# International Comparative Legal Guides

# Copyright 2021

A practical cross-border insight into copyright law

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## 1 Copyright Subsistence

### 1.1 What are the requirements for copyright to subsist in a work?

Copyright will be granted for the work of an author if the work is the author's own intellectual creation. A work protected under Section 2 GCA (German Act on Copyright and Neighbouring rights) must meet the following criteria. It must be:

- a **personal creation** (i.e. man-made creation), which is **perceptible** to other people; and
- shows sufficient **individuality,** thereby exceeding a certain "**level of originality**".

The decisive hurdle for copyright protection lies in sufficient individuality of the work, which exceeds the required level of originality. This criterion distinguishes a protected work from purely technical or routine creations, which are predetermined by objective restrictions or standards rather than being an expression of the author's creative power.

Although the German courts are still reluctant to fully adapt it, it can be assumed that CJEU has developed a general European concept of copyrightable works based on the Information Society Directive, which applies across all types of works and according to which the threshold of protection must be set low. In reaction, the Federal Supreme Court adapted its position regarding applied art and also accepted the low threshold for individuality for applied art. Consequently, most personal creations will be awarded copyright protection; however, a low level of individuality may result in limited scope of protection.

A creation which does not exceed the required level of originality can be eligible for neighbouring rights which are granted for certain artistic achievements, or technical, financial or organisational investments connected to the exploitation of a work.

### 1.2 Does your jurisdiction operate an open or closed list of works that can qualify for copyright protection?

Section 2 (1) of the German Copyright Act ("GCA") provides a list of copyrightable works, which is non-exhaustive. The list explicitly stipulates that the works enumerated are mere examples of copyrightable works. Copyright protection is therefore not limited to already existing types or work, but open to new ones.

Further, within the German Copyright Act other types of works are mentioned that are not included in the list which also enjoy copyright protection.

### 1.3 In what works can copyright subsist?

Generally, copyright can subsist in any work meeting the requirements explained above (in essence: individual creation by a natural person in a perceptible form reaching the minimum threshold of individuality). Furthermore, derivative works (Section 3 GCA) and collective works as well as collections and database works (Section 4 GCA) are protected like independent works.

Section 1 GCA names works in the literary, scientific and artistic domain. The non-exhaustive list in Section 2 GCA enumerates, in particular, **literary works** (such as written works, speeches and computer programs), **musical works**, **pantomimic works** (including works of dance), **artistic works** (including works of architecture and of applied art and drafts of such works), **photographic works** (including works produced by processes similar to photography), **cinematographic works** (including works produced by processes similar to cinematography), and **illustrations of a scientific or technical nature** (such as drawings, plans, maps, sketches, tables and three-dimensional representations).

Although the catalogue in Section 2 GCA is not exhaustive, courts are rather reluctant to develop new types of works and tend to categorise creations under already existing types of works. For example, courts often justify the protection of computer games as cinematographic works. One type of work not explicitly mentioned in Section 2 GCA and accepted in case-law is **multimedia works** in which several elements of different media are combined into a coherent work. This includes, for example, websites which, independently of the copyright protection of individual elements, can also enjoy protection as multimedia works in their entirety.

### 1.4 Are there any works which are excluded from copyright protection?

Creations that lack individuality are excluded from copyright protection, as they are not considered works in the sense of Section 2 GCA, e.g. *objets trouvés* and ready-mades (objects of everyday life).

Another important exclusion criterion for copyright protection is the principle that the mere idea, which has not yet experienced sufficient manifestation, must remain in the public domain. This concerns, for example, the copyright protection of television show concepts, game or advertising ideas. It always depends on the individual case whether the concept is already sufficiently manifested to justify copyright protection, although courts tend to be rather reserved here. Irrespective of

this, the concrete design or individual elements of the design of the shows, games or advertising can be protected by copyright, provided they are sufficiently individual.

In addition, Section 5 GCA stipulates that official works such as statutory acts, statutory instruments, official decrees and official notices, as well as decisions and official head notes of decisions do not enjoy copyright protection. The same applies to other official texts published in the public interest for general information purposes, although with certain restrictions.

### 1.5 Is there a system for registration of copyright and, if so, what is the effect of registration?

An author enjoys copyright protection for a work upon its creation. Hence, the registration of a work is not required for its protection.

However, in order to be able to prove the authorship and the date of origin of a work, it is possible to deposit the work, e.g. with a notary or a similar office.

### 1.6 What is the duration of copyright protection? Does this vary depending on the type of work?

According to Section 64 GCA, the copyright expires 70 years after the author's death. This applies to the duration of copyright regarding every type of work. In case of several authors jointly holding copyright in a work, the copyright expires 70 years after the death of the last surviving joint author as stipulated in Section 65 GCA. Specific provisions for the duration of copyright in cinematographic works and works produced in a manner similar to cinematographic works, or that of a musical composition with text define which authors have to be considered in determining the last surviving joint author.

The copyright protection of anonymous or pseudonymous works expires 70 years after its publication, or, if the work is not published, 70 years after its creation.

Neighbouring rights have different protection durations depending on the right in question ranging from one year to 70 years.

### 1.7 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

In general, different types of intellectual property rights have a separate scope of protection.

Nonetheless, the scope of rights granted by different intellectual property rights can overlap. As such, different aspects of a creation can be protected under copyright as well as under a trademark, design right or a patent simultaneously. In particular, design rights and copyright may overlap, if a specific design is sufficiently individual to be protected by copyright.

A Database can enjoy copyright protection according to Section 4 GCA, as long as the selection and arrangement of the elements contained in it are based on a creative process. If a database is not created in such manner, the investment into the database can still be protected by a neighbouring right granted to the maker of a database (Section 87a GCA).

### 1.8 Are there any restrictions on the protection for copyright works which are made by an industrial process?

As long as the created work fulfils the requirements mentioned in question 1.1, there are no restrictions on copyright protection.

In principle, only human creative activity is protected, so that a creation made solely by a machine or an industrial process does not fulfil those requirements and therefore is excluded from copyright protection.

However, a natural person can use a machine as an aid in creation. As long as the result of the process is predetermined by clear instructions from the person, the output may be protectable as a copyrightable work.

## 2 Ownership

### 2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

According to Section 7 GCA, the creator of the work is the author and thus the original holder of copyright. This principle ties in solely with the intellectual act of creation and applies universally, regardless of whether the creator is in a service or employment relationship. Furthermore, it is not possible to renounce or assign the copyright as an author by agreement. The author can only waive certain specific moral rights or exploitation rights for the future. If several authors have jointly created a work without their shares being separately exploitable, they are co-authors of the work according to Section 8 GCA.

Neighbouring rights, which protect certain efforts similar to copyright, are partly based on a more economic approach. The neighbouring rights of the audio-carrier producer (Section 85 GCA) or the neighbouring right of the producers of films (Section 94 GCA) arise, for example, with the person or entity providing the main economic, technical or organisational effort.

### 2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

As stated in question 2.1, copyright always accrues to the person who created the protected work, regardless of whether the work was commissioned or created on his/her own initiative. It is not possible to renounce or assign the copyright as an author by agreement. In German copyright law, therefore, the model of "work made for hire" does not exist. The author can only grant rights of use to the work. It is therefore important to provide for a sufficiently broad grant of rights in contractual agreements specifying the rights of use assigned to the commissioner of a work.

### 2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

The German copyright concept of the relationship between employer and employee complies in principle with the relation of author and commissioner.

Only the person who creates a work can be the legally recognised author of that work. The model of "work made for hire" does not apply under German copyright law and the employer can only be granted rights of use to the employee's work (insofar as the employer has not become a co-author through his/her own creative contribution). Other than with freelance contracts, however, in the case of employment and service contracts Section 43 GCA establishes the presumption rule that the employer is entitled to the rights of use of the works created within this employment relationship to the extent that the employer needs those rights for operational exploitation of the work.

Despite this presumption rule, it is advisable to provide clauses in employment contracts specifying the grant of rights in order to avoid legal uncertainties.

### 2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Joint ownership of copyrights exists if several parties have each made an individual creative contribution to a work. There are two alternatives:

- A joint ownership as co-authors concerning one work (Section 8 GCA).
- A joint ownership as co-authors concerning compound works (Section 9 GCA).

The first alternative is the result of the cooperation of more than one author, who have jointly created one intellectual work, whereas it is impossible to separately exploit their individual shares in the work. Compound works can be exploited separately or as a whole.

## 3 Exploitation

### 3.1 Are there any formalities which apply to the transfer/assignment of ownership?

Under German copyright law, the copyright ownership is not transferable other than by inheritance. The author can only grant rights of use to third parties.

### 3.2 Are there any formalities required for a copyright licence?

In principle, copyright licences are not subject to any formal requirements. An exception is Section 31a (1) GCA, according to which a contract by which the author grants or undertakes to grant rights for unknown types of use requires the written form.

Irrespective of the freedom of form for copyright licences, it is advisable to conclude a written agreement that is as precise as possible. In case of doubt, only those rights of use are granted which are strictly necessary for the purpose of the contract, according to Section 31 (5) GCA (so-called "*Zweckübertragungslehre*"). This interpretation rule mostly works in favour of the author. It is therefore customary to conclude licence agreements with a precise rights clause.

### 3.3 Are there any laws which limit the licence terms parties may agree to (other than as addressed in questions 3.4 to 3.6)?

Rights of use can be granted exclusively or non-exclusively, limited or unlimited in space, time or content and with regard to different types of use, including those that are not known yet. According to Section 34, 35 GCA, the transfer of rights of use as well as sublicensing requires the consent of the author.

German copyright law has a comprehensive system safeguarding appropriate remuneration of the author, which is now in part also stipulated in Art. 18 of the EU Directive on Copyright in the Digital Single Market. While a contract with inappropriate remuneration does not become invalid, the author, who is not paid an adequate remuneration for the granting of rights, has a right to have the contract amended and has comprehensive rights for information and accountability to enforce the claim for adequate remuneration.

This instrument becomes particularly relevant when extensive rights of use are granted in exchange for a flat fee payment. Although "total buy-outs" with flat fees are not *per se* inadmissible and case law recognises, for example, that flat fees are sometimes customary in the film industry, the fees must be calculated in such a way that they guarantee an appropriate share of the total revenue from the exploitation of the work. In particular, since the author must also be appropriately involved in the further exploitation of the work and due to the risk that only initial use is compensated by flat fees, it is possible that in case of a continuous use, a disproportionality may emerge which makes the overall remuneration appear inequitable. This may result in a claim by the author for adjustment of the contract and extensive additional remuneration. Therefore, in most cases negotiating a proportionate participation of relevant authors at least for continuous exploitation of a work is recommendable.

In addition to the copyright contract law regulations, the general contract law, in particular, the law on terms and conditions also applies to licence agreements. Thus, a copyright agreement or parts of it can be void when its content does not comply with legal stipulations such as criminal law (e.g. pornography), social law (e.g. Labour Promotion Act) or is contrary to public policy or simply disadvantages the author.

### 3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

There are 13 collecting societies in total, with the following being the most important ones:

- Musical works and neighbouring rights:
  - Society for musical performances and mechanical reproduction rights ("GEMA").
    GEMA represents the interests of composers and lyricists of musical works as well as the Music Publisher.
  - Society for the exploitation of neighbouring rights ("GVL").
    GVL exercises the neighbouring rights of performers, organisers of artistic performances, phonogram producers and producers of video clips.
- Literary works and neighbouring rights:
  - Collecting Society Word ("VG Wort").
    VG Wort exercises the rights of word authors and publishers, i.e. all linguistic works, such as written works, speeches and computer programs.
- Visual works and neighbouring rights:
  - Collecting Society Picture Art ("VG Bild-Kunst").
    VG Bild-Kunst represents the rights of visual artists, photograph and film creators as well as authors of all types of representations.
- Audio and audio-visual works and neighbouring rights on television and radio:
  - Society for the exploitation of copyrights and neighbouring rights of media companies ("VG Media").
    VG Media represents the rights of private broadcasters and publishers in the digital sector.

A full list of existing collecting societies can be found on the website of the German Patent and Trademark Office: https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/aufsicht_verwertungsges/liste_vg/index.html.

### 3.5 Where there are collective licensing bodies, how are they regulated?

The collective licensing bodies are regulated according to the Act on the Management of Copyright and Neighbouring

Rights by Collecting Societies ("VGG"), supervised by the German Patent and Trade Mark Office ("DPMA"), which differs between collecting societies, dependent and independent management entities.

Foreign collecting societies are supervised by the DPMA according to the law of their domicile if they operate within Germany. However, the foreign company requires a licence from the supervisory authority for this purpose.

Additionally, the regulation takes place indirectly through the *EU Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.*

### 3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

The licence must be an appropriate compensation for the specific use of a work in question. If the licence is not considered appropriate for the specific use by the party requesting a licence, it can be challenged. Before legal proceedings can be initiated the claimant party shall first recourse to the competent arbitration board, located in Munich at the German Patent and Trade Mark Office. The arbitration board will provide a proposal for an appropriate compensation, which is usually accepted by the courts as an appropriate compensation. The claimant has the possibility to obtain a temporary licence by depositing the challenged excessive portion of the licence fee.

## 4 Owners' Rights

### 4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

Copyright protects the moral and economic interests of the author. An author's moral rights include the right to decide whether and how the work will be initially published (Section 12), the right to be recognised as the author (Section 13) and the right to prohibit the distortion of the work (Section 14). In addition, copyright covers an author's exclusive exploitation rights with regards to the work in its material form (meaning the original of the work or copies of it) and non-material form (meaning the right of communication to the public). According to Section 15 (1) GCA, the exploitation rights in the work's material form cover the rights of reproduction, distribution and exhibition. The exclusive right of communication to the public (Section 15 (2) GCA) compromises the right of recitation, performance and presentation, the right of making the work available to the public, and the right of broadcasting.

The same applies to the holder of neighbouring rights: although the exclusive exploitation rights awarded to the owner of neighbouring rights vary and are not as broad as that of a copyright owner.

### 4.2 Are there any ancillary rights related to copyright, such as moral rights, and, if so, what do they protect, and can they be waived or assigned?

Moral rights protect the moral interests of an author and his/her relation to the work. They include the right to decide whether and how the work will be initially published (Section 12), the right to be recognised as the author (Section 13), the right to prohibit the distortion of the work (Section 14) or the right to revoke a right of use for changed conviction (Section 42 GCA). As such, moral rights are an integral part of copyright and not merely ancillary. Unlike the right of use of a work, the copyright itself and the moral rights it entails are inalienable and cannot be assigned other than by reason of death of the author (Section 29 (1) GCA). Nonetheless, in some cases, authors contractually waive moral rights or undertake not to assert them. However, some rights like the right to revoke an exclusive right of use for non-exercise cannot be waived in advance (Section 41 (4) GCA).

Special provisions can deviate from those general rules and limit the scope of protection. For instance, as a general rule authors of works have the right to prohibit the distortion or any other derogatory treatment of their work which is capable of prejudicing their legitimate intellectual or personal interests in the work (Section 14 GCA), whereas authors of a cinematographic work can prohibit only gross distortions or other gross derogatory treatment of their works.

Moral rights exist accordingly in neighbouring rights, e.g. with regards to photographs and products manufactured in a similar manner to photographs or performances, but only to a limited extent.

An ancillary right is, e.g. the right to adequate remuneration (Section 32 GCA) in case the amount of remuneration for the use of a copyrighted work is not agreed on or the contract governing the remuneration of the use of the work needs to be adjusted as the agreed remuneration is not adequate. The claim to adequate remuneration can be waived or assigned.

### 4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

Yes. Where the original or copies of the work have been put into circulation with the consent of the person entitled to distribute them within the territory of the European Union or the European Economic Area, their dissemination shall be permissible, except by means of rental (Section 17 (2) GCA). The copyright of the work in question is then exhausted to the extent that the copyright holder cannot prohibit further distribution of the specific copies in question. This does not mean a general exhaustion of the copyright as other dealings like the reproduction, broadcasting or public communication of the work are not covered by exhaustion. However, the exhaustion extends to the right of the acquirer to adequately advertise the copies put into circulation, e.g. for sale, even by means of reproduction by depicting the specific good in question.

To which extent the principle of exhaustion may also apply to immaterial copies of a work is a matter of ongoing discussions. For software it is, for example, accepted by case law that immaterial copies of the software might under certain circumstances be subject to exhaustion.

## 5 Copyright Enforcement

### 5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

No, in Germany there are no legal enforcement agencies in copyright law. Certain acts of copyright infringement might, however, be subject to criminal prosecution.

### 5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

In principle, only the author himself or herself or the copyright holder can claim an infringement of his or her rights. Owners of neighbouring rights are treated equally to authors as well as to the purchasers of these rights. However, if the exclusive

rights of use are transferred to a third party, the third party can also assert its own claims in the event of an infringement of the exploitation right for which the holder has an exclusive right of use.

In the event of an infringement of an exploitation right, the holder of a non-exclusive right of use is not entitled to any claim, but may under specific circumstances enforce the claims of the author with the author's consent.

Special rules apply to the enforcement of rights by collecting societies.

### 5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

The copyright claim is primarily directed against the infringer himself, although participants and instigators can also be liable.

Furthermore, parties who are only indirect perpetrators or co-responsible for the infringement under specific circumstances might also be liable for injunctive relief but not damages. In these cases, the infringer must have contributed to the infringement of copyright while he had the legal possibility to prevent it and further breached a duty of care. The duty of care may depend on various factors, such as the business model, function and legal obligations of the party contributing to the infringement as well as the social adequacy of the participation. Host providers/content providers who provide their users with storage space for content will usually not be liable as an indirect perpetrator before being notified of an ongoing infringement utilising their services. In the case where the business model of a hosting provider is designed from the outset for an infringement of rights by the users, the host might also be liable as an indirect perpetrator even without prior knowledge. Also, the controversial Directive on Copyright in the Digital Single Market of 2019 brought a change with regard to providers of user-generated content which give the public access to a large amount of copyright-protected works. According to Art. 17 (1) DSM-Directive, those "online content-sharing service providers" now perform an act of communication to the public themselves, making them directly liable for infringing content, unless they have, *inter alia*, made best efforts to ensure the unavailability of specified works.

### 5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

In contrast to the US copyright system, the German copyright does not provide a fair-use clause. Instead, the law provides for individual exceptions tailored to specific cases. Therefore, if the specific use is not legally permitted under one of the exception provisions, the work may only be used with the consent of the author. A general catch-all clause does not exist.

For example, works may be used for religious purposes, on the basis of freedom of opinion, freedom of the press, artistic freedom or by the administration of justice or state administration under certain conditions. A special exception to this is the adaptation and redesign of works or their translation.

### 5.5 Are interim or permanent injunctions available?

Copyright claims can be enforced in main proceedings or by way of interim injunctions.

In urgent cases, claims for injunctive relief can be enforced by way of an interim injunction. The urgency can be waived, in particular, if the injured party waits too long with the enforcement of its claims. Before an injunction is applied for, a warning letter is usually sent to the infringer. Although there is no legal obligation to send prior warning letters, the infringed party risks bearing the costs of the legal dispute in cases where no prior warning letter was sent if the infringer immediately acknowledges the claim in court proceedings. In case the response to a warning letter is provided with the application for injunctive relief, German courts might even grant an injunction without a prior oral hearing and without notifying the infringer.

### 5.6 On what basis are damages or an account of profits calculated?

There are three alternatives for calculating damages:

1. compensation for the actual loss of assets;
2. the infringer's profit; or
3. a reasonable hypothetical licence fee.

The latter is the most relevant method for calculating damages, as the actual loss is often difficult to quantify and claiming the infringer's profit might only lead to small compensations in the case of unprofitable infringements. When calculating the damages under the hypothetical licence, it is irrelevant whether a licence agreement would have been concluded at all. The conclusion of a licence is assumed and the amount of the licence fee is calculated according to what "reasonable contracting parties" would have determined. Courts employ several means to calculate the fee. If the injured rights holder has a licensing practice, such practice can usually be used for calculation of damages. In the absence of a licensing practice, courts frequently refer to the fee catalogues which are published by various professional associations, for example with regard to professional photographs.

### 5.7 What are the typical costs of infringement proceedings and how long do they take?

The costs of infringement proceedings according to the statutory fee system are based on the value in dispute, i.e. the value of the object in dispute (e.g. value of the licence, amount of damages, amount of lost profit). According to German procedural law, the losing party bears the court fees as well as a proportion of the opposing party's attorney fees calculated in accordance with statutory provisions. Compared to other countries court proceedings in Germany are very affordable.

The duration of infringement proceedings varies with the complexity and scope of the court proceedings. Interim injunctions can be issued within a few days following the application, depending on the working methods of the court. First instance main proceedings, usually vary between six and eight months.

### 5.8 Is there a right of appeal from a first instance judgment and, if so, what are the grounds on which an appeal may be brought?

An appeal against a first instance judgment is admissible if the value of the subject matter of the appeal exceeds EUR 600 or if the court of origin has permitted the appeal. On appeal, the first instance judgment may be reviewed in law and in fact. However, the presentation of new evidence will not be taken into account if the evidence could have been submitted at first instance. The appeal can therefore only be based on the fact that the contested

decision is based on an inadequate application of law, an inadequate interpretation of the facts and evidence brought before the court or that new facts and evidence justify a different decision.

### 5.9 What is the period in which an action must be commenced?

If a claim for injunctive relief is to be enforced in preliminary injunction proceedings, the injured party must show to have an interest in urgent legal action. The assessment of this "urgency period" varies depending on the courts. However, an application should be filed within one month after having obtained knowledge. It must also be taken into account that a warning letter should be sent to the infringer before an application for an interim injunction is filed.

In the main proceedings, only the statutory limitation periods of the claims are to be considered, which are based on general civil law. In principle, a limitation period of three years is applicable commencing at the end of the calendar year in which the claim arose.

## 6 Criminal Offences

### 6.1 Are there any criminal offences relating to copyright infringement?

Criminal offences relating to copyright are the unlawful exploitation of copyrighted work (Section 106 GCA), the unlawful affixing of designation of author (Section 107 GCA), unlawful infringements of neighbouring rights (Section 108 GCA), the commercial unlawful exploitation (Section 108a GCA) and the infringement of technological measures and rights management information (Section108b GCA). The prosecution of these offences requires a request filed by the victim, unless the criminal prosecution authority deems it a matter of particular public interest (Section 109 GCA), with the exception of the commercial unlawful exploitation (Section 108a GCA) of copyright or neighbouring rights which will be prosecuted *ex officio*.

Despite those offences not being part of the German Criminal Code (StGB), they are part of material criminal law. As such, the general provisions of the German Criminal Code apply, including the requirement of subjective factors such as intent, but also criminal responsibility/culpability and the punishability of attempt.

### 6.2 What is the threshold for criminal liability and what are the potential sanctions?

Criminal liability requires the intentional commitment of the aforementioned offences, meaning the infringer acted knowingly and willingly. Negligent behaviour does not establish criminal liability in these cases. Further, the infringer needs to be criminally responsible, meaning he must be capable of appreciating the unlawfulness of his actions. Children under the age of 14 years are deemed to act without criminal responsibility.

Besides that, there is no numerical threshold or quota for criminal liability in regards to copyright infringements.

Depending on the criminal offence, sanctions can be penalties of imprisonment for a term of up to five years or a fine.

## 7 Current Developments

### 7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

The most relevant of the recent legislative changes is the controversially discussed EU Directive on Copyright in the Digital Single Market, which came into force on 6 June 2019 and must be converted into national law by 7 June 2021. Three of the most relevant changes entail the following regulations:

- Most public attention was drawn to the regulation of "online content-sharing service providers", i.e. a "provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes". According to Art. 17 DSM-Directive, it is now clarified that those "online content-sharing service providers" perform a relevant act of communication to the public. In order to avoid liability, the provider must make, *inter alia*, best efforts to ensure the unavailability of specified works, which may also mean the use of upload filters. Although most of the major platforms had already established appropriate systems, the regulation could make it more difficult for new competitors to enter the market.
- The DSM-Directive also reintroduces the neighbouring right for press publishers, which already existed in Germany but had been declared inapplicable by the CJEU. Art. 15 of the DSM Directive now provides for a corresponding right at European level, according to which the reproduction and making available to the public of press publications is protected. The right, which was derogatorily named "lex google", had already been heavily criticised in Germany, although it proved to be of less practical relevance than initially anticipated.
- Finally, the DSM-Directive introduces an obligation for licensees to provide authors and performers with up-to-date, relevant and comprehensive information on the exploitation of their works and performances by the respective licensee, and to provide this information on a regular basis, at least once a year, and taking into account the specificities of each sector. This disclosure requirement is meant to support the author's claim for equitable remuneration. It remains to be seen how the Member States implement this provision but the new disclosure_requirement is expected to produce additional effort in particular for industries not dealing with author's remuneration on a regular basis. The challenge will be to develop processes including content management systems dealing with this disclosure requirement with as little effort as possible.

### 7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

In recent years, the CJEU has developed case law on linking content, according to which the setting of hyperlinks to other websites does not constitute an act of exploitation relevant under copyright law if the act of making the linked content available is not aimed at a new audience. This should be the case if the

work is freely accessible on the linked page and the rights holder has thus already made it accessible to an unlimited audience. According to the CJEU, this applies largely independently of the technology used and thus also to framing technologies and embedded links. The limits of the case law have not yet been fully explored, and there are some tendencies suggesting that a relevant exploitation could be assumed, if the reference to the linked content as a separate service is intended to attract users and thus is aiming to commercialise separately the content.

In Germany, the Federal Supreme Court has developed case law on thumbnail pictures in the context of image search engines. According to the three relevant decisions, the rights holder who makes images available online without technical protection measures must expect the usual acts of use of these pictures, which includes in particular the reproduction of the images and the act of making the images publicly available within the framework of an image search engine. The Federal Supreme Court construes this by means of an "implied consent" of the rights holder. However, it has not yet been clarified to what extent this case law can be generalised beyond the field of image search engines.

Some relevant changes could be brought about by the neighbouring right for press publishers, which is currently being implemented (see question 7.1 above). The neighbouring right protects press publications, which includes literary works, but also other types of works and subject matter, in particular photographs and videos.

**7.3 Have there been any decisions or changes of law regarding the role of copyright in relation to artificial intelligence systems, including the use of copyright in those systems and/or any work generated by those systems?**

While it is easier to implement regulations concerning the work of AI in copyright systems that take a more economic approach with regards to investment protection as a fundamental justification for the recognition of exclusive rights, this poses greater problems for the German copyright system, in which the concept of protection is firmly linked to human creation. No case law on this issue has yet been issued in Germany. On a scholarly level, however, the question has given rise to lively discussions. Nevertheless, the copyright system *de lege lata* reaches its limits where human influence on the outcome of the AI process fades into the background. Even though *de lege ferenda* some voices call for more extensive protection, no efforts to implement this *de facto* have been made so far.

Unlike the protection of the work results of AI itself, the accompanying data processing has now been taken into account in the DSM-Directive. Text and data mining, which according to the previous legal situation encountered considerable problems due to the reproduction of copyrighted material, often subject to licensing, is now to be facilitated by two exception regulations. Articles 3 and 4 of the Directive regulate mining for both scientific and non-scientific purposes, the latter being subject to more stringent conditions. According to Article 4 (2), reproductions may only to be retained as long as necessary for the purpose of mining. Also, according to Article 4 (3), data may not be mined if the use of the works has been explicitly reserved by its rights holder.

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