



Subito case in Germany – decision of the court of Appeal in Munich

By Harald Müller, EBLIDA Copyright Expert Group Member

The Oberlandesgericht Munich (OLG = court of appeal) decided on 10 May 2007 the case of the German publishers association 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 (copies of articles) to end users via email, ftp active, internet download as well as stopping document supply (copies of articles) to other libraries via email, ftp active, internet download plus (!) fax and letter mail. Now the court of appeal partly modified the decision of the first instance, otherwise however the appeals of both parties would have been dismissed.

Press articles covering the decision of the OLG see therein a defeat for the digital document delivery service by libraries. This conclusion however is only partly correct, because a careful reading of the judgment and its reason reveals several remarkable rulings of the court. The plaintiffs have to pay two thirds of the costs of the appeal case, which suggests that they failed predominantly with their application. The publishers intended to achieve a comprehensive prohibition of any kind of document delivery by libraries. But the OLG Munich rejected this as far as possible, going further than the Court of First Instance. The court regards only the delivery of copies of six individual, exactly described articles by e-Mail, ftp asset or internet download as a violation of copyright law. Otherwise the following plaintiff requests were expressly dismissed:

- To prohibit Subito libraries every kind of document delivery by letter mail or fax.
- To prohibit Subito libraries the digital document delivery of all other articles from scientific journals.
- To prohibit Subito libraries offering a digital document delivery service.

The court in its decision determine that:

1. A print journal does not enjoy sui generis data base protection in accordance with German copyright law (§ 87a UrhG).
2. A print journal does not enjoy legal protection as a "compilation" in accordance with German copyright law (§ 4 (1) UrhG), because the build-up of individual contributions is not a personal mental achievement under German copyright law (§ 2 (2) UrhG).

3. Any kind of analogue document delivery by letter mail or fax is absolutely legal as customary law. The decades old practice of document delivery via inter-library loan does not become illegal because of new digital technology.
4. A digital document delivery by e-mail, ftp asset or internet download does not fulfil the requirements of making available to the public in accordance with German copyright law (§ 19a UrhG = art. 3 (1) of directive 2001/29/EC). With this statement the OLG Munich takes a clear opposite position against different opinions in the legal literature.

The two most important statements of the judgment are somewhat hidden and/or in a form understandable only for legal experts. First the court makes clear that the present version of the German § 53 UrhG regarding digital duplication does not implement fully the authorization given by art. 5 (2c) of directive 2001/29/EC. The German legislator could permit digital reproductions and usage for scientific and educational purposes by libraries in full accordance with this directive. The court especially refers to the importance of document delivery for science and research.

The most interesting part of the judgment is the one which explains the prohibition of a digital document delivery by Subito libraries. The court sees hereby a violation of § 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 benefits. For that purpose only analogue reproductions on paper are permitted under German copyright law. Digital copies for direct or indirect commercial use are not allowed by § 53 UrhG, they must be licensed by private contract. With its argument 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 § 53 (2.1.1) UrhG. Subito libraries can continue to send out digital reproductions to persons for scientific or educational purposes.

Enforcement of intellectual property rights

By Toby Bainton, Chair, EBLIDA Copyright Expert Group

For several years, the European Commission has been suggesting that Community legislation should require Member States, in their own laws, to provide criminal penalties for infringements of intellectual property rights.

In some Member States, infringements are a matter of civil law only. The Commission has argued that large-scale criminals, such as counterfeiters of trade-marked goods, or producers of unauthorised recordings of music, may choose to operate in a Member State with a weak legal regime. The Commission argues that, for the purposes of the Internal Market, penalties for infringements like this should be harmonised by Community law.

The Commission's suggestions have become formal, and have resulted in an 'Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights - 2005/0127(COD)'. The European Parliament concluded its first reading of the Directive on 25 April.

EBLIDA has been following the progress of the Directive on behalf of librarians. The Directive, if it is adopted, will clearly apply to infringements of copyright. EBLIDA has several concerns. This is the kind of Directive which may be aimed at a certain group of people (large-scale law-breakers) but which may easily catch ordinary people in what it provides.

First, we want to be sure about the effect of the Directive on users of libraries who may infringe copyright in a trivial way. It may be better, in fact, for individual library users to be faced with the criminal law rather than the civil law, because the criminal justice system may provide better treatment for them. But we do not really want ordinary library users, even if they infringe copyright deliberately, to be faced with penalties under both the civil law and the criminal law (which is possible in some Member States). One set of punishment should be enough.

Also, the Directive, in some of its versions, provides criminal penalties for people who help infringements to happen. EBLIDA does not want libraries or their staff to face criminal punishment simply as a result of facilities they provide. For example, we do not want the provision of a photocopying machine by a library to be a criminal activity, as a result of the machine being used by someone to infringe copyright. This example seems perhaps ridiculous, but it is all too easy for imperfect laws to have bad effects.

The proposed Directive has a more fundamental problem. It assumes that the infringement of copyright is a straightforward matter, and that only a bad person will deliberately infringe copyright. But not all infringements are straightforward. Someone might deliberately infringe copyright in a work, when they have tried their utmost to ask the appropriate permission from the right-holder of the work, who cannot be found. The infringement may be honourable, because the infringer may intend to pay the right-holder a fair price if they can eventually be found, even though it is unlikely that they have any real interest in the work any longer, and unlikely that the right-holder even knows that he holds the rights. And EBLIDA has met examples of actions by a library, where the library believes it is acting lawfully (using an exception to copyright) while a right holder believes that the act is not lawful.

If the right holder is correct, is the deliberate act of the library when it provides the service a deliberate infringement? None of this is clear.

The major danger for libraries from the Directive would arise when they are contemplating a new service for their users, believing that they are using an exception to copyright. If any right-holder then challenges the legality of their service, the challenge is especially forceful if the criminal law may be involved. Nearly all librarians are in the public service, and they cannot knowingly break the law. So a new Directive on criminal measures might be used by right-holders to deter libraries from offering new services. (A library might risk an action in civil law if it believed it was acting correctly, but it would be more difficult to risk a criminal case.)

This proposed Directive is complicated, and like most proposed Directives, it keeps getting amended in committees of the Commission and Parliament. Some Member States are very much opposed to the Directive. Many serious legal and political commentators believe that Community law is not permitted to regulate the criminal law of Member States in matters which are essentially civil disputes.

EBLIDA has been writing letters and sending messages to Parliamentarians as part of an alliance consisting of BEUC, the European Consumers' Organisation, EBLIDA itself, EFF, the Electronic Frontier Foundation, and FFII, the Foundation for a Free Information Infrastructure. We shall continue to lobby about the Directive until it is clear that it does not apply to ordinary library users, or to libraries which are acting responsibly. No one wants to encourage massive infringement of copyright, but no one wants librarians to become criminals when they are doing their ordinary work. A complex, and much-amended law, carries risks for us. We must guard against them.

EBLIDA has joined forces with FFII, EFF and BEUC in a coalition report on the proposed enforcement Directive to respond to Parliament's amendments of 25 April 2007 (first reading). We encourage national associations to take action and refer this report (<http://www.eblida.org/uploads/eblida/10/1180441469.pdf>) to your own politicians.

eIFL Handbook on Copyright and Related Issues By Teresa Hackett, eIFL-IP Project Manager

I am pleased to announce that the Polish version of the eIFL-IP Handbook on Copyright and Related Issues is available in Polish (<http://www.eifl.net/cps/sections/services/eifl-ip/issues/handbook/eifl-handbook-on>). Not only has the text been translated into Polish, but the legal situation in Poland for each topic has been added. This makes it a particularly valuable resource for librarians in Poland.

I would like to thank Jan Andrzej Nikisch, country coordinator from the Poznan Foundation of Scientific Libraries for supporting the work and Barbara Szczepanska for her sterling work in the translation and adaptation to the Polish legal situation. We welcome other translations!