

To: The Commission of the European Communities
(for the attention of the Secretary General)
Rue de la Loi, 200
B-1049 Bruxelles
BELGUIM

CONFIDENTIAL

COMPLAINT

**BEFORE THE COMMISSION OF THE
EUROPEAN COMMUNITIES FOR THE FAILURE
TO COMPLY WITH COMMUNITY LAW**

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1. EXECUTIVE SUMMARY

- 1.1 The Complainants are trade associations and publishers of scientific, technical and medical (STM) journals and books representing practically the whole of the STM publishing sector worldwide.
- 1.2 EC Directive 2001/29 on the harmonisation of copyright and related rights in the information society was designed (inter alia) to ensure the harmonisation of national copyright laws in the Member States so as to confirm the protection of copyright in the digital age and define more precisely the exceptions and limitations to the exclusive rights of rightholders in the context of digital copying and dissemination.
- 1.3 The German law purporting to implement the Directive fails to safeguard the exclusive rights of the rightholder by apparently permitting academic and university libraries and document delivery (docdel) companies to reproduce digitally and dispatch in digital format copyright material on a global basis without paying a contractually agreed royalty to the rightholder.
- 1.4 As a result, Subito, a docdel undertaking formed by the main German libraries and funded by the German Government, has risen to rank as the fifth largest non-publisher docdel delivery service in the world in the space of three years. Its success is entirely due to the fact that unlike other undertakings supplying docdel services, it pays no contractually agreed royalties on the copying and transmission of copyright material, relying upon the application of the minor exceptions rule under German law.
- 1.5 Subito's activity in infringing copyright supported by Germany's defective implementation of the Copyright Directive has cost STM publishers worldwide journal subscription accumulated losses estimated at € 80 million and docdel royalty losses estimated as €113 million between 1998 and 2003.

2. THE COMPLAINANTS

- 2.1 The Complainants comprise the publishing associations listed in paragraph 2.2 below and the publishers listed in paragraph 2.3. The Complainants are the main publishers trade associations and the major publishers of books, journals and other published

material in the STM fields of academic and research publishing. Although the Complaint focuses on STM publishing, the matters which are the subject of this Complaint affect all areas of academic and professional publishing.

2.2 STM Publishing Associations

Further Particulars of Complainants

INTERNATIONAL ASSOCIATION OF SCIENTIFIC TECHNICAL & MEDICAL PUBLISHERS (STM)

Appendix 1

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ASSOCIATION OF LEARNED AND PROFESSIONAL SOCIETY PUBLISHERS (ALPSP)

Appendix 2

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BÖRSENVEREIN DES DEUTSCHEN BUCHHANDELS e.V. **(German Publishers Association) (Börsenverein)**

Appendix 3

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Appendix 4

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INTERNATIONAL PUBLISHERS ASSOCIATION (IPA)

Appendix 5

An Association formed under Swiss Law with consultative relations to the UN, WIPO and UNESCO

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2.3 STM Publishers

AMERICAN CHEMICAL SOCIETY (ACS)

Appendix 6

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BLACKWELL PUBLISHING LIMITED
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Appendix 8

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JOHN WILEY & SONS LIMITED (Wiley)

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- 2.3 The publishing associations and publishers referred to in paragraphs 2.2 and 2.3 above are herein together referred to as "the Complainants".
- 2.4 **Each of the Appendices is confidential to each Complainant and contains business secrets. The Appendices have not been disclosed between Complainants inter se and should not be disclosed to any third party without the consent of the Complainant concerned.**

3. REPRESENTATION

The Complainants have appointed Julian Maitland-Walker of Maitland Walker Solicitors, 22 The Parks, Minehead, Somerset TA24 8BT, England to represent them in this Complaint. Representation Letters in respect of each of the Complainants are contained in Annex 1.

Julian Maitland-Walker's contact details are as follows:

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4. THE INFRINGING STATE

The Federal Republic of Germany

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5. THE COMPLAINT

- 5.1 This Complaint concerns the failure by the German Federal Government to implement or to adequately implement the European Directive 2001/29/EC "*on the harmonisation of certain aspects of copyright and related rights in the information society*"¹ ("the Directive") into German law.
- 5.2 In summary, the Complaint is concerned with the failure of the German implementing legislation,
- (a) to define or adequately define the limits of the exceptions and limitations to the exclusive reproduction right granted to the rightholder by Article 2 of the Directive;
 - (b) to define or adequately define the limits of the exceptions and limitations to the exclusive communication right granted to the rightholder by Article 3 of the Directive;
 - (c) to protect the interests of rightholders in ensuring "fair compensation" for use of their rights under Article 5 of the Directive and providing appropriate sanctions and remedies pursuant to Article 8 of the Directive; and
 - (d) to make exceptions or limitations subject to the IMRO three steps test.²
- 5.3 Article 2 of the Directive requires that Member States shall provide in their national law for the exclusive right for rightholders to authorise or prohibit reproduction by any means of copyright material.
- 5.4 Article 3 of the Directive requires that Member States provide in their national law for the exclusive right for rightholders to authorise or prohibit any communication to the public of copyright works, in particular by way of interactive or on demand transmission over the Internet.
- 5.5 Both Articles 2 and 3 are subject to Article 5 which allows Member States to derogate from the exclusive rights of reproduction and/or communication of the rightholder in certain specified circumstances. These derogations or exceptions or limitations to the

¹ 22/6/01 OJ 1167/10

exclusive rights of the rightholder are sometimes referred to as the "fair dealing exceptions" or "minor exceptions". In this Complaint they are referred to as the minor exceptions.

- 5.6 The key concern of this Complaint is that certain German libraries and document delivery (docdel) services³ are, with the support of the German Government, claiming that German copyright law entitles them to reproduce digitally and to communicate to the public by digital means, copyright material in digital format under the minor exceptions doctrine and without a contractual licence from the rightholder. The Complainants challenge such a view of German copyright law, not least because of its incompatibility with the requirements of the Directive. Without prejudice to that contention, however, the Complainants submit that the fact that German State funded libraries and docdel services are able to assert that such activity is lawful under German copyright law itself demonstrates that the Directive has not been properly implemented. This is reinforced by the fact that the libraries and docdel services concerned are financed by the German Federal Government and that their activities in breach of the terms of the Directive have been expressly and/or impliedly sanctioned by the Government.
- 5.7 By this Complaint, the Complainants request that the Commission do find that the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty and deliver to the said Member State a reasoned opinion requiring that the failure be remedied pursuant to Article 226 EC Treaty.

6. THE FACTUAL BACKGROUND

- 6.1 This Complaint is concerned with the market for the supply and delivery of copies of articles from journals and extracts from books in the academic publishing market and in particular the STM part of that market which covers academic publishing in the hard sciences (life sciences, mathematics, physics etc.) and medicine. STM publishing represents approximately 47% of the academic publishing market.⁴

² See paragraph 9.20-35 below

³ Most notably, Subito, see paragraphs 10.3-10.19 below

⁴ BNP Paribas Equity Research Report September 2003

- 6.2 The STM publications market is a world market with gross sales estimated at \$7.3 billion for the calendar year 2003⁵. STM publishers sell on a global basis either directly or through licensees or local subscription agents.
- 6.3 The major national markets for STM publications are the following:
- United States of America
 - United Kingdom
 - Germany
 - Japan
 - Canada
- 6.4 STM publishing is a specialist area of publishing, distinct from that which may be termed "trade" publishing. STM publishers typically have a close and long established relationship with universities and other academic institutions as well as professional bodies and individual academics. STM books and journals are relatively expensive to produce. Because print runs for specialist markets are low, book prices and journal subscriptions tend to be high when compared with mass-market publications.
- 6.5 STM publishers' principal sources of revenue are as follows:
- (a) journal subscriptions (hard copy and digital) usually prepaid on an annual basis;
 - (b) consortia, multi site and national site licensing;
 - (c) royalties from licensing third parties to reproduce copies of articles from journals or extracts from books;
 - (d) sales of copy articles and offprints through docdel services; and
 - (e) book publishing.
- 6.6 STM publications and in particular articles published in STM journals, are an important resource for those engaged in research, education and technical development. STM journals also have an important role in providing the authors of academic research with a publication vehicle for specialist articles directed to a specific group of specialists, academics or researchers. Academic or professional advancement will often depend on specialists having published work in the relevant

⁵ Source: EPS Survey February 2004

specialist journal, so that STM journals inform STM research and development whilst at the same time exposing research or articles to peer group review.

- 6.7 STM journals invite contributions from academics and researchers. Authors will submit articles to the Journal they consider most appropriate. When received by the publisher of a peer reviewed journal, an article is submitted to a rigorous peer group review and, depending upon such review, may then be approved for publication in the appropriate journal. If the article is rejected then the author will usually submit the article to another journal of lesser reputation serving the same user group. Some journals with a particularly high reputation in one field are perceived to be better than others and publication in those journals is seen to carry more weight than publication in others.⁶
- 6.8 The peer review process is expensive for publishers but it is a very important part of the process and is an important safeguard against scientific fraud and malpractice.
- 6.9 Authors of articles for publication in journals are generally willing to grant to publishers the required rights on an exclusive basis to publish articles because authors derive direct benefits from publication in the context of their academic or professional reputation and advancement.
- 6.10 Scientific research and development has become increasingly international over the last fifty years and the demand for STM publications has followed this trend. In addition, the rapid development of science and technology has led to a demand for STM publications focusing on narrow specializations. This means that the high fixed costs of publishing have to be shared by a relatively smaller customer base so that subscription costs are higher than would be the case for a mass circulation journal. These developments have put pressure on the subscription budgets of academic institutions who have typically sought to pool their resources as a means of reducing costs, or to establish specialist libraries whose function is to focus on particular subject areas and offer a resource center accessible for those seeking information within their subject area.

⁶ For a detailed commentary on how STM Journals work and the role of the Publisher see paragraphs 3&4 of the ALPSP Response to the House of Commons Science & Technology Committee Inquiry into Scientific Publications (Annex 2)

- 6.11 Germany, in common with many other countries, developed an inter library loan (ILL) practice which started in the late Nineteenth Century and has continued to the present day. A library receiving a request for a work which it did not have would locate a copy in another library through the ILL system. The dispatching library would send the original work to the receiving library for study by the reader. The work would then be returned. Because books were loaned rather than copied, ILL did not pose problems with respect to copyright law. In Germany, publishers are entitled to receive compensation for the lending process through publisher's royalty payments received by reprographic rights organizations (RROs) such as VG Wort under §27 of the German Act Urheberrechtsgesetz (UrhG).⁷
- 6.12 With the introduction of photocopiers during the 1960s and where it was practical to do so, the libraries moved to a system of supplying copies rather than the original publication. Notwithstanding this change in practice the libraries still refer to this supply as ILL. The new practice was established to enable the dispatching library to retain the original in its collection for use and in the interests of preserving the integrity of the original printed copy for use and long term archiving. The dispatching library would send the copy of the publication to the receiving library. The user was able to pick up the copy at the receiving library and keep it. Although more efficient than loaning the original book or an issue of a journal, it was necessary first to copy the publication and then dispatch it by mail. Publishers received no compensation for these so called ILL copying processes other than the compensation for a loan under §27 UrhG. The scale of copying was limited and was not at that time seen by publishers as representing a significant economic threat.
- 6.13 The trend to "loan" copies rather than the original led to an increase in requests under ILL for copies of individual articles rather than the whole journal within which the article had been published.
- 6.14 The development of modern fax machines in the 1980s led to German libraries sending copies purporting to fall under ILL by fax rather than mail. In addition the large specialist libraries such as TIB Hanover, Zentralbibliothek for Medizin (ZB Med) etc, while remaining nominally not for profit organizations, adopted a more

⁷ The national laws relating to public lending are harmonised under EC Directive 92/100 of 19 November 1992 "on rental right and lending right and on certain rights related to copyright in the field of intellectual property"

commercial approach. In recent years document delivery or "docdel" has developed into a market in its own right. Some of the large German libraries moved into the docdel market, offering the ILL service to supply copies primarily of German language publications not only to German libraries but also to foreign libraries mostly situated in neighboring Austria and Switzerland and to a lesser extent, libraries of other countries. In the late 1980s and early 1990s, the above-named libraries went a step further supplying copies directly to private and corporate customers in Germany and abroad by fax and by mail.

- 6.15 The STM publishers viewed this expansion of library docdel activities under ILL as a threat to their copyright. They were concerned that the increasing availability of copied journals and individual articles by way of so-called ILL would impact upon the demand for journals resulting in a fall in subscriptions. Furthermore the libraries were perceived to be entering the docdel market in competition with STM publishers and their licensees. In September 1994, civil proceedings were initiated by the *Börsenverein* (Association of German Book Traders) against the library, TIB Hanover, in what is known as the *Kopienversanddienst* case seeking damages for breach of copyright. In its judgment delivered on 25 February 1999, the Federal Supreme Court (BGH) considered the broadly drafted minor exceptions provisions contained in §53 UrhG as they were at that time. The BGH decided that the delivery of a copy by mail or fax did not encroach on the publishers' exclusive right of distribution or communication, but only on the right of reproduction and, hence, was allowed under the minor exceptions rule of §53 UrhG as it then was. On that basis the Court concluded that publishers were not entitled to prevent copying or seek a contractual royalty. However, the BGH took the view that the encroachment of copyright so permitted under §53 UrhG as then in force would be incompatible with the Berne Convention three steps test⁸ unless the rightholder received some form of compensation. Therefore the BGH decided that authors and publishers should receive a special "*document delivery*" compensation. This compensation arrangement was developed entirely on the initiative of the Court to compensate for what was seen as an encroachment on copyright irreconcilable with Germany's international obligations and was intended by the BGH to fill a perceived gap in the law pending legislation.

see in particular Article 5

⁸ See paragraphs 9.20-9.35 below

- 6.16 In *Kopienversanddienst*, BGH found that the Berne Convention, the TRIPs Convention⁹, and Art. 14 GG (German Constitution) did not require a restrictive interpretation of §53 UrhG as it then was and that it had jurisdiction to find a solution giving some compensation to the rightholder. In the Complainants' view the BGH was wrong, however, the finding of the BGH on this issue was clearly binding upon the Lower German Courts unless and until reversed by legislation or by a further judgment of the BGH. By failing to ensure that the pre-existing law met the requirements of the Directive, the German authorities have failed to implement the Directive. In implementing the Directive, the German legislator had the opportunity, indeed the obligation, to fill the gap. It did not do so.
- 6.17 The "*document delivery*" compensation established by the BGH in *Kopienversanddienst* does not adequately compensate the rightholder for the substantial encroachment of its exploitation rights. First of all, the level of royalty is set by the collecting society, in this case VG Wort, without the rightholder having any contractual rights. Secondly, the royalty is set on a uniform basis taking no account of any differential in value between copyright material. Thirdly, payment is made to VG Wort for distribution to authors and/or publishers. The rightholder has little say in how royalties are divided. In practice, the collection and payment of royalty is time consuming and publishers, particularly foreign publishers receive small sums in comparison to the contractual royalty rates to which they are entitled.
- 6.18 The special "*document delivery*" compensation royalty set by VG Wort in 1999 under the General Agreement on Copy Transmission between the Conference of State Ministers for Culture and VG Wort provided for an average royalty payment of €3 per copy compared with a typical contractual copyright fee of STM publishers currently in the region of \$33. Thus STM publishers are effectively losing €30 per copy on average as a result of the current application of German Copyright Law, compared with the typical entitlement if the Directive had been properly implemented.
- 6.19 Relying upon the *Kopienversanddienst* ruling, described in paragraph 6.15 above, these German libraries and docdel providers claim that the transmission of digital

⁹ See paragraph 7.6 below

copies is merely an alternative to mail or fax and that they are therefore entitled to supply copies digitally under the German application of the minor exceptions doctrine and without the need for a copyright licence from the rightholder and therefore without a contractually agreed royalty.

- 6.20 The development of digital technology has created a substantial worldwide market for information supplied on demand through the Internet. STM publishers anticipated and responded to this by publishing journals in both hard copy and electronic versions. Subscribers can take subscriptions in either or both formats. STM publishers have developed docdel services in respect of their own published material and/or licensed others to do so. STM publishers have also developed other delivery options under which a subscriber or any member of the public may access individual articles or groups of articles on a "pay per view basis". Whether published in hardcopy or digital format, the publication of journals as a vehicle for STM articles remains an essential element of STM publishing. There is, of course, nothing to stop academic institutions, universities or individual authors from publishing papers directly on to the Internet and indeed many do so. However, publication in a respected STM journal recognized by academics in the specialist field concerned, remains an important means by which communication to the appropriate user group can be assured and the individual's career enhanced. Essentially, STM journals provide a forum through which academics and researchers in the same fields of activity can communicate with one another.
- 6.21 STM publishers have also invested hundreds of millions of Euros in emerging technologies to make information in electronic form more accessible to the user. For example, Elsevier has invested approximately €284 million in its ScienceDirect electronic distribution platform and other programs such as the digitalization of archived journals. As a result of investment of this kind by STM publishers, users now have the following benefits:
- (a) several research undertakings can form a consortia enabling networked access to information across a number of undertakings;
 - (b) undertakings with more than one site can obtain networked access with a single subscription;

- (c) single users or undertakings may access all journals produced by one publisher through the so called "big deal" arrangements;
- (d) users may access and search STM publishers databases;
- (e) users may link seamlessly to and from papers published by different publishers through CrossRef and similar linking protocols.

As result of these developments STM publishers have substantially increased the amount of information available to scientists and research undertakings and the accessibility of such information. The investment by STM publishers in developing online resources has been transformative for the scientific community. Any unjustified threat to that investment is likely to have a direct negative effect on the development and availability of scientific research.

6.22 Given the extent of such investment it is evident that STM publishers must protect their rights in the creation and transmission of digital copies which has a far greater potential for interfering with the normal exploitation of copyright protected works than does the creation and supply of analogue copies. The need to protect the rightholder's exclusive rights and to adapt the minor exceptions doctrine to meet the needs of the digital age, led to the WIPO Copyright Treaty of 1996 (WCT). One of the purposes of the Directive was to implement WCT and safeguard the rights of the owner of copyright. It was recognized that digital technology allowed virtually instantaneous reproduction and communication of electronic copies without limit in a form identical to the original. As digital technology posed a threat to copyright, the Directive was designed to ensure that a harmonized legal framework was adopted by all Member States providing for "*a high level of protection of intellectual property*".¹⁰ Such a framework was perceived to be necessary to maintain the incentive to develop intellectual property and to encourage businesses to make the necessary investment to ensure the development of a rich networked digital environment.

6.23 Competition for STM publishers in the emerging docdel market is provided by independent companies providing data search engines such as Infotrieve, EBSCO, INGENTA, ISI and Swets. These companies offer access to their databases and

¹⁰ Recital 4 of the Directive

delivery of copy STM articles and extracts from books on the Internet or in hard copy. Delivery by these docdel services is undertaken on the basis of contractual licences granted by the rightholder.

7. THE EUROPEAN DIRECTIVE 2001/29/EC

7.1 The Directive was adopted by the European Parliament and the EC Council of Ministers on 22 May 2001 in the context of Articles 47(2), 55 and 95 of the EC Treaty, which concern freedom of establishment, freedom to provide services and the institution of a system ensuring that competition in the internal market is not distorted.

7.2 The Recitals to the Directive provide the background to the substantive provisions and the objectives of the legislation. They are an important aid to interpretation. The following Recitals to the Directive are of relevance in the context of this Complaint¹¹:

- (1) *The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted.....*
- (4) *A harmonised legal framework on copyright and related rights through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation...*
- (11) *A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources...*
- (14) *This Directive should seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.*
- (22) *The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.*

- (25) ...it should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on demand transmission.
- (30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences...
- (31) A fair balance of rights and interests between the different categories of rightholders as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights...
- (32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.
- (35) In certain cases of exceptions or limitations rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criteria would be the possible harm to the rightholders resulting from the act in question....
- (38) ...Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.
- (40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries

¹¹ Emphasis in the Recitals has been added

and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction of right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject matter...

- (44) *When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject matter. The provisions of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions may have to be even more limited, when it comes to certain new uses of copyright works and other subject matter.*
- (58) *Members States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective proportionate and dissuasive.*

7.3 The following primary themes emerge from the recitals to the Directive:

- (a) National copyright laws throughout the EU should be **harmonised to avoid distortions in trade** and to safeguard the European Single Market (Recitals 1, 4 and 31).
- (b) There should be a **high level of protection for copyright** (Recitals 4, 11, 14, 22 and 58).
- (c) Existing exceptions (i.e. those in existence prior to implementation of the Directive) must be reassessed **and may have to be reduced in scope** in light of the new electronic environment (Recitals 31 and 44).
- (d) In certain cases rightholders should receive **fair compensation** (Recital 35).

- (e) Digital copying is likely to become more widespread and **should therefore be treated differently** from analogue copying (Recital 38).
- (f) Rightholders must have the **exclusive right to make copyright works available by inter active on demand transmission** (Recital 25).
- (g) Library exceptions should **not cover online delivery of copyright works** (Recital 40).

7.4 Articles 2, 3 and 4 of the Directive require that Member States "*shall*" provide the rightholder with the exclusive right to reproduction, communication and distribution of their copyright material.

7.5 Article 5 sets out the limitations or exceptions which are permissible in derogation of the exclusive rights of copyright ownership. Article 5(1) is a mandatory exception relating to temporary acts of reproduction fulfilling certain conditions not relevant to this Complaint. Article 5(2), (3) and (4) set out those circumstances in which Member States may provide for limitations or exceptions in the case of reproduction, communication or distribution (i.e. minor exceptions) as follows:

7.5.1 Reproduction

Article 5(2)(a) - circumstances where reproductions are made "*on paper or any similar medium*" effected by the use of any kind of photographic technique or similar process provided that the rightholders receive fair compensation. Thus, Article 5(2) is limiting reproduction to analogue reproduction only.

Article 5(2)(b) - reproductions "*on any medium*" by a natural person for private use and for ends that are neither directly nor indirectly commercial on condition that the rightholders receive fair compensation. This right extends to both analogue and digital copying.

Article 5(2)(c) - allows copying where "*specific acts of reproduction*" are made by publicly accessible libraries, educational establishments or museums or by archives that are not for direct or indirect economic or commercial advantage. It is not clear what is meant by "specific" acts of reproduction.

Article 5(2)(c) does not use the word "any medium" as applied in Article 5(2)(b) but there is no express exclusion of digital as opposed to analogue copying. However, Article 5(2)(c) limits the exception to "reproduction". It does not deal with the right to "communicate" copies. The right to communicate is dealt with in Article 5(3)(see paragraph 7.5.2 below)

7.5.2 Reproduction or Communication

Article 5(3)(a) - use for the sole purpose of illustration for teaching or scientific research as long as the source including the author's name is indicated and to the extent justified by the non-commercial purposes to be achieved.

Article 5(3)(n) - use by communication or making available for the purpose of research or private study to individual members of the public by dedicated terminals on the premises of libraries, educational establishments, museums or archives, which are not for direct or indirect economic or commercial advantage.

7.5.3 Distribution

Article 5(4) - provides that where Member States permit an exception or limitation in respect of the rights of reproduction under Articles 5(2) and (3) they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4.

7.5.4 Under Article 5(5) - the permissible exceptions identified under Articles 5(1)-(4) shall only be applied by Member States *"in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder"*.

7.6 Article 5.5 of the Directive is important in defining the limitations to the scope of minor exceptions which Member States are entitled to enact in national copyright law. Article 5.5 applies the *"three steps test"* using the language adopted by Article 10 of the WCT which in turn adopted the standard set out in Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (the Trips Agreement) and

Article 9(2) of the Berne Convention (1971)¹². Recital 15 of the Directive confirms that in addition to the objective of harmonising certain aspects of copyright law within the Member States it also serves to implement (inter alia) the WCT. Furthermore, Recital 44 requires that, "*when applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations*".

- 7.7 It will be apparent from the above analysis that the limits of the exceptions or limitations which Member States may apply to qualify the rights of the rightholder in their national law are precisely and narrowly defined in relation to copying, communication and distribution.
- 7.8 The right to communicate copies and particularly digital communication within the minor exception is not generally permitted by the Directive. Recital 40 of the Directive states that in making an exception or limitation for the benefit of certain non-profit making establishments such as libraries, such exception, "*should be limited to certain special cases covered by the reproduction right*". Recital 40 specifically states that these should not include "*uses made in the context of on-line delivery of protected works or other subject matter*". Communication of copyright material by libraries and similar institutions is only permissible by digital means through the use of an intra net on the premises where the copyright material is housed under Article 5(3)(n).
- 7.9 Recitals 25, 32, 38, 40 and 44 of the Directive all serve to reinforce the view that express words would have been used if the Directive had intended to permit digital on-line transmission of copies within the exercise of the minor exceptions rule.
- 7.10 In any event, all the permissible minor exceptions identified in Article 5(1)-(4) are subject to the application of the three steps test set out in Article 5(5). A Member State may not introduce a minor exception under national law falling within the ambit of any one of Articles 5(1)-(4) if the minor exception concerned does not meet all three of the conditions envisaged by the three steps test.¹³

¹² See paragraph 9.20-35 below

¹³ See paragraph 9.21-36 below

- 7.11 Recital 32 of the Directive reminds us that this list of minor exceptions is "*exhaustive*". Outside these exceptions, Member States must ensure that the rightholders' rights are fully protected.
- 7.12 Furthermore, Article 8 of the Directive requires that Member States "*shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied*". Accordingly, it is mandatory for Member States to provide adequate sanctions and remedies to rightholders to protect against copyright infringement. "*Measures necessary*" to achieve this would include ensuring that the scope and limits of any minor exceptions are sufficiently precise to give certainty as to the point at which infringement arises.
- 7.13 Article 13 of the Directive requires Member States to bring into force "*the laws, regulations and administrative provision necessary to comply with the Directive before 22 December 2002*". This obligation is not limited to supplementing existing national laws, regulations and administrative provisions to meet the terms of the Directive, but extends to an obligation to repeal or amend existing national laws, regulations or administrative provisions which are incompatible with the terms of the Directive. Accordingly where pre-existing national law provides a more generous interpretation of the minor exceptions doctrine than is provided by the Directive, a Member State must take steps to reduce the scope of such minor exceptions to those permissible under the Directive.¹⁴

8. GERMAN COPYRIGHT LAW

- 8.1 On 11 April 2003 the German Parliament passed the Copyright in the Information Society Act (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft) (RUI) with the object of implementing the Directive. The RUI amends the UrhG.
- 8.2 The RUI clarifies German copyright by restating the copyright exploitation right in §19a UrhG granting to rightholders the exclusive right to make their work available to the public using cabled or wireless technology in such a way that it is available to

¹⁴ See Recitals 31 and 44

members of the public at the time and place of their choice. Moreover §15(2) UrhG provides the rightholder with an exclusive right to communicate works in intangible form. The RUI thus confirms the exclusive right of the rightholder, in respect (inter alia) of digital communication implementing Article 3(1) of the Directive.

8.3 However, the German implementation of the Directive is defective when dealing with the minor exception rule. In order to understand the German provisions applying the minor exceptions rule, it is necessary to consider §52a UrhG (which deals with the use of works on intranets, inter alia, at educational institutions) and §53 UrhG (which establishes the minor exceptions applicable in the context of reproduction). Whilst the Complainants believe that §52a UrhG is not compatible with EU law, it is not the provision challenged by this Complaint, since §52a UrhG is not being used as the basis for avoiding the requirement to seek a publisher's permission to engage in the business of document delivery. However, reference is made to §52a in this Complaint for the purpose of illustration and to point out the inconsistency of approach between §52a UrhG and §53 UrhG.

8.4 The text of the relevant sections of UrhG incorporating the amendments introduced by RUI, in English translation is contained in Annex 3. §52(a) and §53 as amended provide as follows.

"§52a MAKING AVAILABLE TO THE PUBLIC FOR TUITION AND RESEARCH

(1) *It shall be permissible to make available to the public:*

1. *Previously published small parts of a work, works of limited size, and individual contributions to newspapers or magazines (articles) for illustration in instruction at schools, universities, non-commercial institutions of training and continuing education, and institutions of vocational training, exclusively for a limited circle of participants in said instruction, or*
2. *Previously published parts of works, works of limited size, and individual contributions to newspapers and magazines*

(articles) exclusively for a limited circle of persons for their own scientific research,

provided this is required for the particular purpose and is justified for the pursuit of non-commercial purposes.

- (2) *The making available to the public of a work designated to be used for teaching purposes at schools shall only be permissible with the consent of the right holder. The making available to the public of a cinematographic work is, before the expiration of two years after the start of customary, regular exploitation in movie theatres, within the scope of this law only permissible with the consent of the right holder.*
- (3) *It shall also be permissible in cases falling under paragraph (1) to make the copies required for the making available to the public.*
- (4) *An appropriate compensation shall be paid for the making available to the public pursuant to paragraph (1). The claim can only be asserted by a collective licensing society.*

§53 REPRODUCTION FOR PRIVATE AND OTHER PERSONAL USES

- (1) *It shall be permissible for a natural person to make single copies of a work for their private use on any medium, unless such copies directly or indirectly serve commercial purposes and provided no obviously illegally produced model is used for the copying. The party entitled to make such copies may also have another party make the copies, provided this is done without payment or it is question of copies on paper or a similar medium by any means of photomechanical procedures or other procedures with a similar effect.*
- (2) *It shall be permissible to make or to cause to be made single copies of a work.*
 1. *for personal scientific use, if and to the extent that such reproduction is necessary for the purpose;*

2. *to be included in personal files, if and to the extent that reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction;*
3. *for personal information concerning current events, in the case of a broadcast work;*
4. *for other personal uses:*
 - (a) *in the case of small parts of published works or individual contributions that have been published in newspapers or periodicals,*
 - (b) *in the case of a work that has been out of print for at least two years.*

In cases falling under sentence 1 no. 2, this applies only if:

1. *the copy made on paper or a similar medium is made by means of any photomechanical procedures or other procedures with a similar effect or*
2. *an exclusively analogue use occurs or*
3. *the archive does not pursue a directly or indirectly economic or commercial purpose.*

In cases falling under sentence 1 no. 3 and 4, this applies only if one of the requirements set out in sentence 2 no. 1 or 2 is additionally given.

- (3) *It shall be permissible to make or to cause to be made copies of small parts of a work, of works of small volume or of individual contributions published or made available to the public in newspapers or periodicals (articles) for personal use,*
 1. *in teaching, in non-commercial institutions of education and further education or in institutions of vocational education in a quantity required for one school class or*

2. *for State examinations and examinations in schools, universities, non-commercial institutions of education and further education and in vocational education in the required quantity,*

if and to the extent that such reproduction is necessary for this purpose.

(4) *Reproduction*

(a) *of graphic recordings of musical works,*

(b) *of a book or a periodical in the case of essentially complete copies*

shall only be permissible, where not carried out by manual copying, with the consent of the copyright owner or in accordance with paragraph (2), item 2, or for personal use in the case of a work that has been out of print for at least two years.

- (5) *Para. 1, para. 2 no.2 through 4 and para.3 no. 2 shall not apply to database works whose elements can be accessed individually by electronic means. Para.2 no. 1 and para. 3 no. 1 shall apply to such database works on the condition that no commercial purpose is pursued with either scientific use or use for teaching purposes.*

- (6) *Copies may neither be disseminated nor used for public communication. It shall be permissible, however, to lend out lawfully made copies of newspapers and works that are out of print or such copies in which small damaged or lost parts have been replaced with reproduced copies.*

- (7) *The recording of public lectures, representations or performances of works on video or audio recording mediums, the realisation of plans and sketches for works of fine art, and the reproduction of works of architecture shall only be permissible with the consent of the copyright owner."*

9. THE PRINCIPAL DEFECTS IN GERMAN IMPLEMENTATION OF THE DIRECTIVE

- 9.1 Set out below are the main defects in German implementation upon which the Complainants seek to rely.

Failure to identify the special cases to which the minor exception is to apply

- 9.2 The Title to §52(a), "*MAKING AVAILABLE TO THE PUBLIC FOR TUITION AND RESEARCH*" inaccurately describes the object of the legislation at least to the extent that it seeks to implement Article 5 of the Directive. Article 5 is concerned only with those circumstances in which reproduction is permissible within the minor exceptions. It does not extend to the communication right, nor does it identify the special cases to which any minor exception is to apply. On the contrary, the scope of the section is to the public at large and for tuition and research. This effectively includes the whole of the market within which the Complainants are present.

Discrimination against the interests of STM Publishers

- 9.3 Article 5.5 of the Directive requires that national law implementing the minor exceptions shall "*not unreasonably prejudice the legitimate interests of the rightholder*". The schoolbook carve out from the exception in §52a(2) UrhG was introduced whilst the legislation was passing through Parliament as a result of lobbying on behalf of schoolbook publishers. It was accepted by the German Parliament that as drafted the new law would prejudice the legitimate interests of schoolbook publishers. Thus, the first sentence of §52a(2) effectively excludes the application of the minor exception rule for schoolbooks. In doing so, the legislator accepted the concern expressed by publishers of school books that indiscriminate copying would cause substantial damage to their sales to schools which is a significant part of their business. The argument is precisely the same for STM publications and yet the German legislator did not extend the exclusion to STM publications.
- 9.4 English language STM publications account for over 90% of documents copied by Subito¹⁵ on the basis of §53 UrhG. By offering protection to the predominately German publishers of works used for tuition in schools under §52a(2) and offering no protection for the predominately non-German publishers of works for use in universities and research under §53, this provision effectively discriminates against non-German publishers of copyright material and damages the legitimate interests of the right holder.

¹⁵ Source - Subito Website

Failure to implement Article 5(3)(a) of the Directive

- 9.5 Article 5(3)(a) of the Directive only permits "use" (i.e. making available) for the "*sole purpose of illustration for teaching or scientific research*", subject to the condition that the source and author's name is indicated (unless impossible) and that use is for a non-commercial use. This does not extend to reproduction and communication for any other purpose. Accordingly, the right to copy under §52(a)3 is outside the scope of the narrow exceptions permitted under Article 5(3)(a).

Failure to provide for fair remuneration as required under Article 5(2)(a) of the Directive

- 9.6 Article 5(2)(a) of the Directive requires that the rightholder must receive "*fair remuneration*". This is not a defined term in the Directive. However, Recital 35 states that, "*when determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be possible harm to the rightholders resulting from the act in question*". This suggests that the loss of profit sustained by the rightholder as a result of being deprived of the direct sale should be the basis of compensation. §52(a)(4) UrhG in the English translation refers to "*adequate remuneration*" and states that "*the claim can only be brought by a collective licensing agency*".¹⁶
- 9.7 As stated above¹⁷, the amounts which collective licensing agencies in Germany collect from the transmission of copyright material are traditionally based on unified fee schedules with a very low average of €3 per copy in comparison with a typical contractual royalty rate of €33. Furthermore, the rightholders are unable to determine the form, terms for payment or the level of such fees which are set independently by the collective licensing agencies who have no regard to the value or cost structures of individual copyright works.

¹⁶ i.e. in relation to STM an RRO such as VG Wort

¹⁷ Paragraph 6.18

- 9.8 In effect, therefore, the rightholder is deprived of the right to set a fair level of compensation on the basis of the particular copyright and is obliged to accept whatever the Collecting Society may determine. This is inconsistent with the requirement of "*fair remuneration*" under Article 5(2)(a).
- 9.9 Furthermore, fair compensation implies the presence of an effective mechanism for establishing the extent of the exploitation of the copyright material. The reason why the Directive requires that Member States must distinguish digital from analogue reproduction is that the former allows instantaneous and extensive communication with little effort with the result that the risk of damage to the rightholder's property rights is much greater than is the case with analogue reproduction. This would, at the very least, require a different level of compensation to satisfy the "*fair remuneration*" test. Furthermore, "*fair remuneration*" should take account of the costs of digitalisation and the additional benefits for the user in terms of increased access, search and linkage capabilities.

Failure to prevent delivery of copies by third parties to individuals by digital means

- 9.10 §53(1) UrhG permits reproduction for private use by a natural person on any medium and to that extent follows the minor exceptions permitted under Article 5(2)(b) of the Directive. However, §53(1) goes on to provide the person entitled to make such copies "*may also have another party make the copies, provided that this is done without payment or it is a question of copies on paper or a similar medium by any means of photomechanical procedures or other procedures with a similar effect.*"
- 9.11 Neither Article 5(2)(b) nor any other provision of the Directive permits the additional right of communication conferred on the private user as contained in §53(1). Given that the list of permissible minor exceptions in Article 5 of the Directive is described as "*exhaustive*" in Recital 32, any departure from such list in national legislation is outside the terms of the Directive.

Failure to overrule the BGH Decision in Kopienversanddienst

- 9.12 As stated above¹⁸ in the *Kopienversanddienst* case, the BGH concluded that fax transmission and mail deliveries are permissible as long as "*document delivery*"

¹⁸ Paragraph 6.14

compensation is paid to the rightholder on the basis that a gap in the law must be closed by the Court through analogous application "*as long as the law maker remains inactive*".¹⁹ In other words unless and until the legislator specifies the extent of permissible methods of delivery and ways adequately to compensate rightholders within the application of the minor exceptions, the Court is free to devise a remuneration scheme for document delivery similar to those remuneration schemes which it considers analogous.

9.13 Recital 31 of the Directive notes that existing differences in the exceptions and limitations which exist as between Member States have "*direct negative effects on the functioning of the internal market of copyright and related rights*". In implementing the Directive, the German authorities should have included provisions to ensure that the rightholder was properly protected and that the BGH's finding in *Kopienversanddienst* was overruled. However, the German authorities did not do so. On the contrary, it is clear that the legislator intended §53(1) UrhG to permit libraries to provide document delivery services to private individuals within the minor exceptions doctrine and in breach of the Directive.

9.14 §53(1) UrhG permits the digital transmission of copies but only to the extent that it is not intended directly or indirectly for any business or commercial purpose. The explanatory note to §53(1) states as follows:

"The proposed provision also ensures that transmission of copies remains possible because under paragraph 1, the person authorised to reproduce [document] may also cause copies to be made by another person free of charge by means of reprography. In addition, reproductions made "free of charge" under this provision shall also include reproductions made, for example, by libraries that levy charges or fees for borrowing, provided that cost recovery is not exceeded".

9.15 By apparently allowing digital transmission of copies §53(1) is inconsistent with Recital 40 of the Directive which expressly excludes from uses under the minor exception, "*made in the context of on-line delivery of protected works or*²⁰ *other subject matter*".

¹⁹ BGH Zum 1999, 566, 573 - *Kopienversanddienst*

²⁰ See paragraph 7.8 above

Failure to expressly limit German libraries and docdel service to specific acts of reproduction

- 9.16 Article 5(2)(c) of the Directive only permits Member States to apply the minor exceptions rule to "*specific acts of reproduction*" made by, "*publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage*". Accordingly, the Directive limits the use of the minor exceptions right for libraries to "*specific acts of reproduction*". §53(1) UrhG goes beyond the exceptions and limitations to the reproduction right permitted under Article 5(2)(b) of the Directive and is being used by German libraries and docdel companies such as Subito to allow them digitally to supply digital copies without a contractual copyright licence from the rightholders.
- 9.17 Subito (which is an Association of German libraries having separate legal personality from its members) is engaged in business as a document delivery service²¹. It relies upon §53(1) UrhG to offer for sale digital copies of copyright material without a contractual licence from rightholders and to sell, offer for retrieval or delivery these copies both in Germany and elsewhere in return for a fee.
- 9.18 Quite apart from giving libraries minor exceptions rights going beyond what is permissible under the Directive, §53(1) UrhG extends such rights to non-libraries. Subito is not itself a publicly accessible library, it operates as a commercial docdel service and charges a fee for copies, albeit a fee based on its costs. Subito claims the right to benefit from the minor exceptions rule in relation to its business under §53(1) UrhG without any contractual copyright licence from rightholder. Subito is funded by the German Federal Government and it may be assumed that it is acting in accordance with the official interpretation of German copyright law which is clearly contrary to Article 5(2)(c) of the Directive. The Federal Government's support for Subito's activities is further proved by the fact that it has joined with the Conference of Education Ministers to call on the Arbitration Board of the German Patent and Trade Mark Office to determine the level of Subito royalty.

Failure to provide a rigorous and effective system of copyright protection

9.19 Recital 11 of the Directive requires a "*rigorous, effective system*" for the protection of copyright and Recital 58 and Article 8 requires Member States to provide "*effective sanctions and remedies*" for infringement. As described above, §52(a) and §53(1) broaden the scope of the minor exception rule as applied in Germany to the detriment of the rightholder.

The failure of the German Copyright law to satisfy the "three steps test"

9.20 As stated at paragraph 7.6 above, Article 5.5 of the Directive defines the limits in the scope of minor exceptions which Member States may introduce in derogation of the proprietary rights of rightholders (inter alia) by applying the so called "*three steps test*" which the European Community is required to apply under international treaty obligations.

9.21 The three steps test was analysed in the report of the WTO panel in the IMRO case²² (IMRO). It is submitted that such analysis is highly persuasive if not binding upon the Commission in determining whether a Member State has overstepped the limits of its discretion in establishing the minor exceptions to be applied within its jurisdiction.

9.22 The three steps test under Article 5(5) of the Directive requires that limitations and exceptions to exclusive rights:

- (1) **be confined to certain special cases**
- (2) **do not conflict with a normal exploitation of the work, and**
- (3) **do not unreasonably prejudice the legitimate interests of the right holder.**

9.23 Before applying each of the three steps test to the minor exceptions adopted by German copyright law, three general points may be made. First that the three conditions apply cumulatively; a limitation or an exception is consistent with Article 5(5) only if it fulfils each of the three conditions²³. Second that the ultimate burden of proof for invoking an exception or limitation falls on the party seeking to maintain

²¹ See paragraphs 10.3-19 below

²² *United States - Section 110(5) of the US Copyright Act* dated 15 June 2000

²³ Para 6.74 IMRO

it²⁴. Third that the minor exceptions doctrine is primarily concerned with de minimis use²⁵.

"Certain Special Cases"

- 9.24 This condition requires that a limitation or exception in national legislation should be clearly defined and narrow in scope²⁶.
- 9.25 The IMRO case was concerned with the exception from copyright applied under US copyright law in respect of music played in certain types of retail establishment below a certain size. The WTO Panel found²⁷ that a substantial majority of eating and drinking establishments and close to half of retail establishments were covered by the exemption and therefore concluded that the exemption could not qualify as a special case.
- 9.26 §53.1 appears to permit reprography by analogue and digital means without distinction allowing libraries to copy for the purpose of on-line document delivery by email, FTP or otherwise, so long as the activity is conducted "*without charge*". According to the explanatory memorandum to §53 "*without charge*" means on a cost recovery basis. Furthermore, once a copy has been digitised, multiple reprography and transmission by email may be difficult to control.
- 9.27 It is precisely because of the dangers of uncontrolled reprography presented by digital transmission that Recital 38 of the Directive requires that analogue and digital private copying should be treated differently.
- 9.28 In the IMRO case it was pointed out that the minor exception provided by US copyright law would extend to cover the transmission of musical works over the Internet. The implications of Internet transmission did not need to be addressed on the facts of IMRO since there was no evidence of such Internet transmissions having taken place. Nevertheless, the WTO Panel did make the point²⁸ that future new technologies such as Internet transmission might have implications for the assessment of whether a particular exception satisfied the "*certain special case*" condition. In

²⁴ Para 6.16 IMRO

²⁵ Para 6.93 IMRO

²⁶ Para 6.112 IMRO

²⁷ Para 6.133 IMRO

other words, if the wording of a minor exception provision could be interpreted to extend to digital or on-line delivery, that could bring it outside the condition in the first of the three steps test.

- 9.29 §53 allows digital communication without limiting the right to any special cases. The German copyright law is neither clearly defined, nor narrow in scope.

"not conflict with a normal exploitation of the work"

- 9.30 In IMRO, the WTO Panel reached the following conclusion²⁹ on the application of this second condition:

"We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e. the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains."

- 9.31 The German copyright law as now amended has enabled Subito and other document delivery services to *"enter into economic competition"* with publishers and their licensed docdel suppliers. In IMRO, the WTO Panel accepted that it was appropriate to consider not only the actual but the potential impact of the exceptions. The evidence of the economic impact of Subito's activities in the German and international market for copies of journals and scientific and technical articles since 2002 contained in paragraph 10 below demonstrates that Subito has become a very significant competitor with publishers and their authorised licensees who provide docdel services, primarily by undercutting existing contractual arrangements and setting lower fees. Subito's business model and marketing strategy indicates that to compete in the global market is its express objective³⁰.

²⁸ Para 6.153 IMRO

²⁹ IMRO 6.183

³⁰ See paragraph 10.12 below

"not unreasonably prejudice the legitimate interests of the rightholder"

9.32 In IMRO, the WTO Panel concluded that:

"prejudice to the legitimate rights of rightholders reach an unreasonable level if an exception or limitation causes or has the potential to cause unreasonable loss of income to the copyright owner"³¹.

9.33 For this purpose the effect on all right holders from all WTO members must be taken into account. Although this Complaint arises in respect of the non-implementation of an EC Directive primarily concerned with the harmonisation of trade within the EU, the Directive also implements a number of new international obligations³² including WCT Article 10 which lays down the parameters of permissible exceptions to the exclusive rights of rightholders, including the principles applied in Article 5.5 of the Directive. Thus the impact actual and potential on all publishers including the Complainants needs to be taken into account.

9.34 Appendices 6-12 of this Complaint demonstrate the significant actual and potential loss suffered by the publisher Complainants as a result of the failure by Germany properly to implement the Directive.

9.35 In conclusion, therefore, German implementation fails to satisfy the requirements of the three steps test.

Derogation from General Law to be Narrowly Construed

9.36 Whilst it is not compulsory for Member States to adopt the language of the Directive in national implementing legislation, it is usually desirable to do so unless there are good reasons to do otherwise. §52(a) and §53 UrhG and Article 5 of the Directive are phrased very differently. Since Article 5 of the Directive is a derogation from the general principle of copyright protection it must be narrowly construed. The fact that the German implementation of the Directive adopts an approach and uses words different from the Directive is of itself a deficiency in implementation and prejudices the sanctions and remedies available to a rightholder contrary to Article 8.³³

³¹IMRO 6.229

³² See Recital 15

³³ See paragraph 7.12 above

10. DAMAGE SUFFERED BY COMPLAINANTS BY GERMAN DEFECTIVE IMPLEMENTATION OF THE DIRECTIVE

General

- 10.1 The Directive requires that Member States ensure that national law is brought into line with the terms of the Directive. This includes taking appropriate steps to reduce the scope of minor exceptions previously permitted by national law which go beyond the limits set by Article 5 of the Directive.³⁴ The main defect in German implementation of the Directive, is the failure of the RUI to prohibit the digital delivery of copyright material under the minor exceptions rule as is currently practised by certain German libraries and docdel services without a licence from the rightholder and without payment of a contractually agreed royalty. The German authorities should have taken steps to ensure that the minor exceptions rules as provided by UrhG and the jurisprudence of the German Courts prior to the implementation of the Directive was cut down by the RUI to accord with the requirements of the Directive as envisaged by Recitals 31 and 44.
- 10.2 A number of German libraries, including TIB Hanover and ZB Med are asserting such rights in their docdel services, but the main damage to the rights of STM publishers arises from the activities of an association of the major German libraries known as Subito which well illustrates the deficiency in German implementation of the Directive.
- 10.3 The Subito service was originally launched as a project in 1994 on the initiative of the German Federal Ministry of Education and Science and the library consortium of the Conference of Ministers of Education and the Arts, representing the Federal States. The proposal was to set up a central database of published material held by German libraries followed by a centralised docdel service. In 1997, Subito became operational and began offering docdel supply of journal articles. In 1999 the service was extended to the supply of copies of extracts from books and book lending.
- 10.4 In 1999 Subito was restructured as an independent commercial undertaking. In 2000 the Ministry of Education and Science agreed to provide grant aid to cover Subito's

³⁴ See Recitals 31 and 44 of the Directive

"set up financing" for a maximum of six years on the basis that after that Subito would be expected to be self financing.

10.5 Subito has approximately thirty active supplier libraries³⁵ comprising many of the leading German academic and university libraries, as well as two Austrian and one Swiss library. Each member library makes available to Subito its indexes which are incorporated into Subito's central database and commits its inventories to supply copy documents for the Subito document delivery system. Full details of Subito's document delivery system are contained in Subito's brochure published on the Subito website (www.subito-doc.com).

10.6 On its website, Subito describes itself as follows³⁶:

"Subito is the document delivery service of international libraries. It is a fast and uncomplicated service that sends the user copies of journal articles and portions of books and assists in the borrowing of books. The document delivery service enables online research as well as ordering and direct delivery of technical literature to the user's workplace. Irrespective of location, everyone who is looking for literature can turn to Subito. Several million journals and books in European libraries form an important basis for the supply of information in all areas of science, business, and society. Subito provides comprehensive, uncomplicated access to these inventories, Subito is the result of an initiative implemented by the Federal Ministry of Education and Research and by the states to accelerate the supply of literature. Subito's philosophy is this: literature should be in the right place at the right time!"

10.7 The Website defines the objective of Subito in the following terms:

"Germany's libraries are preparing for global competition in the information society. For the first time, innovative scientific libraries throughout the country are organizing themselves as an independent information service provider. The objective is to continue to develop Subito, the electronic document delivery service that has been introduced, into an internationally renowned brand-name product."

10.8 It will be apparent from the extracts from Subito's website and indeed from Subito's promotional material in general, that Subito is not a library itself, but an undertaking which has entered the publishing business as a docdel service provider in competition

³⁵ For full list of supplier libraries see Appendix to Subito Brochure

with the STM publishers and their licensees, but without paying contractually agreed royalties to rightholders for its docdel activities. The fact that Subito claims to be a not for profit organisation has no bearing on the fact that it is carrying on an economic activity. Furthermore, the public funding of Subito expires in 2006 (see paragraph 10.4 above). If it is to be self-financing and "*to assert itself successfully in the international competition of document suppliers*"³⁷, it will have to charge a commercial fee for its services and make a surplus in order to reinvest in its future activities.

- 10.9 Subito offers a web based international service through which customers can obtain (inter alia) copies of literary, artistic, educational and scientific works including articles from STM journals held in the collection of Subito member libraries. The articles are scanned at one of the member libraries and, in return for a fee, are sent in the main in digital format to the customer. Users can order copies of works from a database of approximately one million articles and seventy million books. The journals and books³⁸ come from countries all over the world and from every field of knowledge.
- 10.10 Subito offers two services: a public service and a library service. Subito claims to be a "*quick and easy to use*" co-operative delivery service, which supplies the user directly with copies of individual articles from journals or parts of books and can also provide books on loan. In 2002 alone, nearly one million copies of articles were transmitted to users throughout the world by these means. In addition, Subito also provides an "inter library service" making available copies of works both for its member libraries and other libraries. As stated at paragraph 10.8 above, Subito is not a library and therefore cannot benefit from the reproduction right permitted under Article 5(2)(c) of the Directive. However, due to the defective implementation of the Directive, German copyright law appears to enable Subito to do so.
- 10.11 Even if Subito could be considered a library (which the Complainants would strongly deny) and if German law complied with the Directive, Subito even as a library would not be entitled to trade in and make available copies digitally, for example by email,

³⁶ Emphasis added

³⁷ See Subito Brochure page 30 (www.subito.doc.com)

³⁸ Subito Brochure page 3

active FTP or passive FTP which it is understood comprise 95% of Subito's business.³⁹

- 10.12 Subito charges a fee for copies of articles. The amount of the fee is dependent upon the category of user, delivery method and speed of delivery. Details of the current rates are contained in the Subito Brochure (page 7). Subito's prices for normal email/FTP delivery are as follows:

User Group	Normal Service Fee (Up to 20 pages) €
1	4
2	11 ⁴⁰
3	6.5
4	3

This compares with a typical price for individual articles supplied by the publishers (or their licensees) in the region of €33. Subito is able to subsidise its prices because it does not have to bear the publishing costs, nor does it pay a contractual royalty to the rightholder in respect of the copies produced and because its sales activities are funded by the Federal Government.

- 10.13 The creation of digital copies which are then transmitted digitally, has a far greater potential for interference with the normal exploitation of copyright-protected works than does the creation and transmission of analogue copies, as is recognised in Recital 38 of the Directive. The recipient of a digital copy by digital means can redistribute the document in unlimited copies across the world virtually instantaneously with no loss of quality.
- 10.14 The Subito Website (www.subito-doc.com) indicates that "*anyone can use Subito over the Internet*". All that is needed to obtain a copy of an article is registration with Subito which requires the provision of basic contact details and self-assignment to one of four user groups as follows:

³⁹Email from Subito's lawyers dated 30 March 2004

⁴⁰Price offered by Augsburg University Library. There are slight price variations depending upon Subito source library for copy

User Group 1 - includes students, pupils, trainees, associates of colleges and universities, employees of research institutes and government agencies.

User Group 2 - includes companies, self-employed, i.e. all "commercial" users.

User Group 3 - includes private individuals.

User Group 4 - includes public libraries or libraries from institutions which are primarily financed by public funds.

10.15 The Subito Website informs users that: *"Users must assign themselves to user groups during registration and for the individual order. Assignment to User Group 1 must be proven, if requested. Misuse can be pursued under private law"*. In practice, however, Subito takes little or no action to establish user identity.

10.16 The Subito library service (User Group 4) is offered *"to both national and foreign libraries"*⁴¹. Subito's library service began in 2002. The total number of copies delivered by Subito to libraries in Germany and internationally in 2002 and 2003 were as follows:

	2002	2003
Germany	11,758	18,421
Rest of the World	13,669	43,020
Total	25,427	61,441

Source: Lovells letter dated 30 March 2004 (Lawyers for Subito)

Deliveries by fax and mail represent less than 5% of these sales, the remainder are distributed digitally⁴².

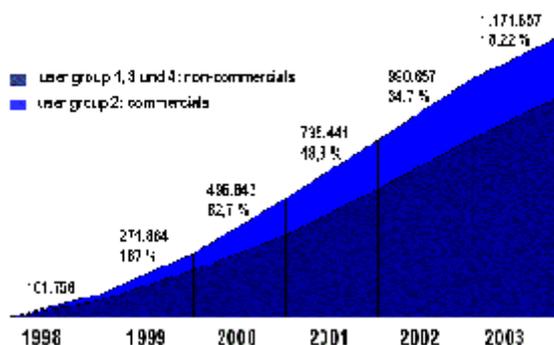
10.17 In relation to docdel services (User Groups 1, 2 and 3) Subito has been very successful. Since it started its document delivery in 1998, orders have increased from 101,756 to 990,657 orders in 2002. In 2003 the number of sales increased to 1,104,940 of which 119,552 copies went to non-German speaking countries.⁴³ The exponential increase in Subito's sales is demonstrated in the following graph reproduced from the Subito Brochure:

⁴¹ Subito Brochure page 6

⁴² Subito's lawyers Lovell's letter dated 30 March 2004

⁴³ Subito Brochure page 10 and Lovells email 8 June 2004

order volume 1998 - 2003



Source: Subito Brochure page 10

10.18 Within five years Subito has established itself as the fifth largest undertaking in the aggregate document delivery service worldwide. The Complainants believe that currently the largest docdel suppliers are as follows:⁴⁴

1. British Library
2. Infotrieve (a commercial docdel supplier)
3. CISTI (part of the Canadian Research Council)
4. INIST (part of the French National Research Council)
5. Subito

It is important to stress that all the docdel companies identified above operate at least partially under contractual licences from the rightholder with the exception of Subito.

10.19 Since Subito pays an average royalty of only €3 per copy as compared with the average of €33 per copy charged by STM publishers and their licensees, it is not surprising that Subito has been so successful. That success has, however, been at the expense of STM publishers' business both in terms of a fall in journal subscriptions, particularly in the German speaking countries and in Eastern Europe and in terms of damage to STM publishers' sales in their emerging docdel markets, thus undermining STM publishers long term business investment in digital delivery.

Fall in Journal Subscriptions

10.20 Appendices 5-9 illustrate that over the past four years STM subscriptions in volume terms have fallen steadily at an average of approximately 3% per year. Despite this, STM publishers have generally maintained or increased revenues by developing new

⁴⁴ This excludes docdel services provided by STM publishers in respect of their own publications

STM products, enhancing existing products and expanding activities in the docdel market.

- 10.21 In Germany, however, the reduction in subscriptions in the last two years seems to be falling at twice the worldwide average as German subscribers and libraries switch to obtaining email copies of individual journal articles from Subito as and when required which is a significantly cheaper alternative to paying an annual subscription.
- 10.22 Assuming a uniform loss of subscriptions from Germany, Austria and Switzerland at an annual rate of 6%, and allowing for the worldwide fall in subscriptions at 3%, the annual total loss of revenues for STM publishers attributable to the defective implementation of the Directive by Germany, is 3% of the annual subscription volumes. As will be apparent from the calculation contained in Appendix 12 to the Complaint, the estimated potential loss for the period 1998-2003 is €80 million and is increasing.
- 10.23 The difficulty for STM publishers is that the deteriorating subscriber base in Germany will inevitably lead to an increase in annual subscription rates globally as fewer subscribers have to share the largely fixed costs of journal publishing.

Damage to emerging docdel markets

- 10.24 Docdel represents an important and relatively new area of business for STM publishers, providing an opportunity to compensate for the reduction in subscription income.
- 10.25 The Complainants do not have precise figures for docdel sales in Germany, but based on the figures contained in Appendix 12 to the Complaint, the estimated potential loss for the period 1998-2003 appears to be €113 million.

11 STEPS TAKEN TO CHALLENGE GERMANY'S FAILURE TO IMPLEMENT THE DIRECTIVE

Taskforce Docdel

- 11.1 Early in 2002, members of the STM formed a "digital document delivery" interest group (Taskforce Docdel). The Taskforce Docdel concluded that the unauthorised

electronic transmission of digital copies by libraries and state supported or independent commercial transmission services was a violation of international copyright law and constituted a serious threat to the publishers' trade in technical information which, as a result of modern technologies, was increasingly becoming an "*article business*". Taskforce Docdel is seeking to enforce the rightholders' right to contractual licensing. Taskforce Docdel has taken action with regard to the activities of document delivery services in various countries, however the activities of Subito have been the main focus of its attention since Subito represents the greatest challenge to the rightholders' interests at present.

Action Against Subito

- 11.2 In September 2002, lawyers representing Taskforce Docdel issued a formal letter before action to Subito requiring it to cease copyright infringement and in particular:
- (a) the unauthorised transmission of copies of copyright material in whatever form to countries outside Germany;
 - (b) the unauthorised transmission of digital copies by electronic means.

It was argued that under US and English law, Subito could not supply users in those jurisdictions without consent. Copies of relevant correspondence in relation to the English proceedings are at Annex 4. These proceedings have not yet been issued.

- 11.3 Subsequently discussions took place between the parties as a result of which Subito agreed on a without prejudice basis:
- (a) to suspend transmission of documents (in any format) to the USA with effect from late December 2002;
 - (b) to suspend transmission of documents (in any format) to all the non-German speaking countries in Europe with effect from 21 September 2003.

This arrangement does not extend to Subito's supply of copies to libraries abroad.

- 11.4 Subito has insisted that it is not prepared to suspend the supply of copies inside Germany, Austria and Switzerland, which it describes as the German speaking territories. Subito has also refused to agree to pay a copyright royalty on its supply of

copies to libraries inside or outside Germany. Negotiations with Subito are continuing.

German proceedings

- 11.5 Proceedings have been issued in the Munich Regional Court 1 in Germany by the Borsenverein and STM Publishing (Claimants) against the University Library of Augsburg and Subito (Defendants) in respect of the breach of copyright by the Defendants in copying and communicating or delivering to customers STM publications in breach of copyright seeking an injunction and damages. The proceedings were filed on 18 June 2004. A copy of the Claim in German is at Annex

Action against ZB Med

- 11.6 In spite of the above discussions with Subito, ZB Med continued to supply copies of the publishers' works throughout the world through its websites. Accordingly, a letter before action was sent to ZB Med on behalf of the publishers Blackwell Publishing Limited, Elsevier Limited and John Wiley & Sons Limited (and companies within their group of companies outside the US) on 13 January 2004. This letter also related to copyright infringement under UK law resulting from ZB Med's delivery of copies of publishers' works in the UK (also in particular by email, active and passive FTP and fax, through ZB Med's websites). A claim form and particulars of claim for UK High Court copyright infringement proceedings were then issued on 14 January 2004 and served on 3 February 2004, on behalf of the above three UK publishers plus Blackwell Science Limited. The proper defendant under German law is the Federal State of North-Rhine/Westphalia. Service of the proceedings is deemed to take place on receipt of the documents by the German Ministry of Foreign Affairs (following transmission through various official channels), and is expected to take place shortly. ZB Med will then be required to submit a defence. ZB Med have also instructed Lovells in Frankfurt and without prejudice settlement negotiations may also begin with them (although this is currently subject to ZB Med agreeing to certain additional preconditions in view of its conduct). In the meantime, ZB Med have stated that they ceased deliveries outside Germany, Austria and Switzerland from 1 June 2004. Copies of relevant correspondence is at Annex 6.

Negotiations with the Library Royalties Committee

- 11.7 Negotiations between the Library Royalties Committee of the Conference of Education Ministers and VG Wort (with the involvement of the *Börsenverein*) on an extension of the 1999 General Agreement on Copy Transmission failed. The agreement therefore expired on 31 December 2002. At issue is the language of the agreement that suggests inclusion of transmission by email in the area of application of the compensation provisions for the copy transmission service.
- 11.8 In late 2003, the Library Royalty Committee and VG Wort agreed to extend the General Agreement on Copy Transmission Services retroactively to 1 January 2003, in a reduced form (with exclusion of email and cross-border transmissions). At the same time, the Conference of Education Ministers called on the Arbitration Board of the German Patent and Trademark Office to find that VG Wort is required to form a general agreement with the Library Royalty Committee for Subito's email and cross-border transmissions as well.
- 11.9 Subito has indicated that it holds monies on trust pending transfer to VG Wort, but when or if any payment will be made to publishers is not known.
- 11.10 Subito has indicated that it has paid approximately €8.5 million since its inception up to 31 December 2002. STM publishers await VG Wort's decisions on and distribution of the collected amounts.
- 11.11 The royalty rates published by Subito averaging €3 are of course calculated and paid on a block royalty basis and compare with an STM publishers contractual royalty averaging €33. Given the differential, Subito's success both in Germany and internationally is unsurprising.

12 DAMAGE TO THE COMMUNITY INTEREST

- 12.1 The failure on the part of the Federal Republic of Germany to implement or to adequately implement the Directive has given rise to actual and continuing damage to the Community interest.

12.2 The main objectives of the Directive are to secure:

- (a) that competition in the internal market is not distorted (Recital 1)
- (b) a harmonised legal framework on copyright (Recital 4)
- (c) a rigorous and effective system for protecting copyright (Recital 11)

12.3 The RUI failed to implement the Directive into German copyright law in:

- (a) Failure to identify the special cases to which the minor exception is to apply;
- (b) Discrimination against the interests of STM Publishers;
- (c) Failure to implement Article 5(3)(a) of the Directive;
- (d) Failure to provide for fair compensation as required under Article 5(2)(a) of the Directive;
- (e) Failure to prevent delivery of copies by third parties to individuals by digital means;
- (f) Failure to overrule the BGH Decision in Kopienversanddienst
- (g) Failure to provide a rigorous and effective system of copyright protection;
- (h) The failure of the German Copyright law to satisfy the three steps test;
- (i) Derogation from General Law to be narrowly construed.
- (j)

12.4 So far as the Complainants are aware, no other EEA Member State has implemented the Directive in a manner so prejudicial to the interests of STM publishers. Accordingly, the RUI has the effect of undermining rather than developing the harmonised legal framework which the Directive is intended to achieve. This is demonstrated by the fact that Subito's sales of copies to other Member States has already led to breach of copyright proceedings being initiated in England (see paragraph 11.2 above).

- 12.5 §52a(2) also discriminates in favour of protecting predominantly German publishers of books for use in schools at the expense of publishers of books for use in universities and in research who are predominantly non-German (see paragraph 9.3 above).
- 12.6 The substantially different approach adopted in Germany to the minor exceptions rule compared to that adopted in other EU States (and indeed internationally) is causing and will continue to cause distortions of competition in the internal market. Paragraph 10 demonstrates the rapid growth of Subito's business since it began its document delivery system. In five years between 1998 and 2003, Subito increased sales ten fold from 101,756 to 1.2 million. This was achieved primarily through Subito's exploitation of the minor exceptions rule as it is applied in Germany to deprive rightholders of their legitimate right to a contractually negotiated royalty for the supply by Subito of copy works outside the minor exceptions permissible under Article 5 of the Directive. Subito's success has been at the expense of docdel systems offered by publishers and independent docdel services who respect the need to provide right holders with fair remuneration.
- 12.7 The fact that Subito has suspended the transmission of documents in any format to all non-German speaking countries in Europe in response to STM publishers threat of proceedings⁴⁵ demonstrates that distortions in competition and in the application of copyright law is already present as between Germany, Austria and Switzerland and the rest of Europe.
- 12.8 STM publishing and document delivery are international businesses and many of Subito's competitors are established businesses elsewhere in the EEA who have suffered serious economic damage as a result of Germany's defective implementation of the Directive. In particular it is known that the British Library and Infotrieve, both substantial competitors of Subito in the docdel business, have suffered significant loss as a result of Subito's unfair trading activities. According to Subito's own exploitation statistics⁴⁶, the one hundred journals from which most articles are copied and sold by Subito are all English language technical journals. Only one of them is published in Germany. In addition, according to Subito's own figures, 10.8% of orders in 2003

⁴⁵ See paragraph 11.3 above

⁴⁶ See Subito Website

came to Subito from non-German speaking countries. According, to Subito's lawyers⁴⁷, the figure would have been higher but for the undertakings to suspend the transmission of documents to non-German speaking countries as referred to in paragraph 11.3 above.

- 12.9 The impact of Subito and other German docdel service providers who trade in copies of copyright material without paying royalty has already severely damaged the businesses of STM publishers as is demonstrated in paragraph 10.22 and 10.25 above and in Appendices 6-12. If allowed to continue, this is likely to cause damage to the future of STM journals and the important role they provide to the academic and research bodies they serve. Copyright infringement on the scale presented by Subito in the past four years has already reduced the number of subscription orders (new orders and renewals) in German speaking countries and elsewhere, thus requiring a shrinking subscription base to carry an increasing cost burden for those journals to remain viable and threatening the continuing investment by STM publishers in the digital development and enhancement of their products.
- 12.10 Finally, the German implementation of the Directive does not satisfy the three steps test under Article 5.5 of the Directive (see paragraph 9.21 above). The Directive and Article 5.5 in particular was adopted to meet the EC's internal obligations under WCT (see paragraph 7.6 above).

13 CONFIDENTIALITY

- 13.1 The Complainants do not object to the Commission disclosing their identities to the authorities of the German Federal Republic against whom the Complaint is directed.
- 13.2 The confidential version of this Complaint contains business secrets confidential to the Complainants and should not be disclosed to any third party or to the Complainants otherwise than through their appointed representative.
- 13.3 The Complainants do not object to the Commission disclosing the non-confidential version of this Complaint to any third party.

⁵⁰ Letter from Subito's lawyers Lovells dated 30 March 2004

ACCORDINGLY

The Complainants request that the Commission:

- (a) Act upon the Complaint**
- (b) Carry out such investigations as are necessary and appropriate pursuant to Article 226 EC Treaty**
- (c) Take such action as is necessary and appropriate to require that the Federal Republic of Germany remedy its breach of Community Law**

SIGNED by JULIAN MAITLAND-WALKER

the appointed representative of the Complainants

at Minehead, Somerset, England

on 25th day of June 2004