



## Country Report Germany

Annual report to the IFLA CLM committee  
San Juan Puerto Rico 2011

### Copyright

#### ***Revision/changes in existing law or regulations***

#### ***New legislation***

We are still waiting for the next copyright revision. After 4 hearings with stakeholders (see country report 2010), the agents of the department of justice are still working on a draft for the government's bill. At the same time, some parliamentary fractions have made proposals for revisions concerning orphan works and open access.

#### *Orphan Works:*

While the EU Commission released a proposal for an orphan works directive on 2011/5/24, members of the German parliament have launched proposals for legislation.

Opposition parties (Die Linke, SPD and Die Grünen) offered drafts with different approaches: While "Die Linke" prefers a legal fixation in the copyright code as a copyright exception, the SPD wants to situate it in the RRO legislation. "Die Grünen"s Government Request also prefers a solution by copyright exception. In general, corresponding to the bills, one part of the definition of orphan works is the requirement of a diligent search. There has to be paid a licence fee to the RRO's. If the copyright holder appears, she/ he can prohibit the publication on the internet. Thus, there is broad political consensus that there is need to settle the orphan works issue.

The awaited government bill on copyright reform will probably not handle with the orphan works problem because of the current proposal of the EU Commission.

The EU proposal from 2011/5/24 ([http://ec.europa.eu/internal\\_market/copyright/docs/orphan-works/proposal\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf)) settles a mutual recognition of in one member country (the country of first publication) so defined orphan works. Before classifying a work as an "orphan", there has to precede a diligent search in different resources (e.g. library – and RRO-Databases).

As orphan can be classified only *published* works. Legal consequence is that libraries, museums, archives and educational establishments are allowed to digitize the works and display them to the public. There is no remuneration to pay, unless the work is used commercially.

#### *Open Access*

Another important issue is new legislation about the legal possibilities to facilitate Open Access by making available works that already have been published in periodicals (see country report 2010). 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 "soft 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.

#### *Ancillary copyright for publishers*

Publishers claim – apart from derived copyright concerning the works themselves – an own right for their efforts. (see country report 2010)

### **Public lending rights:**

There is a new general contract on library royalties, which foresees a fixed remuneration until 2014. After that, reiterated statistical evaluation of library lending will provide data for later. Non-book-materials like music or films on data carriers will be remunerated with the double price.

## **Legal matters**

### **Revision/changes in existing law or regulations**

#### *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 states of Sachsen-Anhalt and Hessen followed in 2010. The Governments of Schleswig-Holstein and Nordrhein-Westfalen have already brought bills into their parliaments. In the new coalition agreement of Rheinland-Pfalz can be found statements about a planned library act.

#### *Privacy*

Data retention: After the "Bundesverfassungsgericht" (Federal Constitutional Court) has declared the law on data retention (partly) as unconstitutional, the discussion about reform is running. Even parts of the governing coalition are against a new data retention law and prefers "quick freeze", which means that access-providers would be mandated to record user data only case by case on prosecutor's demand. At the same time, the directive on data retention obligates Germany as a EU member to implement the respective law. Germany has already been reproved by the EU Commission. However, it is still controversial if the directive violates the EU Charter of fundamental Rights.

## **Law cases**

#### *Works available by dedicated terminals in the library's lecture room,*

*(Court of appeals, OLG Frankfurt, Az.11 U 40/09 Darmstadt university library case)*

The library must prevent library users to make copies: USB-Ports at the dedicated terminals are not allowed, the library is not permitted to connect the terminals with printers (see country report 2010). The dispute parties applied for revision at the federal supreme court (Bundesgerichtshof).

#### *Copyright in abstracts (short summaries):*

*(Federal Supreme Court, BGH, Urteil v. 01.12.2010, Az. I ZR 12/08)*

The federal supreme court concretized the copyright protection for abstracts: In general, it presumes protection.

#### *Secondary Liability of Internetcafés as Access providers*

*(Hamburg district court, LG Hamburg, Beschluss vom 25.11.2010 - 310 O 433/10 )* The court declares Internet-Café as responsible for customer's copyright infringements, if the operator doesn't take any measures (like reducing upload volume or port-blocking).

#### *Secondary liability of Hotel operators as access providers*

*(Frankfurt district court LG Frankfurt a.M., Urteil vom 18.08.2010 - 2-6 S 19/09)*

The court declares Hotel as not responsible for customer's copyright-infringements if access is restricted by code.

**Lobby activities**

Close Contact to MP's of different parties ; planned meeting with government's WIPO agents, planned legal congress on library matters in Cologne in March 2012

**Educational activities**

Copyright classes in all library science curricula

Armin Talke, 2011/7/19