

ALAI Executive Committee – short report on amendment to German copyright act

Dr. Silke v.Lewinski

After also the second chamber (Bundesrat) agreed to the so-called “second-basket” amendments of the German Copyright Act on 21 September 2007, the amendments will most probably come into force on 1st January 2008 (note after making of report: the amendments did enter into force on that date). The “second basket” contains issues not dealt with in the law of 2003 implementing the EC Information Society Directive but related to them.

The main amendments concern the following issues:

1) Private reproduction

a) clarification of a previous amendment under which copies made from an obviously illegally made copy were not covered under the private copying exception; this provision has been extended to cover copies made from a copy that has been obviously illegally made available to the public; thereby, copies from illegal P2P services are more clearly exempted from the private use privilege.

b) an initially proposed exemption from criminal liability for illegal copies for private use made in a limited volume has not been adopted, because this would have been considered a wrong political signal.

c) the method of determining the remuneration for private reproduction is changed. So far, minimum tariffs were laid down in an Annex to the Copyright Act but had not been modified since 1985. In order to better react to technical developments, it was considered more appropriate to entirely leave the determination of the remuneration to the negotiating parties, while faster arbitration procedures are provided and key factors for the determination of the remuneration are laid down in the law, namely: the factual use rather than the capability of a device or carrier for making private reproductions matters and has to be ascertained by empirical market studies. Where DRM hinders private reproduction, no remuneration is due. While the originally proposed upper limit of 5% of the retail price of the copying device or carrier has been deleted in the adopted version, the law provides that the remuneration must be within an economically appropriate relationship to the retail price of the device or carrier; thereby, the interests of the hardware industry are taken into account.

2) A new limitation is introduced in favour of public libraries, museums and archives to show their material at electronic terminals. Such libraries may also – for the first time not only based on case law but also on a statutory basis – reproduce works and distribute or transmit the copies by e-mail on demand. Interests of right owners are taken account of in both cases through the limitation of the number of copies of a particular work that is allowed to be simultaneously shown at several terminals: the number must not exceed the number of copies available in the library or other institution. Online-transmission on demand is permitted only unless the publisher itself offers an own online service at appropriate conditions.

3) Contract law: So far, under § 31(4) of the Copyright Act, an author could not grant rights (“einräumen”) for yet unknown uses. This protective provision has been replaced with a set of rules in favour of publishers and other users of rights. According to the newly inserted §§ 31a and 32c CA, it is now possible to grant rights for yet unknown uses, if done in writing, but the author has a right to a separate equitable remuneration once the work is exploited in the

previously unknown way. Also, the exploiting business must inform the author before beginning with such use, and the author then has the possibility to revoke the grant of right within three months after the publisher or other user mailed the announcement to the author; however, the publisher or other user only needs to send an announcement of the envisaged new use to the author's address that is last known to him. The three months period for revoking the right expires even if the announcement has not reached the author at that address. It only applies during the lifetime of the author. Also the exploitation of existing works is covered by this rule, so that archives may now be used also in new ways. It also has been extended to the presumption of transfer regarding film works; though without the author's possibility to revoke his rights within three months. Thereby, an important author-protective rule of German copyright law has been abolished in its essence, and it remains to be seen whether the accompanying conditions of this industry-friendly modification will suffice in practice to appropriately take account of authors' interests.

For all amendments, see the Second Law on the Regulation of copyright in the information society of 26 October 2007, BGBl. I no 54 of 31 October 2007, p. 2513 et seq.