



Committee on Copyright and other Legal Matters (CLM)

Country Report Germany

Annual report to the IFLA CLM committee
Seoul, Korea 2006

Copyright

New legislation

The "second basket" for German copyright law

As Germany got a new federal government in 2005 the old bill (the "second" basket) to change the copyright act had to be brought before parliament again.

Text of the January 2006 bill: <http://www.bmj.bund.de/media/archive/1122.pdf>

Proposals for new or to be changed regulations are:

- Contracts for unknown exploitation;
- Citation right;
- On the spot consultation in libraries;
- Right of reproduction;
- Document delivery.

Two intended regulations affect libraries' activities:

Art. 52b Communication to the public of works through electronic terminals in libraries open to the public

It is permissible to make available published works exclusively in the rooms of libraries open to the public, museums or archives at specially installed electronic terminals for research purposes or private studies, as long as there is no opposing contract and for ends that are neither directly nor indirectly commercial. A fair remuneration has to be paid. This can only be claimed by a collecting society.

Art. 53a Document delivery on demand

1. *The reproduction and distribution via mail or fax by public libraries of single articles published in news-papers and journals as well as small parts of published works is legal by single order as long as the use by the client is allowed in art. 53. The reproduction and distribution in electronic form is permissible exclusively as a graphic file and proper only, if access to the articles or small parts of a work is not possible for members of the public on a contractual base from places and at times of their choice.*
2. *The copyright owner is entitled for a fair remuneration. This right can be claimed only by a collecting society.*

These regulations differ from the versions in the 2004 version of the bill (cf. last year's country report from Germany). A broad coalition of research and education institutions opposes the "second basket". Details can be found under: <http://www.urheberrechtsbuendnis.de/index.html.en> - The Coalition for Action "Copyright for Education and Research" is representing the interests of Research and Education with regard to the amendment of the German Law on Intellectual Property Right (UrhG Urheberrechtsgesetz) in the political discussion.

Amendment to the federal act about the German National Library

A new version of the federal act about the German National Library was published 29. June 2006 (<http://www.d-nb.de/wir/pdf/dnbg.pdf>). It enlarges the collection mission of the library. From now on digital or web publications fall under the legal deposit regulation. The library now officially works under the name "German National Library".

Law cases

The SUBITO case

What is SUBITO?

On its webpage you'll find the following definition: "*SUBITO is the brand name of the **document delivery service of research libraries** in Germany, Austria and Switzerland. SUBITO provides a quick and easy-to-use service which makes copies of articles from periodicals or books, sends them to the user and supports the lending of books.*"

So SUBITO is the name of the main German document delivery service. But far more important, SUBITO is not only a name, it is a private company. And the company partners are all the participating libraries, university libraries as well as state libraries. That means SUBITO is a good example for the privatization of a formerly public sector.

SUBITO started 1994 as a so-called "federal/state initiative" by the Federal Ministry of Research and Technology to improve document delivery by German libraries. Over the years it became clear that only the legal form of a private company would meet the demands of today's knowledge society.

The SUBITO case

Although publishers had been involved in the SUBITO initiative from the very beginning, there had been all the years controversial positions about the need for licenses. SUBITO sees its service fully covered by German copyright law, which means additional licenses are unnecessary.

On 18 June 2004, the German Publishers Association and the Stichting STM as plaintiffs took SUBITO to court. The case was brought before the court of first instance (Landgericht) in Munich and labeled as a "test" case by the parties. Although court cases are public, the records of a case are confidential. Normally! In the SUBITO cases both parties enjoyed open access principles and made the texts of complaint and defense available on the internet for a long time (www.boersenverein.de/de/69181?dl_id=69928 & www.subito-doc.de/base/downloads/klageerwiderung.pdf. / both no longer valid!).

The application

The plaintiffs' application for relief shocked the libraries in Germany. The publishers wanted SUBITO and all participating libraries

- To stop document delivery (copies of articles) to end users via email, ftp active, internet download.
- To stop document delivery (copies of articles) to other libraries via email, ftp active, internet download **PLUS** fax and letter mail.

The second application would end interlibrary loan for any form of reproduction.

The main arguments

The plaintiffs' main arguments are:

- Subito is a commercial enterprise with an economic advantage.
- German copyright law does not allow mailing of digital reproductions.
- A library must buy a license from the publisher for any kind of electronic document delivery.
- Interlibrary Loan ILL is not a sufficient legal base for document delivery, because mailed copies are not "on loan".

The judgment

The Munich court gave his judgment at 15 December 2006, which has been made available full text over the internet by SUBITO (<http://www.subito-doc.de/cms/filedatabase/files/Teilurteil15Dez05-komprimiert.pdf>). In January 2006 both parties appealed, so the judgment is nor final and not absolute. The case is now pending before the Court of appeal (Oberlandesgericht) in Munich. It could go up to the German Federal Supreme Court and the Constitutional Court. But that's a future story....

Opinion of the court

In its opinion the court surprised everybody. The court ruled that mailing of paper copies via interlibrary loan from one library to another is illegal, because it violates art. 53 (VI) German copyright law. But it is allowed as customary law, because for decades (= since 1965) nobody objected to this „illegal“ practice. That means, SUBITO libraries can continue with a document delivery service in analog form (= paper copies).

But in its second opinion the court ruled that mailing of digital copies is illegal and prohibited, as art. 53 German copyright law (in force since September 2003) doesn't offer a valid legal basis.

As the case is on appeal now, this first judgment is just the beginning of the story.

Legal Complaint by STM publishers against Germany

In 2004 STM publishers and others had filed a legal complaint before the European Commission against Germany under the heading "Failure to comply with Community law" because of a pretended German defective implementation of the EU directive 2001/29/EC. Full text is available under

http://www.boersenverein.de/global/php/force_dl.php?file=%2Fsixcms%2Fmedia.php%2F686%2FSubito-Beschwerde.pdf.

This complaint was rejected by the EU commission in February 2006.

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