



Country Report Germany

Annual report to the IFLA CLM committee
Gothenborg Sweden 2010

Copyright

Revision of copyright law

The next revision of the German copyright act (Urheberrechtsgesetz) gets started. In her "Berlin speech on copyright" on June 14, the federal minister of justice claimed an ongoing adjustment of copyright to the digital revolution. She underlined, that the creator's right remains the quintessence of any copyright amendment, but, on the other hand, that the advantages of the digital world should be made use of. In the eyes of the ministry, there will be no "flatrate" for exploiting copyright protected works on the internet.

The ministry of Justice (Bundesjustizministerium) scheduled 4 hearings with stakeholders, where at a time one crucial issue is going to be (or already has been) discussed:

- June 28: ancillary copyright for publishers. Publishers claim – apart from derived copyright concerning the works themselves – an own right for their efforts. Motivation for their demand are existing web services like google news, which, in the opinion of (some, especially newspaper-) publishers, exploit the publisher's efforts without providing any remuneration to them. The claimed ancillary copyright is supposed to permit an equivalent, which would be collected by collecting societies. However, the publisher's claim did not get very far to date: In the hearing on June 28, they did not manage to define in what exactly their effort consists and how it could be put in legal language.
- July 13: Open Access (among other topics): The claims of the library and scientists community seem to bring the attitude of copyright experts in the ministry of justice in motion: There was a lively debate about legal possibilities to facilitate making available works that already have been published in periodicals. One possible solution is the amendment of § 38 copyright act, which at present allows the author to publish his article again after one year, *if there is no different agreement between author and publisher*. Libraries and scientists claim this dispositive law to be changed into mandatory. The amendment would allow authors to give a simple license to repositories. Even if we take into account the practice of some publishers who allow making available the work at least as a pre-print, the change would give certainty to the authors, who, in many cases, simply don't know any more if the stipulations allow making available the work on a repository. In Germany, many of the publishers don't appear in the Sherpa/Romeo-List. Concerning e.g. German legal publishers, normally the (exclusive) agreements don't allow for making available the works on repositories. Open Questions for the amendment: The period of time to elapse after the first publication (in the periodical) and the possible collision with copyright in other states.
- September 27: Collective Licensing: The hearing will be about necessary copyright amendments on behalf of the digital use in the internet.
- October 13: Orphan Works. The debate between the German National Library, the collection societies and the publishers association about implementing an exception for orphan works is put on ice. The solution was targeted on a copyright exception, which stipulated detailed condition for a diligent search for a work to be declared as "orphan". On behalf of the draft, there should be paid a licence fee to the collection society, which serves to pay a indemnification if the copyright holder shows up. As the EU law, esp. the "Infosoc"-directive 2001/29/EC does not foresee an exception for orphan works, national law cannot be enacted. *Tilman Lüder*, copyright expert in (EU-) DG Internal Market and Services, announced that the

Commission will adopt a „regulatory approach” to provide legal certainties for all parties to use orphan works by the end of 2010.

Levies

In Germany most of the copyright levies are not paid directly by libraries, universities, museums etc. As all these remunerations can only be claimed by a collecting society in most cases levies contracts (Gesamtvertrag) have been signed by state authorities and the collecting societies. In 2010, to date, one more of these contracts has been signed: The levies contract on document delivery (2010-1-6). In Germany, § 53a copyright act allows libraries the document delivery on paper or as fax. The electronic delivery (other than fax) is only allowed if the right-holder does not offer access to the work via internet on reasonable (“angemessen”) terms and conditions.

Legal matters

New legislation

Library acts (Bibliotheksgesetze)

In Germany, the 16 individual states (Länder) have the legislative competence for culture and science. So they are also competent to enact library acts. After the first library act in Germany has come into force in 2008 in Thuringia, the state of Sachsen-Anhalt followed in 2010. The Governments of Schleswig-Holstein, Hessen and Nordrhein-Westfalen already brought bills into their parliaments.

Law cases

Court of appeals (OLG Frankfurt): Works available by dedicated terminals in the library’s lecture room, Darmstadt university library case (court of appeals, OLG Frankfurt, Az.11 U 40/09)/ for the facts of the case and court of lower instance decision see country report 2009)

The library must prevent library users to make copies: USB-Ports at the dedicated terminals are not allowed, the library cannot connect the terminals with printers.

Federal supreme court of justice (Bundesgerichtshof): Moral rights and newspaper online archives, (BGH, 15.12.2009, Az. VI ZR 227/08 und VI ZR 228/08 and BGH, 9.2.2010, Az. VI ZR 243/08 und VI ZR 244/08)

The German supreme court (Bundesgerichtshof) decided in 2 cases that an online archive, which contains articles with persons recognizable by name or picture (here: Murderer of the famous actor Walter Sedlmayr. The murderers were just released from prison), is not liable for removal of that article from the online archive. Every time, when a person appears individuatable in an article, his/ her personality rights has to be pounded with the freedom of press. In this case, the court’s decision was based on the fact, that the respective newspaper article was very appropriate as well as the report was objective and *that the archive was not indexed by search engines.*

Constitutional Court (Bundesverfassungsgericht): Data retention unconstitutional (BVerfG, 2.3.2010, Az. 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08) The German law of data retention is unconstitutional. Access provider are not committed nor allowed to store traffic data. As the German act is based on the EU directive 2006/24/EC, the legislator has to oblige access providers to store the data, so the act is expected to be passed again with the modifications the constitutional court has defined. However, the underlying EU directive is applied for control of compatibility with European law at the European Court of Justice.

Secondary liability for copyright infringement via Wi-Fi Router, Supreme Court (Bundesgerichtshof) BGH, 12.5.2010, Az. I ZR 121/08 : An individual person who runs a Wi-Fi Router in the private home, can be liable for copyright infringements committed by others, if he does not have impeded the access to the router’s service by password.

Lobby activities

The German Library Association made proposals for the copyright revision and takes part in every hearing at the ministry of justice.

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