



## Committee on Copyright and other Legal Matters (CLM)

### Country Report Germany

Annual report to the IFLA CLM committee  
Durban South Africa 2007

#### Revision of copyright law

##### The "second basket" for German copyright law

In last year's country report Germany I mentioned the copyright bill (the so called "second basket"). The German Libraries Association (DBV) had put a lot of work in lobbying activities. In July 2007 this bill passed German parliament with minor changes, resulting mainly from combined efforts by the DBV and the Coalition for Action "Copyright for Education and Research". For libraries the most important new regulation is about document delivery. It has now this form:

##### *Art. 53a Sending copies on demand*

*(1) The reproduction and transmission via mail or fax by public libraries of single articles published in newspapers and journals as well as small parts of published works is permissible for single orders as long as the use by the client is allowed by art. 53. The reproduction and transmission in other electronic form is permissible exclusively as a graphic file and for illustration of instruction or for scientific research purposes, as far as this is justified for non-commercial purposes. The reproduction and transmission in other electronic form is permissible further only, if access to the articles or small parts of a work is obviously not possible for members of the public on a contractual base under reasonable conditions from places and at times of their choice.*

*(2) The copyright owner shall receive a fair remuneration for the reproduction and transmission. This right can be claimed only through a collecting society.*

The bill also introduces a new regulation about "Communication to the public of works through electronic terminals in libraries open to the public" in art. 52b. The new regulation implements art. 5 (3) n of the European directive 2001/29/EC into German copyright law and opens the way for digitisation projects in libraries (cf. last year's country report from Germany for more details). If the Federal Council (Bundesrat) of Germany agrees to the bill in September, the new copyright law could come into force in winter.

#### Law cases

##### The Subito case before the Court of Appeal

On 10 May 2007, the Court of Appeal, the Oberlandesgericht Munich ("OLG"), rendered a decision in the case of the German publishers association ("the plaintiff") against Subito and the university library in Augsburg. The subject of the case was the document delivery service by Subito libraries. Subito is the brand name of the document delivery service of research libraries in Germany, Austria and Switzerland. The plaintiffs' application for relief demanded that Subito and all participating libraries stop document supply (that is, copies of articles) to end users via email, ftp active, Internet download, as well as stop document supply to other libraries via email, ftp active, Internet download plus fax and letter mail. The court of appeal partially modified the decision of the first instance (as reported in last year's German country report), and dismissed the appeals of both parties.

The general press covering the decision of the OLG reported a defeat for the Subito digital document delivery service. This is only partly correct. A careful reading of the judgment and its reasons reveal several remarkable sayings from the court. The publishers intended to achieve a comprehensive prohibition of any kind of document delivery by libraries. The court of appeal rejected this outright prohibition, even further than in the court of first instance. The court of appeal regarded only the delivery of copies of six individual, exactly described articles by e-mail, ftp asset or Internet download as a violation of German copyright law. As such, the court dismissed the following requests by the plaintiffs:

1. To prohibit Subito from every kind of document delivery by letter mail or fax.
2. To prohibit Subito from engaging in digital document delivery of all other articles from scientific journals.
3. To prohibit by Subito from offering any sort of digital document delivery service.

The appeal court in its decision determined the following:

1. A print journal does not enjoy *sui generis* database protection in accordance with German copyright law (art. 87a UrhG).
2. A print journal does not enjoy legal protection as a "compilation" in accordance with German copyright law (art. 4 (1) UrhG), because the buildup of individual contributions is not a personal mental achievement under German copyright law (art. 2 (2) UrhG).
3. Any kind of analog document delivery by letter mail or fax is absolutely legal as customary law. The decades old practice of document delivery via interlibrary loan does not become illegal by new digital techniques.
4. A digital document delivery by email, ftp asset or Internet download does not fulfill the requirements of making available to the public in accordance with German copyright law (art. 19a UrhG = art. 3 (1) of directive 2001/29/EC). With this statement the OLG Munich takes a contrary position against opinions in German legal literature.

The two most important statements of the appeal judgment are somewhat hidden and/or in a form understandable only to legal experts. First, the court makes clear that German art. 53 UrhG regarding digital duplication does not implement fully the authorization given by article 5 (2c) of directive 2001/29/EC. The German legislation permits digital reproductions and dispatching them for scientific and educational purposes by libraries is in full accordance with this European Union ("EU") directive. The court especially refers to the importance of document delivery for science and research.

Second, the judgment explains the prohibition of a digital document delivery by Subito. The court sees hereby a violation of art. 53 (2. 3) UrhG. With the implementation of directive 2001/29/EC into German copyright law in the year 2003 digital copies are legal only for private or scientific use. Subito offers its service to everyone, which includes economic and commercial advantage. For that purpose only analog reproductions on paper are permitted under German copyright law. Digital copies for direct or indirect commercial use are not allowed by art. 53 UrhG, and they must be licensed by private contract. However, the OLG Munich shows the way to a positive solution for every document delivery service by libraries: Any digital copy exclusively made for scientific use would be totally in accordance with art. 53 (2.1.1) UrhG. Subito libraries can continue to send out digital reproductions to persons claiming a scientific or educational purpose.

### **Lobby activities**

The German Libraries Association (DBV) had regular discussions with the publishers' association (Börsenverein). This year the main topics were orphan works and out of print works. It is planned to sign an agreement, which allows libraries to digitize works still under copyright, if certain conditions are fulfilled.

During these discussions two other agreements were signed by the Börsenverein, which allow libraries to use parts of works for the purpose of catalog enrichment. The Börsenverein allows libraries to enrich their catalogs with tables of contents, registers, bibliographies, cover text from

books and journals. This permission does not include a whole book cover (with illustrations) and abstracts.

Information about further activities of the DBV law commission can be found under <http://www.bibliotheksverband.de/ko-recht/index.html>

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