



## 1. Copyright: Revision/changes in existing law or regulations / new legislation

### General:

Needless to say, we find legislative activity all over the world in order to deal with the challenges of the Internet, digitization and “knowledge society”. Apart from more general ideas of a more fundamental reformation of IP law, discussions center on piracy, (digital) preservation of cultural heritage, TPM’s, new duties and responsibilities of *Collective Management Organizations*. In some states, we find legislative initiatives to foster Open Access to public funded research by limitations of exclusive licensing Reports show that librarians lobby in parliaments, ministries and respective authorities for the copyright issues related to libraries. Below, you find a (non-exhaustive) summary of the 17 country reports (Australia, Bulgaria, Canada, China, Croatia, Denmark, Finland, Ghana, Germany, Hong Kong, Latvia, Moldova, Namibia, Netherlands, Russia, South Africa and the US) with respect to new developments from August 2011 – July 2012.

### Exclusive rights:

In **Hong Kong**, the exclusive right to communicate works to the public has been proposed by the government. In **Bulgaria**, the right of communication to the public has been specified and, at the same time, the penal law for copyright infringement has been aggravated: Now it’s up to 6 years prison. In the **USA**, copyright sharpening bills SOPA, PIPA and OPEN, as a consequence of the overwhelming protests, failed in the Congress. SOPA (Stop Online Piracy Act) was introduced “to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property.” PIPA (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act; “Protect IP Act”) was introduced “to prevent online threats to economic creativity and theft of intellectual property.” This legislation would have curtailed copyright violations on the Internet by blocking access to and cutting revenue sources for foreign websites primarily dedicated to infringing or counterfeit goods, referred to as “rogue websites.” OPEN (Online Protection and Enforcement of Digital Trade Act) was intended as less severe alternative to SOPA/PROTECT-IP. In **Germany**, respective to consultations between ministry of justice and stakeholders, presumably there will be installed an ancillary copyright for press publishers. Corresponding to the initiative, search engines will have to pay levies for implementing snippets of newspaper articles in their service (e.g. Google News). In **South Africa**, and **Namibia** new, very controversial Intellectual Property Amendment Bills on Traditional Knowledge create a whole new layer of works under copyright protection.

**Fair use/ exceptions:**

In **Canada** education and parody was added as a non-infringing use under fair dealing. In **Russia**, new rules passed 1<sup>st</sup> parliament reading: respective to the proposal, libraries are allowed to create single digital copies of old, defective publications and manuscripts the use of which could lead to their loss, and of works of outstanding scientific and educational significance. The proposal allows delivery of digital copies of articles and small works by user requests for education purposes. In **Hong Kong**, a government bill seeks to introduce the exclusive right to communicate a work to the public, and exceptions of this exclusive right for the purposes of education and preservation by libraries. Moreover, the bill proposes “safe harbour” regulations for service providers in case of copyright infringements on their platforms. In **Bulgaria**, there has been fixed a remuneration also for the fair use in the field of copyright – related rights (ancillary copyrights).

**Orphan works / out-of-print-works:** In the **European Union**, the draft directive on orphan works is on its way. The last version from June 8, 2012, which is the result of consultations between European Parliament and Council, installs the privilege (only) for libraries, archives and other cultural institutions to copy and communicate the works to the public after diligent search. In the annex to the draft directive are listed search resources which at least have to be consulted by the privileged institutions. The later appearing rightholders have to be remunerated. There is mutual recognition of national legal instruments within the EU. The communication of out-of-print-works to the public is not part of the draft directive, but is permitted on a national level.

In **Germany**, the Ministry of justice is consulting stakeholders on the respective national instruments, especially on the question, if the catalogue of search resources should be extended and how the remuneration of appearing rightholders can be organized. In **China**, the National Copyright Administration launched a Revised Draft of the Copyright Act, which would permit the use of o.w. after thorough search and paying a fee to the state’s copyright management department. There is no limitation of privileged institutions. In the **USA**, libraries (ARL) released a resource packet on orphan works, explaining the lawsuit against Hathi Trust and providing general information concerning orphan works. In January, the **Finland** Copyright Commission made a suggestion for a new extended collective license. This would give the publishers a right to conclude agreements with representative collecting societies and with extended effects based on law for the digitization and making available of their own archives. At the moment this is possible for libraries, museums and archives only.

**United States** Copyright Office proposes that direct licensing, collective licensing, and other emerging business models might balance the needs of users with the interests of copyright owners.

From **Bulgaria**, currently there are about 38 000 objects in EUROPEANA. The Commission indicative target is to reach 267 000 objects by 2015. A cooperation project between Bulgarian Wikipedia and the State Agency “Archives” has started. In **Latvia**, the working group reviewing the

law, organised by the Ministry of Culture of Latvia agreed on a provision defining the cases when digitization of cultural heritage materials by libraries is allowed (works that are no longer commercially available for preservation purposes without copyright owners consent and without any remuneration), a provision for access of digitized materials (on the premises of memory or educational institutions and NGOs serving as memory institutions, with secured connection for registered users using specially designed workstations, extending the definition of the closed network also to the network of public libraries) access to thumbnails by memory institutions. In **Bulgaria** and **Croatia**, small individual projects of digitization are still the rule – there is no mass digitization yet.

### **Digital preservation:**

In **Canada**, library preservation was amended to allow for preservation in anticipation of obsolete format

### **Legal deposit**

In **Australia**, there are consultations about enabling the delivery of digital born material of Australian cultural significance to the National Library. Proposed model for extended legal deposit sets mandatory delivery of ‘offline’ physical format electronic publications and mandatory delivery of ‘online’ publications on demand. In **Finland**, National Library has defined the enlargement of electronic legal deposit as one of the most important focal points of its new strategy for 2013-2016. A pilot project on electronic deposit of newspapers is on its way. **Moldova** reduced a number of institutions which receive legal deposit from 7 to 4.

### **Public Lending Right:**

In **Croatia**, a proposal of the public lending remunerations tariff was forwarded to the Ministry of Culture for comment. The Croatian Writers’ Association has not yet started to collect the remuneration for public lending. No progress has been made in the process of lobbying of the Academic and Non-Fiction Authors’ Association of **South Africa** (ANFASA) for public lending rights in South Africa.

### **Collective societies / levies:**

In **Ghana**, the monopoly in collective societies is shattered: 3 new RRO’s on Music/ Reprographic works/ audiovisual have been established. In **Bulgaria**, there has been introduced the obligation to register RRO’s. 8 organizations are already listed. In **Croatia**, one collective society has been authorized to represent all publishers in the country, apart from those who decide to opt-out. Two new collecting societies received authorization by the State Intellectual Property Institute – one for the fine arts authors and one for the journalists. In Germany levies will be introduced for snippets of newspaper articles included in search engines services, Kulturflatrate for Internet use is discussed

### **Creative Commons:**

In **Germany**, more and more libraries offer their whole catalogues for download and “waive” their database rights by CC0 licenses.

**DRM:** In the USA, the copyright office allowed the Librarian of Congress, upon the recommendation of the Register of Copyrights, to exempt certain classes of works from the prohibition against circumvention.

**Trade agreements:** Australia is engaged in negotiations on TPP (Trans-Pacific Partnership Agreement) which envisages extension of copyright protection to 95 years for film and music and entrenches criminal liability; Canada has been invited to join as a new country. ACTA has been under review in Australia, where it was signed, but not yet ratified.

### **Other:**

#### **Stimulating Open Access: Limitation on exclusive licensing**

In the **Netherlands**, there is a discussion on strengthening the position of authors through restrictions for exclusive licensing to publishers. Resp. to the last proposal in the consultations between the governments and libraries, in the future, for exclusive licensing, there will be needed a deed.

In **Finland**, the government intends to clarify the rules relating to copyright transfer.

In **Germany**, political parties, even groups of the governing Christian Democrats, want to stimulate Open Access of public research establishing a mandatory right of the authors to communicate their works to the public, even in case of exclusive licensing to publishers.

**Education and Training:** In Australia and Croatia free copyright training for library staff across the country has been organized. In the Netherlands a seminar on the possibilities of buying off the remuneration for the use of works in mass digitization projects was organized. In Ghana training in copyright has been initiated for library and information students.

**Privacy:** A new Data Protection Act has been passed in Ghana.

### **Cases:**

There is a number of lawsuits dealing with liability of service providers, which may have implications also to libraries. From special importance are the decisions on exhaustion of distribution rights for downloaded works and claims against Google and HathiTrust.

## **Liability:**

Australia:

Singtel Optus v National Rugby League Investments (No 2) [2012] FCA 34

cloud-based personal video recorder, “TV Now” infringed the reproduction right of the copyright holder and no exception applied: Implications for libraries and archives – Full Federal Court’s findings placed emphasis on making copies of content to store in digital memory. All cloud services, for educational instruction, preservation, storage, etc, involve the making of digital copies. Libraries providing cloud-based services may be exposed to greater liability for copyright infringement following the Full Federal Court’s decision.

China:

Zhaoqing digital cultural network: limited liability for library as a service provider: “Notice and take down” – principle for internet linking: After removing a link to an illegal service, no more liability.

Finland:

In October 2011 the Helsinki District Court ordered the teleoperator ELISA to block access to pages of Pirate Bay in order to prevent violations of copyright. Later in June 2012 same kind of decision was issued to other major tele-operators.

Germany:

Illegal streaming portal, Leipzig Court (2011/12/7): Administrator of illegal streaming portal convicted to 3 years prison; the admin of the portal “Kino.to” uploaded at least 23.000 pirate copies of films on their servers; altogether, Kino.to provided access to 1,1 million illegally copied films.

## **Exhaustion / parallel importation:**

European Court - usedsoft: Exhaustion with software download

The principle of exhaustion of the distribution right applies not only where the copyright holder markets copies of his software on a material medium (CD-ROM or DVD) but also where he distributes them by means of downloads from his website.

USA: Supap Kirtsaeng v. John Wiley & Sons. The U.S. Supreme Court is considering whether the first sale doctrine applies only to copies manufactured in the United States. The U.S. Supreme Court agreed to review the Second Circuit’s decision, that held the first sale doctrine (Section 109 of the U.S. Copyright Act) does not apply to copies manufactured outside of the United States, and the oral argument has been scheduled for October 29, 2012. An adverse decision in this case could affect libraries’ right to lend books and other materials manufactured abroad.

Bulgaria: Case 1/2011 of Supreme Court of Cassation (SCC) of Bulgaria: “The import of original goods without the consent of the Trademark Owner does not constitute trademark infringement under the Law on marks and geographical indications”.

Germany: Exhaustion of distribution right / Stuttgart Provincial Court: No exhaustion of distribution right (first sale doctrine) with downloads of audio books . The court excluded downloaded audio books from the exhaustion, because it applies only to tangible copies.

### **Lending Right**

Netherlands: In September 2011, the Stichting Leenrecht (Foundation Lending Right) appealed the ruling of the Supreme Court regarding the question whether a renewal constitutes a new lending for which a fee must be paid.. A judgment is expected in October 2012. In June 2011 the Court in The Hague ruled in the procedure between the Stichting Leenrecht and the Public Library Association that a renewal of the lending term is not a new lending for which a remuneration should be paid

### **Fair use / exceptions:**

Canada:

Alberta (Education) v. Canadian Copyright Licensing Agency. The Supreme Court ruled that copies of short extracts of works for classroom use were covered by the fair dealing exception.

Society of Composers, Authors and Music Publishers of Canada et al. v. Bell Canada, et al  
The Supreme Court ruled that free music downloads (between 30-90 second excerpts) were a fair dealing use and do not infringe copyright.

Germany: Making works available for education / Stuttgart Provincial Court (OLG Stuttgart):  
“Communication to the public” for Student seminars; the court had to decide about the legitimacy of e-learning practice at Hagen Open University. Corresponding to the judgement, the underlying § 52a copyright code does not allow to make available 91 pages of a 533 page book. But, in general, it is permitted to communicate small parts of the book to the whole class, even if it comprises 4000 participants.

USA: Cambridge University Press et al. v. Georgia State University: Use of book chapters for course readings provided to students through e-reserves. The court stated 5 infringements out of 74 claims. (At trial the plaintiffs introduced evidence concerning 99 excerpts, but abandoned 25 claims at the end of trial.) The ruling overwhelmingly favors Georgia State University. The decision in this case is limited to a specific type of work- book chapters; the ruling was nonetheless favorable in reinforcing the role of fair use in education and teaching.

### **Exclusive rights**

Canada: Communication to the public / Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada: The Supreme Court ruled unanimously that communication to the public takes place through on-demand, point-to-point transmissions of works, even when the transmission is not public.

Latvia: Digital reproduction / lending

Some authors (backed by their publishers) have sued a privately owned digital library venture for digitizing and making available their works. The company claims that it actually haven't made their works available, since they are a state registered library (which is true), they are lending works (and paying authors according to state regulations, which also is true), and that they are digitizing works (which they do not own) on basis that digital copies can be lent, therefore they insist that the digitization is also legal.

USA:

Copyright restoration in foreign works

Golan et al. v. Holder, Supreme Court: Uruguay Round Agreements Act on copyright restoration to foreign works in the U.S. is not a violation of the First Amendment. The case challenged the constitutionality of copyright restoration in foreign works that were previously in the public domain in the U.S. Plaintiffs argued that the URAA violates the First Amendment insofar as it interferes with the right to keep using works that were exploited when they were in the public domain. The case raised interesting questions pitting U.S. obligations under the Berne Convention against U.S. constitutional law.

Streaming: AIME v. UCLA - dismissed. Video publishers (AIME) against the Regents of the University of California and the Chancellor of UCLA. The plaintiffs alleged that UCLA's practice of

streaming digitized video through its course management system constituted copyright infringement. Plaintiffs allege that, using Video Furnace system, Defendants copied programs owned and licensed to AVP and streamed them on university intranet. The case is fundamentally about interpretation of contractual terms with respect to streaming as a public performance, but is relevant to the interpretation of fair use and of exclusive rights as they are implicated in streaming.

#### Digitizing:

*Authors Guild v. HathiTrust*. Authors Guild et al filed suit against the HathiTrust and five universities: This is a case about the digitization of copyrighted works that stems from the original Google Print Library Project that commenced in 2004 (which is the subject of a separate lawsuit). The case also concerns the HathiTrust Orphan Works Project. The plaintiffs ask for injunctive relief, requesting that the copying, distribution and display of copies cease; that defendants cease to supply Google with copyrighted works to digitize; and that the alleged unauthorized digital copies held by HathiTrust and the five universities be impounded (approximately 7 million copies of the HathiTrust's scans).

*Authors Guild v. Google*. Judge denied Google's motions to dismiss the claims of the Authors Guild and American Society of Media Photographers as associational plaintiffs, and he granted the motion for class certification. Google had argued that the plaintiffs did not have standing to sue, and that each affected association member should have to litigate his claim individually. The judge ruled otherwise, and the case will move forward with the Authors Guild and American Society of Media Photographers as associational plaintiffs in two separate actions.