



The SUBITO Case in Germany: Implications for Libraries

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Ladies and gentlemen,

this presentation is kind of a follow-up to a lecture by Uwe Rosemann at last years IFLA WLIC in Oslo. Under the title “SUBITO and German Developments in Copyright Law” he spoke about the different levels of activities of SUBITO and publishers in the context of copyright (<http://www.ifla.org/IV/ifla71/papers/097e-Rosemann.pdf>). He also mentioned briefly the fact that publishers sued SUBITO before a German court, but he was not able to report any legal details about the case, which at that time was not yet decided.

Now – one year later - we have a judgment of the court of first instance, and being a lawyer and a law-librarian, I have the pleasure to give you some more specific legal information about the dispute. But don't panic: I am not going to torture you with detailed arguments and quotations from articles of German copyright law which only legal experts would understand. This is just an interim report of a story which will continue for some more years. So let's stay on a level of common understanding.

What is SUBITO ?

I start with a question. What is SUBITO? On its webpage you can find the following definition: “*SUBITO is the brand name of the **document delivery service of research libraries** in Germany, Austria and Switzerland. SUBITO provides a quick and easy-to-use service which makes copies of articles from periodicals or books, sends them to the user and supports the lending of books.*”

So SUBITO is the name of the main German document delivery service. But far more important, SUBITO is not only a name, it is a private company. And the company partners are

all the participating libraries, university libraries as well as state libraries. That means SUBITO is a good example for the privatization of a formerly public sector activity.

SUBITO started in 1994 as a so-called “federal/state initiative” undertaken by the Federal Ministry of Research and Technology to improve document delivery by German libraries. Over the years it became clear that only the legal form of a private company would meet the demands of today’s information society.

The SUBITO case

Although publishers had been involved in the SUBITO initiative from the very beginning, there had been all the years controversial positions about the need for licenses. SUBITO sees its service fully covered by German copyright law, which means it considers that additional licenses are unnecessary.

On 18 June 2004, the German Publishers Association and the Stichting STM as plaintiffs took SUBITO to court. The case was brought before the court of first instance (Landgericht) in Munich and labeled as a “test” case by the parties. Although court cases are public, the records of a case are confidential. Normally! In the SUBITO cases both parties employed open access principles and made the texts of complaint and defense available on the internet for a long time (www.boersenverein.de/de/69181?dl_id=69928 & www.subito-doc.de/base/downloads/klageerwiderung.pdf. / both no longer valid!).

The application

The plaintiffs` application for relief shocked the libraries in Germany. The publishers wanted SUBITO and all participating libraries

- To stop document supply (copies of articles) to end users via email, ftp active, internet download.
- To stop document supply (copies of articles) to other libraries via email, ftp active, internet download **PLUS** fax and letter mail.

The second application would end interlibrary loan for any form of reproduction.

The main arguments

The plaintiffs` main arguments are:

- ▶ Subito is a commercial enterprise with an economic advantage.
- ▶ German copyright law does not allow mailing of digital reproductions.
- ▶ A library must buy a license from the publisher for any kind of electronic document delivery.
- ▶ Interlibrary Loan ILL is not a sufficient legal base for document delivery, because mailed copies are not ”on loan”.

The judgment by the court of first instance

The Munich court gave its judgment on 15 December 2005. The text of the judgment has been made available full text over the internet by SUBITO (<http://www.subito-doc.de/cms/filedatabase/files/Teilurteil15Dez05-komprimiert.pdf>). In January 2006 both parties appealed, so the judgment is not final and not absolute. The case is now pending

before the Court of appeal (Oberlandesgericht) in Munich. It could go up to the German Federal Supreme Court and the Federal Constitutional Court. But that's a future story....

Opinion of the court

In its opinion the court surprised everybody. The court ruled that mailing of paper copies via interlibrary loan from one library to another is illegal, because it violates art. 53 (VI) German copyright law. But it is allowed as customary law, because for decades (= since 1965) nobody objected to this „illegal“ practice. That means, SUBITO libraries can continue with a document delivery service in analog form (= paper copies).

But in a second part of its opinion the court ruled that mailing of digital copies is illegal and prohibited, as art. 53 German copyright law (in force since September 2003) doesn't offer a valid legal basis.

As the case is on appeal now, this first judgment is just the beginning of the story.

Copyright bill 2006

In January 2006 the German government introduced a bill in parliament to amend the copyright law. It contains a new article on document delivery on demand:

(1) The reproduction and distribution via mail or fax by public libraries of single articles published in news-papers and journals as well as small parts of published works is legal by single order as long as the use by the client is allowed in art. 53. The reproduction and distribution in electronic form is permissible exclusively as a graphic file and proper only, if access to the articles or small parts of a work is not possible for members of the public on a contractual base from places and at times of their choice.

(2) The copyright owner is entitled to a fair remuneration. This right can be claimed only by a collecting society.

This article would solve some of the problems raised in the SUBITO case, but also produce new trouble. As you can see only graphic files (PDF) will be legal, and document delivery by libraries would be prohibited, if a publisher offers a commercial service. The bill encountered strong resistance by the academic community as well as by the German states

(<http://www.urheberrechtsbuendnis.de/index.html.en>).

Implications for libraries

Well, what are the implications of the SUBITO case for libraries? At the moment there is a great uncertainty in German libraries. What document delivery service is allowed: just photocopies or digital reproductions as well? This problem will be given further clarification in the next months by the copyright bill.

The SUBITO case shows very clearly that document delivery is a main battlefield for libraries and publishers. Publishers claim this service as their area of commercial interest. Document delivery by libraries and the service offered by SUBITO turned out to be most successful. While we, the information professionals, see it as our natural mission, publishers smell the big money. They want to sell licenses to libraries. So the SUBITO case is in their eyes just a test battlefield for other EU member states, and maybe for the rest of the world. We should be careful!

Thank you very much for your attention!