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COLUMN

# Copyright in the networked world: international document delivery

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## Abstract

**Purpose** – This column seeks to look at the case of a long-standing project to arrange document delivery between US and German libraries. This case represents the broader problem of international document delivery.

**Design/methodology/approach** – The primary methodology is anthropological. The column considers cultural and economic differences and assumptions, as well as differences between the law codes that enable document delivery.

**Findings** – Document delivery is at least temporarily impossible from Germany to the USA owing to lawsuits and agreements within Germany. The introduction of Digital Rights Management (DRM) software into new agreements may lead to programs with seriously abbreviated rights for users.

**Originality/value** – The case of US-German document delivery has particular importance because of the amount of research contact between the two countries and because of the substantial differences in their legal systems and their copyright laws.

**Keywords** Copyright law, Interlending, Document delivery, Germany, United States of America

**Paper type** Case study

## Introduction

Interlibrary lending was a feature of US libraries well before the days of photocopy machines when the only meaning of the usual acronym (“ILL”) implied sending a library-owned copy of a physical volume to another library for a patron to use and return. In those days many libraries refused to lend bound journals because they were heavy, hard to replace and often much in demand locally.

Photocopier technology made it possible for libraries to keep their bound journals and still share a copy of a particular article. In the US (and elsewhere) the law also changed to protect this expansion of a well-established practice. Consumers plainly benefited from access to journals that their local library could not afford, and the burden of retrieving the volume, making a careful photocopy (without damaging the spine of the book) and then sending the copy to the requesting library put a limit on how much document delivery any one library was willing to do. The cumbersome mechanics of the process protected rights holders and close cooperation between libraries established a self-regulating mechanism. The workload eased somewhat when the Research Libraries Group developed the Internet-based software package “Ariel” in 1991 (sold to Infotrieve 2003), but not in a way that overly alarmed rights owners or led to any change in the legislation.



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**US law**

The current US copyright law gives libraries an explicit right to exchange copies between libraries as long as the copy becomes the property of the person making the request:

*(d)* The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if –

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation (17 USC 108(d), 2004).

The law does include a few restrictions on the type of library, the notice required, and the non-commercial nature of the exchange:

the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section (17 USC 108(a), 2004).

Nothing in this statute restricts US libraries from sending or receiving articles from libraries in other countries, as long as the other restrictions in the law are observed. Canadian libraries participate regularly in document delivery arrangements with US partners.

**German law**

The expectations in Germany were not fundamentally different. German libraries developed well-organized document delivery systems such as GBVDirekt/Subito e. V. from the Gemeinsamen Bibliotheksverbund (GBV), a consortium of research libraries in eight states in northern Germany. Subito received key financial support from the Federal Ministry for Education and Research as well as from member libraries. It is a non-profit service that provides services that resemble those of ILLIAD from OCLC, RAPID from Colorado State University, or the various in-state or consortial agreements among US libraries (inMich, for example in the state of Michigan).

One important difference between the US and German situations was the language of the copyright law. The US Copyright law mentions “libraries” or “librarians” 104 times (excluding 21 references to the Library of Congress and 110 references to the

Librarian of Congress, both of whom play administrative roles within US Copyright law) (US Federal Government, 2003). The German law, in contrast, has only two references to “Bibliothek” or “Bibliothekar” (Federal Republic of Germany, 2003). This gives some sense of the degree to which the US Congress wrote the copyright law with libraries in mind, thanks in large measure to active lobbying on the part of American Library Association, and the German Bundestag wrote the German copyright law with little consideration for specific library issues. As a result, the German law makes no explicit provision for document delivery between libraries.

Much of the language in the German law that enables libraries to copy articles and share them through interlibrary services comes from §53 “Vervielfältigungen zum privaten und sonstigen eigenen Gebrauch“ (“Copying for private and other personal uses”). One of the key limits on modern document delivery is:

Dies gilt im Fall des Satzes 1 Nr. 2 nur, wenn zusätzlich

1. die Vervielfältigung auf Papier oder einem ähnlichen Träger mittels beliebiger photomechanischer Verfahren oder anderer Verfahren mit ähnlicher Wirkung vorgenommen wird oder
2. eine ausschließlich analoge Nutzung stattfindet oder
3. das Archiv keinen unmittelbar oder mittelbar wirtschaftlichen oder Erwerbszweck verfolgt.

[In the case of sentence 1, Nr. 2, only when

1. the duplication occurs on paper or a similar medium by means of photomechanical procedures or other similar method or
2. an exclusively analog method
3. the archive has no indirect or direct economic purpose (UrhG §53, 1965)

Nonetheless, document delivery seemed well-enough established in practice that the German-North American Resources Partnership[1] established a working group to experiment with international document exchange between US and German libraries.

### **German-North American resources partnership**

At the meeting in Göttingen in 1999 the beta testing had gone well enough that the working group planned to expand to all ARL Libraries:

1 July is our target date as we gear up the access interface, procedural documentation, accounting system, and appropriate publicity for all GRP member libraries to begin full participation in document delivery. This will enable us to publicize the service at ALA at the end of June, aiming not only at current GRP institutions, but at other libraries who will find the service attractive and choose to join GRP in order to participate (GNARP, 1999).

There were certainly problems in terms of the language of the web interfaces and expectations by US librarians about how automated the process would be. The cost model was particularly different than what many US document delivery librarians were accustomed to and needed explanation:

The group discussed costs. It is important to know that some Subito and GBV libraries are 25 percent to 50 percent higher than others for the same service. . . . These costs can not be standardized, . . . and our literature can describe it as such while preparing users for the inevitable variations they will encounter. The person ordering a document can, of course, consider this factor when choosing the supplying library (GNARP, 1999).

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Accounting problems plagued the experiment, in large part because of procedural differences between US and German libraries that were harder to translate than the language of the interfaces:

Lynn reported on the suspension of the document delivery service via ARL. We need to make sure that older bills have been paid, so that we can work out the financial mechanism for next phase. UB-Göttingen will handle the billing and forward them to ARL to disburse from the deposit account. The billing and accounting pieces are variable and difficult. Not everyone can do credit cards or pay individually. Some places are ordering through GBV Direct. There seems to have been a communication problem that needs resolution face-to-face. The request to stop ordering in January did not stop libraries from ordering, and ultimately the accounts had to be closed on 1 May. The goal is to settle these problems within two months. . . . Phase II will be using RLG software for ordering documents from US libraries. It will get a new timeline and move forward. Testing should begin in two months (GNARP, 2002).

The temporary suspension indicated frustration, but the minutes also show an active intent to solve the problems with different software. The goal was not in doubt, merely the mechanism. By 2004 the situation changed dramatically with the lawsuit by the Börsenverein des deutschen Buchhandels und Stichting STM against Subito:

In der Klageschrift wird subito e.V. mit Androhung einer Schadensersatzforderung bzw. einer Ordnungshaft zur Unterlassung des Artikelversandes aufgefordert. Einzustellen ist der Versand des kopierten Artikels—per Email, FTP aktiv und passiv aus Deutschland an Kunden in Deutschland, Österreich und der Schweiz—per Email, FTP aktiv und passiv, Post und Fax aus Deutschland an Bibliotheken im In- und Ausland, die die Artikel an Dritte weitergeben (Subito, 2007a).

[The lawsuit threatened subito e.V. with financial penalties and/or a court order to stop supplying articles. Subito had to stop sending copies of articles:

- by email, FTP actively or passively from Germany to customers in Germany, Austria, and Switzerland;
- by email or FTP, actively or passively, and by mail or by fax from Germany to libraries within and outside of Germany that resend the articles to others (My translation).

This lawsuit effectively stopped any document delivery from Germany to US partner libraries. Many librarians in the US were distressed and perplexed that this could happen, and found the legal issues difficult to understand, both because the legal language in any country tends to be opaque to the untrained reader, especially for a non-native speaker, and because the German legal system functions differently than the Anglo-American common law. Nonetheless, for US librarians the effect of this lawsuit was minor. US libraries never had depended heavily on German libraries for materials, except in a few fields. The lawsuit and its potential consequences had far disruptive effect within Germany. While US librarians were sympathetic, no organized support for Subito came from interested US organizations, nor was it clear that such support would be useful except as moral support.

### **Recent agreements**

Since 2004 a complex set of court decisions, discussions and agreements have alleviated the document delivery situation within Germany. Subito is functioning again for patrons within Germany, Austria, and Switzerland and other countries “except the USA and Great Britain” (Subito, 2007b).

A key agreement took place between the Deutsche Bibliotheksverband e. V. (German Library Association) and the Börsenverein des Deutschen Buchhandels (the Market Association of the German Book Trade). The agreement settled a number of questions about what libraries may do with document delivery and what kinds of materials publishers are compelled to license for this kind of service. Some aspects of the agreement are not in fact so different than the US practice, where libraries pay a royalty fee through the Copyright Clearance Center whenever they send more than three copies of an article. Nonetheless, the agreement contained troubling language about requiring the use of DRM (Digital Rights Management) software, which would effectively limit the use and resending of the copy that a user received:

Der digitale Versand vom Verlag nicht online angebotener Werke sollte öffentlichen Bibliotheken gesetzlich gestattet werden, wenn nur eine nicht veränderbare graphische Datei geliefert wird, die durch DRM gegen Vervielfältigung und Weiterleitung gesichert ist (DBV, 2007).

The sending of materials in digital form that publishers do not offer online is allowed only when send in an unalterable graphic file format that has DRM protection against copying and retransmission (My translation).

The limit on retransmission seems reasonable on the face of it, but can, for example, prevent a user from moving the copy from a desktop to a laptop machine. The limit on copying can also prevent printing.

Perhaps even more troubling to libraries was the sense in which they were giving in to the commercial interests of the publishers:

Die Unterzeichner dieses offenen Briefes haben mit Bestürzung zur Kenntnis nehmen müssen, dass sich "unser" Verband mit dem Börsenverein auf ein gemeinsames Positionspapier verständigt hat, welches den Interessen von Wissenschaft, Forschung und ihren Dienstleistern, den wissenschaftlichen Bibliotheken großen Schaden zufügt (Griebel, 2007).

The signers of this open letter have noted with distress that "our" Association agreed to a common position with the Publishers' Group, which harms the interests of scholarship, research, and the infrastructure that supports their work (My translation).

The signers represented some of the most important library collections in Germany and those with major digitization centers. The prospect of a split within the DFV was explicitly mentioned:

Wir würden es im Interesse aller Bibliotheken sehr bedauern, wenn wir uns veranlasst sehen müssten, hinsichtlich unseres weiteren Verbleibens im dbv Konsequenzen zu ziehen (Griebel, 2007).

In the interests of all libraries, we would regret it if we felt compelled to draw conclusions about our remaining in the Association (My translation).

This is serious language, and it should be clear to the reader that the issues about how to do document delivery within Germany have to have a higher priority than the problem of restarting document delivery to the US and Great Britain. The issues raised in the open letter are far from being resolved. Active discussion continues in the e-mail lists and within library circles even while this article is being written.

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## Conclusion

The experience of the German-North American Resources Partnership's attempt to establish regular document delivery from and to Germany shows the fragility of a feature of library cooperation that librarians on both sides of the Atlantic took for granted. From the librarian viewpoint the materials US libraries were likely to request were unlikely subscription candidates. The publishers were not losing sales, but merely gaining readership that might possibly increase the significance of a journal and the likelihood of future sales. The publisher viewpoint was different, of course. Excessive sharing seemed as if it had to affect sales negatively. The intent of this column is not to suggest who was right, but to show the breakdown of a long-standing consensus over inter-library sharing. And this example shows with particular clarity that when that consensus fails, international exchanges become a low priority until domestic issues can be settled.

This does not mean that other international document delivery programs are endangered. In countries where the legislature explicitly protects the rights of libraries to make these exchanges, the programs will likely remain robust. But the economic model for publishers is changing and librarians should not view their interest in article-by-article royalties as a punishment or restraint, but as a shift to more of a by-the-article cost structure. It may force more libraries throughout the world to modify their principles of no-cost all-you-want access for users.

The most sinister element in this story is the agreement to restrict copies using DRM software. While DRM protections seem reasonable to many publishers and even to some librarians, they seriously undermine a user's ability to use a copy for ordinary teaching and research. It is not quite the equivalent of burning books, but it has something of the effect of locking them away, especially for the poor and for students. An ordinary PDF can be moved from computer to computer, can be printed, can even have parts copied into an article to ensure an accurate quote (as I have done a number of times in this article). A DRM-protected file may well forbid such things. At the very least, any DRM agreements should specify carefully what the DRM software might limit. International document delivery today clearly makes sense only in digital form. The terms of any new consensus between libraries and publishers needs to beware of precedents set for the future.

## Note

1. Originally sponsored by the Association of Research Libraries as the German Resources Project. The Center for Research Libraries in Chicago is the current sponsor.

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