

## **KEY ISSUES OF ADDENDUM NO. 1 TO THE GENERAL AGREEMENT BETWEEN PUBLISHER AND SUBITO**

The Subito General Agreement will be extended by Addendum No.1 to, firstly, include deliveries to customers located within GALS (Germany, Austria, Liechtenstein, Switzerland), and secondly to allow the distribution of copies delivered by Subito via intermediaries. This applies for intermediaries located within and outside of GALS. The key issues of the Addendum are summarized as follows:

### **I. Extension concerning deliveries within GALS**

As yet, the Subito General Agreement only allowed the delivery by Subito to customers located outside of GALS. For deliveries within GALS, the Addendum introduces some amendments to the General Agreement. The remaining provisions and obligations of the Subito General Agreement are applicable to the Addendum.

#### **1. Primary obligations**

The publisher grants Subito and its supplier libraries a non-exclusive and non-transferable right to reproduce and deliver articles of its journals within GALS. It is recalled that Subito itself does not reproduce and deliver any copies. Subito serves only as portal to order deliveries, while the supplier libraries of Subito reproduce and deliver the ordered articles.

Subito owes the publisher a licensing fee per delivered article. Conditions and amount of the fee depend on the mode of delivery (e.g. mail, fax or electronic delivery (e.g. email),) as well as on the client group to which the article is delivered to.

#### **2. Details of the extension**

##### **In general**

The licence of the Addendum is granted under the following conditions, identical to those of the licence of the Subito General Agreement:

- The copy must be made from a original printed publication,
- which is part of the permanent collection of the supplier library.
- Each intermediary copy that has been produced needs to be deleted and shall not be used again. Thus no database of the delivered article shall be established or used.
- Subito always needs to enter with its clients in a Customer Licence Agreement which includes the minimum standards of Annex 10 of the Subito General Agreement in order to ensure publisher's rights.
- In case of electronic delivery, Subito and its supplier libraries need to apply a Digital Rights Management (DRM) system that limits the use of the electronic copy according to Annex 2 of the Subito General Agreement.

##### **In particular**

The Addendum Nr.1 grants Subito a licence for those deliveries that are not covered by a legal licence. These are (i) all electronic deliveries within GALS as long as the publisher offers the delivered article via its own pay-per-view service for download, and (ii) GALS cross-boarder deliveries per mail and fax (e.g. from Germany to Austria etc.). It is emphasised that the parties could not agree on a precise distinction between deliveries per fax and electronic deliveries. Therefore, Subito granted the publisher a flexible right to terminate the Addendum. Please see point 5. This right can be exercised if it turns out that Subito hardly carries out and declares electronic deliveries, but predominantly undertakes deliveries per fax. In the latter case the publisher would only receive the lower fee mentioned under (ii) below.

#### **i) Electronic deliveries (e.g. email)**

##### **Conditions the publisher has to comply with:**

- The publisher has to offer the article that has been delivered by Subito via his own, or via a licensed pay-per-view service, for download, and
- this information needs to be visible for Subito via the Electronic Journals Library ( Elektronische Zeitschriftenbibliothek (EZB)) (<http://rzblx.luni-regensburg.de/ezeit/>). Therefore, the publisher needs to enter the data of its journals that are available via his pay-per-view service into the EZB, according to the conditions of the EZB.

#### **Fees:**

- **Deliveries to clients of client group 1A and 1B (students and academic staff):**  
See precise definition of the client group in Addendum No.1, Section 2.7.4. The fee per delivery of a copy of an article is € 3,50 in month 0-18, € 4 in month 18-24, € 4,50 in the third year after the Addendum entered into force, € 5 in the fourth year and € 5,50 in the fifth year.
- **Deliveries to clients of client group 2 (commercial entities, private persons etc.):**  
See precise definition of the client group in the Addendum No.1, Section 2.7.4. The fee is to be set by the publisher.
- **Deliveries to clients of client group 3 (client libraries):**  
See precise definition of the client group in the Addendum No.1, Section 2.7.4. + **Schedule 14** of the Addendum. The fee per delivery of a copy of an article is € 3,50 in month 0-18, € 4 in month 18-24, € 4,50 in the third year, € 5 in the fourth year and € 5,50 in the fifth year. The fee is the same as for deliveries to client group 1A and 1B.

#### **Cap regarding deliveries to client group 1A, 1B and 3:**

The deliveries at a low fee to client group 1A, 1B and 3 are capped. Within 18 months after the signing of the Addendum, all deliveries to client group 1A and 1B need to be routed via client group 3. After these 18 months, Subito and its supplier libraries are allowed to deliver only 10 copies per journal, calendar year and client library at the low fee of client group 1A, 1B and 3. Further copies to a client library that already received 10 copies of the same journal in the current calendar year have to be charged with the fee of client group 2 that has been set by the publisher.

#### **Forwarding of electronic deliveries by client libraries to their users:**

Electronic deliveries that have been sent to client libraries do not need to be printed and picked up at the premises of the library. They can be forwarded upon request to the clients of client group 1A and 1B (students and academic staff). These deliveries then need to be protected via a DRM system according to Annex 2 of the Subito General Agreement. In addition, an increased fee of € 0,5 to € 1 for each delivery will apply within 18 months after the Addendum entered into force. Please see the precise fee under **Schedule 13** of the Addendum.

#### **ii) Cross boarder deliveries within GALS via mail and fax**

- Concerning deliveries of supplier libraries that already have been member libraries of Subito before October 1, 2007 (most of them), the publisher currently receives from Subito a fee of € 1,16 per delivered copy. This amount depends on the fee set by VG Wort for purely national deliveries within Germany per mail or fax.
- Concerning deliveries of supplier libraries that have not been member libraries of Subito before October 1, 2007 (only few of them), the publisher receives from Subito the fee that has been agreed to in the Subito General Agreement. For deliveries to client group 1 and 2 that would be the publisher set price. For client group 3 that would be € 3,50 in the first year after the Subito General Agreement entered into force, € 4 in the second year, and renegotiable for the third year.

#### **3. Deliveries for which Subito does not need to pay a fee to the publisher but to the competent collecting society (if applicable)**

- Pure national deliveries of Subito by mail and fax within GALS (e.g. deliveries by a supplier library of Subito within Germany to a user within Germany etc.).
- The same applies to electronic deliveries via Subito that are not available for online download via the pay-per-view service of the respective publisher, or that have not been entered into the EZB.
- Deliveries that are not ordered via Subito but via the Inter-library Lending and Use (ILL) that supplier libraries provide independent of the Subito service and in compliance with the legal licence. Deliveries under the legal licence should usually not be electronic deliveries. This includes pure national deliveries as well as cross boarder deliveries within GALS.

#### **4. Reports**

According to the obligations of the Subito General Agreement, Subito needs to include all deliveries listed under 2. and 3. above into the respective reports, with exception of the ILL deliveries that supplier libraries provide independent of the Subito service. Subito needs to send to the publisher the following reports:

- According to **Schedule 15** of the Addendum, within 30 days after each calendar year, a report that separately lists all above mentioned deliveries of copied articles of the journals of the publisher, and that distinguishes between client groups and delivery methods.
- According to Annex 4A of the Subito General Agreement, a monthly statistical report of the deliveries of **all** publishers that distinguishes between countries to which the copies have been delivered, as well as client groups. GALS needs to be listed as any other country to which Subito delivers under the Subito General

Agreement. This report only needs to be supplied to publishers within the two initial years of the Subito General Agreement.

#### **5. Term of the Addendum and possibilities to terminate the Addendum**

The Addendum No. 1 will be concluded for 5 years. It will be extended automatically for one year if it is not terminated in time. In addition, the Addendum provides further possibilities to terminate the Addendum:

- After the two years initial period of the Subito General Agreement, the Subito General Agreement as well as the Addendum may be terminated if, within the sole discretion of the publisher, the volume of deliveries to client libraries located outside of GALS increases in an unacceptable way, or conflicts with the business model of the publisher.
- After 18 months of the Addendum's entry into force, the Addendum may be terminated if, within the sole discretion of the publisher, the volume of deliveries to client libraries increases in an unacceptable way, or conflicts with the business model of the publisher. Thereafter, under the same considerations, termination is possible as to June 30 or December 31 of any year.

#### **6. Supplier libraries of Subito that provide their own document delivery service, e.g. TIB Hanover**

The Addendum applies accordingly to Supplier Libraries that conduct their own document delivery service.

## **II. Amendments of the Subito General Agreement concerning intermediaries**

### **1. Intermediaries**

The Subito General Agreement will be amended by the Addendum to the extent that so called intermediaries may order copies of articles via Subito which they then may forward to their own clients. This applies for intermediaries located within and outside of GALS. The intermediaries will be regarded as clients of Subito of client group 2 (commercial entities, private persons etc.). Please see the precise definition of the client group in the Addendum, Section 2.7.4.

That implies that

- The publisher receives for each copy that has been delivered to an intermediary the fee of client group 2 that has been set by the publisher;
- Subito needs to ensure that a customer licence agreement is concluded with the intermediary as well as with the client of the intermediary. The customer licence agreement needs to include the minimum standards of Annex 10 of the Subito General Agreement with the exception that the intermediary in fact is not an endclient. Subito also ensures the enforcement of the customer licence agreement vis-à-vis intermediaries and their clients;
- A DRM system needs to be used for the deliveries to the intermediaries and their clients that includes the minimum standards set out in Annex 2 of the Subito General Agreement.

### **2. Exclusion of intermediaries**

The publisher may exercise vis-à-vis Subito the exclusion of an intermediary under the following conditions:

- Concerning intermediaries listed in **Schedule 12** of the Addendum, after a first warning if the intermediary continues to infringe his contractual obligations, or applicable copyright or unfair competition law etc.
- Concerning intermediaries that are not listed in **Schedule 12** but on the website of Subito, following a first infringement of a contractual obligation or applicable copyright or unfair competition law etc.

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Januar 16, 2008, HG, CSLLAW