



IFLA
2005
OSLO

World Library and Information Congress: 71th IFLA General Conference and Council

"Libraries - A voyage of discovery"

August 14th - 18th 2005, Oslo, Norway

Conference Programme:

<http://www.ifla.org/IV/ifla71/Programme.htm>

Juni 10, 2005

Code Number:

097-E

Meeting:

125 SI - Document Delivery and Resource Sharing

subito and German Developments in Copyright Law

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Abstract:

The presentation describes the different levels of activities of subito and publishers in the context of copyright. The following subjects will be covered:

- *Short background information on the German copyright fee system*
- *Complaints of STM publishers against subito in Germany with two important petitions: no electronic deliveries, no international interlibrary loan*
- *Status of the negotiations of subito with the same publishers concerning enduser delivery in not-german speaking countries*
- *Decision of subito for the implementation of a digital rights management (FileOpen)*
- *Document delivery from genuine electronic documents*
- *Complaints of STM publishers against Germany in Brussels (EU-Commission)*
- *Reform of German copyright law*
- *View from a supplier library (TIB)*

Ladies and gentlemen,

I would like to address the following topics in my presentation:

- German copyright and its system of remuneration

- Legal action taken by international publishers against subito and other German libraries
- Negotiations between STM publishers and subito
- Application of a DRM system
- Reforms to German copyright law
- Document delivery and electronic documents
- The strategies of a document supplier (TIB)

There is one thing I should warn you about before I start, or reassure you about, depending on your point of view! I am a qualified mathematician rather than a legal expert, which means that I will no doubt be leaving out many legal niceties and complexities in the subject of my presentation. Indeed, I am approaching this issue from more of a pragmatic viewpoint, which is something I have had to get used to as the Director of a large library and the Head of subito.

German Copyright and Its System of Remuneration

To understand the German system, it is first necessary to review some important recent events.

The "Börsenverein" is a trade association that represents the interests of German publishers and booksellers. As far back as 1994, the Börsenverein took legal action against my library, the TIB. The TIB is the German National Library of Science and Technology, the largest specialist technical library in the world. This initial court case revolved around the key question as to whether a library is permitted to make a copy of a journal article on behalf of a customer and to accept money for and advertise this service.

The case took five years to resolve and went all the way up to the highest German court, the German Federal Supreme Court. This Court finally issued the following ruling based on the situation of German copyright law:

- Making a copy on the basis of a concrete order is permissible
- Sending this copy to the end user is permissible
- Sending the copy using modern technical methods is permissible (post, fax, e-mail)
- Royalties for the copies must be paid to the publisher. The responsibility for this lies with the "Verwertungsgesellschaft Wort", or "VG Wort", an association dealing with the exploitation of rights that acts as a kind of German copyright clearance centre.

Subsequently, in September 2000, an agreement was concluded between the Börsenverein and the German government stating that libraries may send copies to end users all over the world in any form. User groups were defined (academic users, private persons, commercial users) and rates were agreed for each group (e.g. one euro for academic users, six euros for commercial users). These rates were included in subito's fees, for example. As a result, up to the year 2002, several million euros in royalties were paid out to "VG Wort", which was charged with forwarding this to the publishers and authors.

The reason I emphasise this point is that both publishers and international competitors continue to insist that subito does not pay any copyright fees.

At the end of 2002, the publishers decided not to renew the agreement I mentioned and permission for any kind of electronic delivery or delivery to foreign countries was denied. As a result, since 2003, Germany only has an agreement for postal and fax deliveries within Germany. However, since the legal viewpoints of the German government and the Federal states were different to those of the "VG Wort", the ministries responsible for the libraries instituted arbitration proceedings with the aim of forcing "VG Wort" to supply an agreement for electronic delivery. This process is still ongoing.

Legal Action and Negotiations

The threat of legal action against subito had already been posed by some of the big STM publishers at the end of 2002. Subsequently, in the spring of 2003, subito entered into negotiations with representatives from the STM publishers. subito went into this process with the following strategy in mind:

The negotiation is intended to tackle the issue of licenses for end customers in non-German-speaking areas (Germany, Austria, Switzerland).

What is required is continued toleration of the subito library service, which can be viewed as an inter-library loan system and which should therefore remain royalty-free.

These negotiations have not yet come to an end.

Before I sketch out some of the problems in these negotiations, I should briefly mention three further legal proceedings:

- Two actions stemming from the USA and the UK have been brought against the German National Library of Medicine (ZBMed) in Cologne with the general objective of stopping all document deliveries to foreign countries. In response, subito ceased end user deliveries to non-German-speaking foreign countries in May 2003 and now only offers the library service in those countries.
- On 18 June 2004, the Börsenverein and the International Association of Scientific, Technical and Medical Publishers took subito to court in Germany with the aim of prohibiting all electronic document deliveries and all forms of inter-library loans with domestic and foreign libraries. This case has so far led to the lawyers involved exchanging copious quantities of documents; the first court hearing is expected to take place in the summer.
- On 25 June 2004, the STM Association lodged a complaint with the European Commission against the Federal Republic of Germany under the heading "German Defective Implementation of the Directive". The "Directive" in this case refers to the EU Copyright Directive.

Taking stock of all the measures being taken, it would certainly be fair to qualify this as a worldwide, large-scale campaign on the part of the publishers against subito and its legal foundations.

The negotiations on an international level with the publishers who have taken proceedings against us on a national level have been running for approximately 2 years and are currently heading towards a successful conclusion. There were problems on many levels:

- Definitions of customer groups
- Individual prices on the article, journal, or publisher level
- Who is liable - subito or the supplying libraries?
- Should subito supplying libraries be permitted to offer other document delivery products apart from subito?
- How can the publishers monitor subito?
- Should genuine electronic documents be incorporated too?
- Should a Digital Rights Management (DRM) system be employed?

I would like to make a couple of comments on these last two points.

What subito and the publishers have in mind is the idea of directly incorporating the electronic products offered by the publishers in subito's services, with specific prices where applicable.

That means the customer can then choose whether they wish to have immediate access to an article already available electronically or whether they wish to receive a PDF file within 72 hours. This point still remains unresolved, since the publishers imagine that subito should also take into consideration the existence of any regional consortiums for electronic journals and should incorporate these consortiums in the pricing structure. In fact, subito cannot afford to do this in this manner.

subito is, however, able to respond positively to the issue of employing a DRM system.

Based on the results of a different project, there is a recommendation in Germany to use the "FileOpen Web Publisher" software as DRM.

From subito's perspective, DRM software must fulfil various criteria, including the following:

- Differentiation between reading rights and printing rights
- A way of preventing an unprotected copy from being created on a local workstation
- Ensuring that encryption is allowed
- Enabling of processes in batch operation
- High-performance capabilities
- Enabling of differentiated collection procedures (e.g. forwarding in the library service).

subito is preparing itself for the deployment of the DRM system; the corresponding installations are being carried out in my library, which is where the subito computers are operated.

Reforming Copyright Law

Finally, I would like to briefly address a further issue that is currently very much a 'hot topic' in Germany and which further intensifies the problems that exist between publishers, libraries and scientists.

Copyright law in Germany is in the process of being reformed; a draft of the new law was published by the Ministry responsible in September 2004. The draft bill changes the legal basis for electronic document delivery services: electronic document delivery is only to be permitted in cases where the corresponding publisher does not itself offer items electronically. Otherwise only postal and fax deliveries would still be permissible.

Since the draft bill would entail yet more restrictions on the electronic utilisation of scientific information, which are too numerous to elaborate here, there is currently a huge campaign being mounted by the German scientific community against this proposed law. Within the so-called "Alliance for Copyright in Education and Science" (*Aktionsbündnis Urheberrecht für Bildung und Wissenschaft*), virtually all the German scientific organisations, specialist associations and groups, and more than 3000 university lecturers have signed a declaration containing an amendment to the draft bill. It is still too early to tell what decision will eventually be made by the German legislator.

What will be the best strategy for surviving for a document supplier like my library TIB? For us subito is one important way of distributing our services, but it is not the only one. But we will take over the results of the negotiations between subito and the publishers for our own order system, a DRM included. So we will run a subito certified system and this policy probably will be pursued by all German document suppliers.

To conclude, I would like to include myself among those who demand that education and science should be able to utilize the new digital forms of distribution and acquisition of knowledge and information, without hindrance, and under fair and balanced conditions. TIB and subito intend to help make this possible.

Thank you very much for listening.