



Update “Second Basket” German Copyright Law

The second chamber of the German legislator, the *Bundesrat* approved the “Second Basket” (2nd law for the regulation of copyright in the information society) on September 21, 2007. It will enter into force on January 1, 2008.

The key articles of the “Second Basket” that have been introduced into the German Copyright Act are the following:

Copyright Exception for Science and Research

Display of Works at Electronic Reading Places

Art. 52b of the German Copyright Act (UrhG) permits public libraries, museums and archives to make available and display works at electronic reading places provided that:

- They do not pursue commercial purposes.
- The works are displayed at strictly dedicated electronic reading places,
- for private use and research only.
- in principle, the number of works which may be shown simultaneously corresponds to the collection of the institution.
- The display does not conflict with contractual obligations.

An appropriate remuneration has to be paid for the display of works. The remuneration can only be claimed by a collecting society.

Document Delivery on Request

Art. 53a UrhG permits public libraries to copy and disseminate individual articles of newspapers and magazines and small portions of published works by mail, fax and other electronic form. Copying and Dissemination in other electronic form is only permitted:

- In form of graphic files.
- If justified for illustration of teaching and scientific research purposes.
- For the pursuit of non-commercial purposes.

Moreover, it is required that the publisher of a particular work does not *itself* offer the work online in an *obvious* manner, and *on reasonable terms*. Libraries and publishers currently discuss the terminology of *obvious* and *on reasonable terms*.

An appropriate remuneration has to be paid for document delivery by libraries. The remuneration can only be claimed by a collecting society.

Making Available to the Public for Tuition and Research

Art 52a UrhG was introduced into the German Copyright Act as part of the “First Basket”. This provision is due to come under review and would expire in December 31, 2008, if not extended further by Parliament. Art. 52a UrhG is mentioned here as reminder that an extension should be avoided.

Unknown Exploitation Rights

Publishing Agreements Concluded on January 1, 2008 and Thereafter

Art. 31a UrhG will allow the licensing of future unknown exploitation rights but written form is required. It replaces **Art. 31 paragraph 4 UrhG** that prohibited the licensing of unknown exploitation rights since 1966. However, the author retains the right to withdraw the licence concerning future unknown rights until the exploitation has started. To ascertain that STM publisher will obtain future unknown exploitation rights we suggest to consider a redrafting of their standard licensing agreement.

Publishing Agreements Concluded Before January 1, 2008

Art. 137I UrhG grants publishers under certain circumstances unknown exploitation rights where they did not explicitly obtain rights. It has effect not only with regard to unknown exploitation rights to be developed in the future, but also retroactively on the former unknown online exploitation rights. It grants publishers the online exploitation under the following conditions:

- That the rights of the respective work have been obtained before 1995.
- That publishers obtained an exclusive licence of the respective work,
- including all exploitation rights that were relevant at the time for the respective publishing agreement,
- covering uses world-wide,
- and unlimited in time.
- That the author of the work does not object to the online exploitation within one year after Art. 137I UrhG enters into force.
- That all co-authors object, if the work has been created in co-authorship.

Private Copying

Private Copying certainly is allowed in the digital environment, but the “Second Basket” makes clear that Private Copying is prohibited:

- If the copy is made from an obvious illegitimate copy, such as from an illegal copy listed in a P2P file sharing network.
- If the copy is obtained by hacking Technical Protection Measures (TPMs).

„Third Basket“

The second chamber of the German legislator, the *Bundesrat*, expressed on September 21, 2007 the need to start to work on a “Third Basket” as soon as possible. It remained to be analysed how Open Access – and Open Source models should be taken into consideration. The German “*Länder*” represented by the *Bundesrat* claimed that the display of works at electronic reading places should be extended to educational institutions, and that document delivery of specialist journals (including STM journals) by public libraries should be permitted without limitation.