publications could be weakened.
- 25 State aid is legally assessed under application of Art. 107 EC. This provision contains the prohibition of anti-competitive benefits. State funds granted wit-

hout consideration or reciprocal payment constitute state aid in terms of Art. 107 EC. Hence, any funding of electronic media granted to university publishing houses by the DFG or any other government organisation is regarded as state aid, since the universities do not reciprocate.<sup>36</sup> Art. 87 EC only mentions “undertakings” as receivers of state aid. It has, however, been established that public institutions are also considered receivers of state aid, if they participate in a market.<sup>37</sup> This is the case with e-publishing.

### III. The research aid exemption of the prohibition of state aid

- 26 Funding research is, however, not impermissible in all cases. There are many good reasons for funding innovation, research and development under certain circumstances, see 2006/C 323/01.<sup>38</sup> But as with any other type of aid, research aid generally requires prior notification of the European Commission. Non-notified aid is prohibited (para 3.1).
- 27 Only certain types of aid do not require notification.<sup>39</sup> Unlike funding for fundamental research on electronic media, funding for experimental development of electronic media does not require notification. According to art. 30 nr. 4 of the guideline 800/2008/EC this only includes the phases of conceptualisation, planning and documentation of new products. However, funding products that do not serve commercial purposes is not prohibited and does not require notification. Electronic publishing products of universities are regarded as non-commercial products, if they are only distributed to universities and related institutions at cost price. Commercial products, on the other hand, are only exempt from the prohibition (for the sake of documentation), if their development would be too expensive (art. 30 Nr. 4 of the Guideline 800/2008/EC). In this case, profits must be subtracted from the costs covered by state aid.<sup>40</sup>

### IV. Funding electronic university journals has no noticeable competitive effect on the market for equivalent commercial print publications

- 28 Funding electronic university journals has no negative effect on private publishing houses with regard to competition, if these do not publish equivalent journals in the first place, because of a lack of promise of significant profit. Where private publishing houses do in fact publish such journals, the state may only fund the research and development of university journals offered to other universities and public research institutions up to the point where the

aid becomes noticeable on the market and distorts competition.<sup>41</sup>

- 29 The only other case in which competition would be distorted is, if the aid for the electronic journals also had an effect on the market for printed journals. In my opinion, however, print and electronic publications do not constitute one market. Rather, each product forms their own market. Only online products offer immediate publication and access to new research results. Comments and discussions can, therefore, also be posted much sooner and alterations can faster be implemented. This changes the world of scientific discourse and offers dynamics that expensive and infrequently printed journals and anthologies cannot achieve. We can therefore speak of two different markets, each fulfilling a different function.<sup>42</sup>
- 30 Books and online texts generally do not belong to the same market. Whilst the average online-reader primarily seeks information, a reader with an actual book in his hands is willing to delve into the complexity of the structure of a text, to work through and digest it in its entirety. Rieble<sup>43</sup> speaks of studying a text, instead of only screening it for information. A scientist writing in an renowned journal wants to achieve the former. He writes for a particular audience and wishes to be studied. E-publishing on the other hand is open to everyone and it is improbable that any large profits will come out of it.<sup>44</sup>

### V. Does competition between universities and commercial online products exist?

- 31 Online publication by private publishing houses should also not be included in the market of open access academic publication described above. Most of such publishing houses traditionally base on print media and only publish an online journal, if they obtain the rights to the printed version as well. Consumers are obliged to pay a fee for access to online articles. Online publications by universities directed at scientists, academics and scholars are free of charge and do not require an accompanying print publication. They offer articles strictly categorised into certain fields of research, such as those offered by projects like Euclis, Muse and HighWirePress. Hence, the consumers of the universities' products and the commercial products are not the same.<sup>45</sup>
- 32 The global market for tools to publish online journals would not be distorted by state aid. Without aid, such products would have next to no chance of entering this new market. A similar development has been observed regarding the profitability of traditional printed archives, journals and anthologies. Funding open access projects could help the market

flourish and realise its full potential, which would in turn give academics and scholars the direly needed easy and fast access to knowledge.<sup>46</sup>

## F. Conclusion

- 33 This paper takes a differentiated look at different forms of academic publishing and the perspectives and opportunities created by open access as an increasingly important substitute and expansion to the classical means of publishing in journals, archives and anthologies.
- 34 It concludes that neither competition law nor state aid regulations prohibit the funding of academic open access publications or the setting up of repositories for these.
- 35 Whilst open access challenges some of the traditional ideas on copyright and authorship, this paper concludes that at least with regards to academic publishing a more advanced stance needs to be taken to better suit the needs of today's academics and the on-line community of researchers.



- 1 See [http://www.dfg.de/forschungsfoerderung/formulare/download/12\\_17.pdf](http://www.dfg.de/forschungsfoerderung/formulare/download/12_17.pdf) (15.7.2009).
- 2 Brochure by the Alliance of German Economic Organisations (*Allianz der deutschen Wirtschaftsorganisationen*), 19 October 2009, see <http://www.wissenschaftsrat.de/aktuelles-allianz.html>.
- 3 Kleiner, in: *Forschung und Lehre* 2009, p. 640.
- 4 German Research Foundation (*Deutsche Forschungsgemeinschaft*), German Science and Humanities Council (*Wissenschaftsrat*), German Academic Exchange Service (DAAD), Fraunhofer Society (*Fraunhofer Gesellschaft*), Helmholtz Society (*Helmholtz-Gemeinschaft*), Max Planck Society (*Max-Planck-Gesellschaft*), Alexander von Humboldt Foundation (*Alexander von Humboldt-Stiftung*), Leibniz Society (*Leibniz-Gemeinschaft*) and German Academy of Sciences Leopoldina (*Leopoldina*).
- 5 *Heidelberg Appeal*, Für Publikationsfreiheit und die Wahrung der Urheberrechte (*For More Publishing Freedoms and Copyright Protection*) (22 März 2009), see [www.textkritik.de/urheberrecht/index.htm](http://www.textkritik.de/urheberrecht/index.htm).
- 6 So Reuß, the initiator of the Heidelberg Appeal, in: *Forschung und Lehre* 2009, p. 644.
- 7 Kleiner, in: *Forschung und Lehre* 2009, p. 640.
- 8 Kleiner, in: *Forschung und Lehre* 2009, p. 640, 641.
- 9 Kleiner, in: *Forschung und Lehre* 2009, p. 640, 641.
- 10 Reuß, in: *Forschung und Lehre* 2009, p. 645.
- 11 Reuß, in: *Forschung und Lehre* 2009, p. 645.
- 12 Rieble, *Forschung und Lehre* 2009, p. 648; Reuß/Rieble, *Autorschaft als Werkherrschaft in digitaler Zeit (Authorship and Control in the Digital Age)*, 2009, p.29 et seq.
- 13 Sec. 28 et seq. German copyright act (UrhG).
- 14 Sec. 13 German copyright act (UrhG).
- 15 Ruling of the German federal constitutional court, BVerfG 31, 229, 239.
- 16 Ruling of the German federal constitutional court, BVerfG 30, 173, 190.
- 17 Dreier, in: Dreier/Schulze UrhG, sec. 52 a, para. 1.
- 18 Wandtke/Ost, in: Wandtke/Bullinger UrhG, sec. 52a, para. 3.
- 19 Ruling of the German federal constitutional court (BVerfG, 11.10.1988), In: BVerfG GRUR 1989, p. 193, 196 – Vollzugsanstalten.
- 20 Sec. 17 Abs. 2 German copyright act (UrhG); The doctrine of “copyright exhaustion” or “first sale exhaustion” describes the loss of certain intellectual property rights after the first unrestricted sale or use of the property subjected to such rights, see ruling of the German Federal Court of Justice (BGH) GRUR 1988, p. 206, 210 – Kabelfunkentscheidung II.
- 21 Rieble, in: *Forschung und Lehre* 2009, p. 651.
- 22 Taubert, in: *Forschung und Lehre* 2009, p. 657, 659.
- 23 Taubert, in: *Forschung und Lehre* 2009, p. 657, 659.
- 24 According to majority opinion an online publication does not fall under this provision, of different opinion: Berger, “Urheberrechtliche Erschöpfungslehre und digitale Informationstechnologie” (Copyright Exhaustion and Digital Information Technology) GRUR 2002, 198 et seq.
- 25 BGH GRUR 2005, p. 940, 942; BGH ZUM 2000, p. 1082, 1084.
- 26 Taubert, in: *Forschung und Lehre* 2009, p. 657, 658.
- 27 Mestmäcker/Schweizer, EG Wettbewerbsrecht, sec. 2, para. 120 et seq.
- 28 [http://oa.mpg.de/openaccess-berlin/Berliner\\_Erklaerung\\_dt\\_Version\\_07-2006.pdf](http://oa.mpg.de/openaccess-berlin/Berliner_Erklaerung_dt_Version_07-2006.pdf).
- 29 <http://www.cedis.fu-berlin.de/veroeffentlichungen/index.html>.
- 30 [www.projecteuclid.org](http://www.projecteuclid.org); [www.muse.jhu.edu](http://www.muse.jhu.edu); [www.highwire.stanford.edu](http://www.highwire.stanford.edu).
- 31 Gemeinsame Erklärung der Wissenschaftsorganisationen Open Access und Urheberrecht: Kein Eingriff in die Publikationsfreiheit (*Common Declaration of the Research Institutes on Open Access and Copyright Law: No Infringement in the Publishing Freedom*), 25. March 2009, see <http://www.wissenschaftsrat.de/aktuelles-allianz.html>.
- 32 Krüger, in: *Allgemeine Staatslehre* 2. Ed., p. 606 et seq.
- 33 European Court of Justice (ECJ), 15.3.1994, C-387/92, (1994) E.C.R. I-877, 907, para.11.
- 34 See Art. 3 (1)(g) EC; ECJ, 19.3.1991, (1991) E.C.R. I-1223, 1296, para. 4; Säcker, in: *Competition Law: European Community Practice and Procedure*, Intro., para. 1-1-001; Immenga/Mestmäcker, in: Immenga/Mestmäcker, *Wettbewer EG/I*, Intro. B. para. 8; Terhechte, *Die Rolle des Wettbewerbs in der europäischen Verfassung (The Role of Competition in the European Constitution)*, EuR Supplement 3, p. 107-226.
- 35 Ehrlicke, in: Immenga/Mestmäcker, *Wettbewer EG/I*, Art 87 EC, para. 42; Koenig/Kühling/Ritter, EG-Beihilferecht (*EC-State Aid Law*), para. 67; Müller-Graff, ZHR 152 (1988), p. 403, 418.
- 36 European Court of Justice, 15.3.1994, C-387/92, (1994) E.C.R. I-877, 907, para.11 – Banco Exterior de Espana/Aytuntanientode Valencia, ECJ, 27.10.1993, C-69/91, (1993) E.C.R. I-5335; Heidenhain, *Handbuch des Europäischen Beihilferechts (Handbook of European State Aid Law)*, § 3, para. 14; Huber, EuZW 2008, p. 171.
- 37 Information Commission, O.J. C 323/1, 30.12.2006; Huber, EuZW 2008, p. 171; Frenz/Kühl, EuZW 2007, p. 172.
- 38 Commission Regulation (EC) No 800/2008, 6.8.2008, O.J. L 214 9. August 2008; see Heinrich, *Die rechtliche Systematik der Forschungsförderung in Deutschland und den Europäischen Gemeinschaften unter Beachtung von Wissenschaftsfreiheit und Wettbewerbsrecht (Legal Aspects of Research Aid in Germany and the European Communities whilst Taking Academic Freedom and Competition Law into Account)*, 2003, p. 175 et seq; 210 et

- seq; *Bartosch*, Die neue Allgemeine Gruppenfreistellungsverordnung im EG-Beihilfenrecht (*The New Block Exemption Regulation in EC-State Aid Law*), NJW 2008, p. 3612 et seq.
- 39 Commission Regulation (EC) No 800/2008, 6.8.2008, O.J. L 214, 9. August 2008.
- 40 European Court of First Instance, 23.10.2002, (2002) E.C.R. II-4217, 4245, para. 69 – Diputacion Floral de Guipuzoca u.a./Kommission.
- 41 *Kleiner*, in: *Forschung und Lehre* 2009, p. 640.
- 42 *Rieble*, in: *Forschung und Lehre* 2009, p. 648, 650.
- 43 *Day*, Economics of Electronic Publishing, in: *The Journal of electronic publishing*, Vol. 1, no. 1&2, January 1995, siehe <http://www.journalofelectronicpublishing.org>.
- 44 [www.projecteuclid.org](http://www.projecteuclid.org); [www.muse.jhu.edu](http://www.muse.jhu.edu); [www.highwire.stanford.edu](http://www.highwire.stanford.edu).
- 45 The European Commission`s Green Paper “Copyright Law in an Economy Determined by Knowledge” (*Urheberrechte in der wissensbestimmten Wirtschaft*) COM (2008) 466 final. , GRUR 2009, p. 135, 139, see also *Peifer*, GRUR 2009, 22 et seq.