

Country Report Germany

Annual report to the IFLA CLM committee
Quebec Canada 2008

1. *New copyright law in force*

With the beginning of the year 2008 the so called 'second basket' for German copyright law came into force. The German Libraries Association (DBV) had put a lot of work in lobbying activities during the last two years. In July 2007 the bill passed German parliament, and in October 2007 the German federal council (Bundesrat = states council) agreed with minor modifications, resulting mainly from combined efforts by the DBV and the Coalition for Action 'Copyright for Education and Research'. Several changes have been implemented into copyright law, but for libraries the most interesting part of the amendment are two new regulations.

The first new article regulates the communication to the public of works through electronic terminals in libraries open to the public.

Art. 52b

"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. Basically it is only permissible to make available as many copies at electronic terminals as the collection of the institution possesses. A fair remuneration has to be paid. This can only be claimed by a collecting society."

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. Since the year 2003 art. 53 (2) n. 2 German copyright law allows to digitize a rare collection for archival and preservation purposes. The new art. 52b defines the use of digitized archival items in a library.

The other new article deals with document delivery.

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."*

For the first time in history German copyright law offers a legal base for document delivery by libraries. The new article grants only to libraries the exclusive right to copy a work and deliver the reproduction to a user. Document delivery by libraries has to fulfill two or three conditions. Delivery of paper (analog) copies is allowed, if it is based on a single order and the user can rely upon art. 53 (private or research purposes).

Electronic document delivery is also allowed, but it must fulfill three conditions:

1. Education or research purposes;
2. The digital copy must be a graphic file (PDF);

3. An electronic commercial access to the article should not exist. If the commercial service is not obviously and under reasonable conditions, a library may deliver digital copies notwithstanding. This started a discussion in Germany about the question, what are reasonable conditions. Is the price of 5,- Euro for a student unreasonable, if this student spends 5,- Euro each day for food?

German libraries are moderately happy about the new law, but not so enthusiastic about the restrictions for electronic document delivery. The German library association (DBV) published an explanation of the new law¹, which got harsh reactions by the publishers association. As document delivery is traditionally part of Interlibrary Loan (ILL) the details of the obligatory remuneration have to be discussed between the German states (responsible for cultural activities) and the collection society.

Another modification in the copyright law results in a massive disadvantage for schools. Any kind of copying of school books as now strictly prohibited. Every kind of reproduction in schools must be licensed. Of course this particular modification of the law was pushed forward by the school book publishers.

Orphan works: The German copyright law still is silent about the problem of orphan works. In a recent article two copyright specialists show that the digitalization of such works is not possible under German law. (Gerald *Spindler*, Jörn *Heckmann*: Retrodigitalisierung verwaister Printpublikationen : die Nutzungsmöglichkeiten von „orphan works“ de lege lata und ferenda, in: GRUR Int. 2008, 4, pp. 271-284.)

2. New model licence (Rahmenvertrag) by Subito

Subito and its member libraries have a great interest to send copies in electronic format. It had signed some time ago (July 2006) a model licence for document delivery to clients outside of Germany. This was updated in December 2007 by an additional licence contract (Key issues of addendum no. 1 to the general agreement between publishers and Subito http://www.stm-assoc.org/storage/Key_Issues_Addendum_No.1_English_180108.pdf) for document delivery inside of German. This new licence provoked heated discussions among German libraries, as it is in large parts much more restrictive than the new art. 53a. Subito is being criticized for completely surrendering to the publishers' commercial interests. As art. 53a allows all libraries the service of document delivery as part of Interlibrary Loan, Subito libraries are free to deliver copies without a licence contract to non-commercial users. Only for commercial clients a licence is necessary. So Subito slowly becomes a commercial enterprise, but with negative results for the academic community.

3. A new library law

Germany is a federal state, and the competence for cultural matters belongs exclusively to its states (Länder). None of these states ever had a library law. Only in the former German Democratic Republic a library decree was in force (Bibliotheksverordnung BVO 1968). In spring 2008 the state of Thuringia (Thüringen) brought a bill for a library law into its parliament. The German library association DBV took up the opportunity, put the topic of library laws on its agenda and published a model library law (http://www.bibliotheksverband.de/bibliotheksgesetz/dokumente/Musterbibliotheksgesetz_09_04_08.pdf). Now several other German states are discussing the pros and cons of a library law in their parliaments.

¹ Vgl. Talke, Armin: § 53a UrhG – Auslegungsschwierigkeiten beim Kopienversand. In: Bibliotheksdienst 42 (2008) S. 288-297.

4. Law cases

Several cases have been decided by German courts dealing with lost/stolen library ID cards, the last one by the administrative court in Münster (http://www.justiz.nrw.de/nrwe/ovgs/vg_muenster/j2007/1_K_464_06urteil20070424.html). In all these cases the courts refused to put any liability on the library user. The main argument is: if a library offers the service of lending items by using a machine-readable ID card as the unique proof of identity, it has to take over all damages resulting of lost/stolen cards.

5. Lobby activities

The German Libraries Association (DBV) had regular discussions with the publishers' association (Börsenverein). In 2007 the main topics were orphan works and out of print works.

During these discussions an agreement was signed by the Börsenverein, which allows libraries to use parts of works for the purpose of catalog enrichment. The Börsenverein permits libraries to enrich their catalogs with tables of contents, registers, bibliographies, cover text from books and journals. Another agreement was signed with the collection society for images and art (VG Bild Kunst) allowing libraries to enrich their catalogs with images of book covers

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

Prepared by
Harald Müller / 26 June 2008