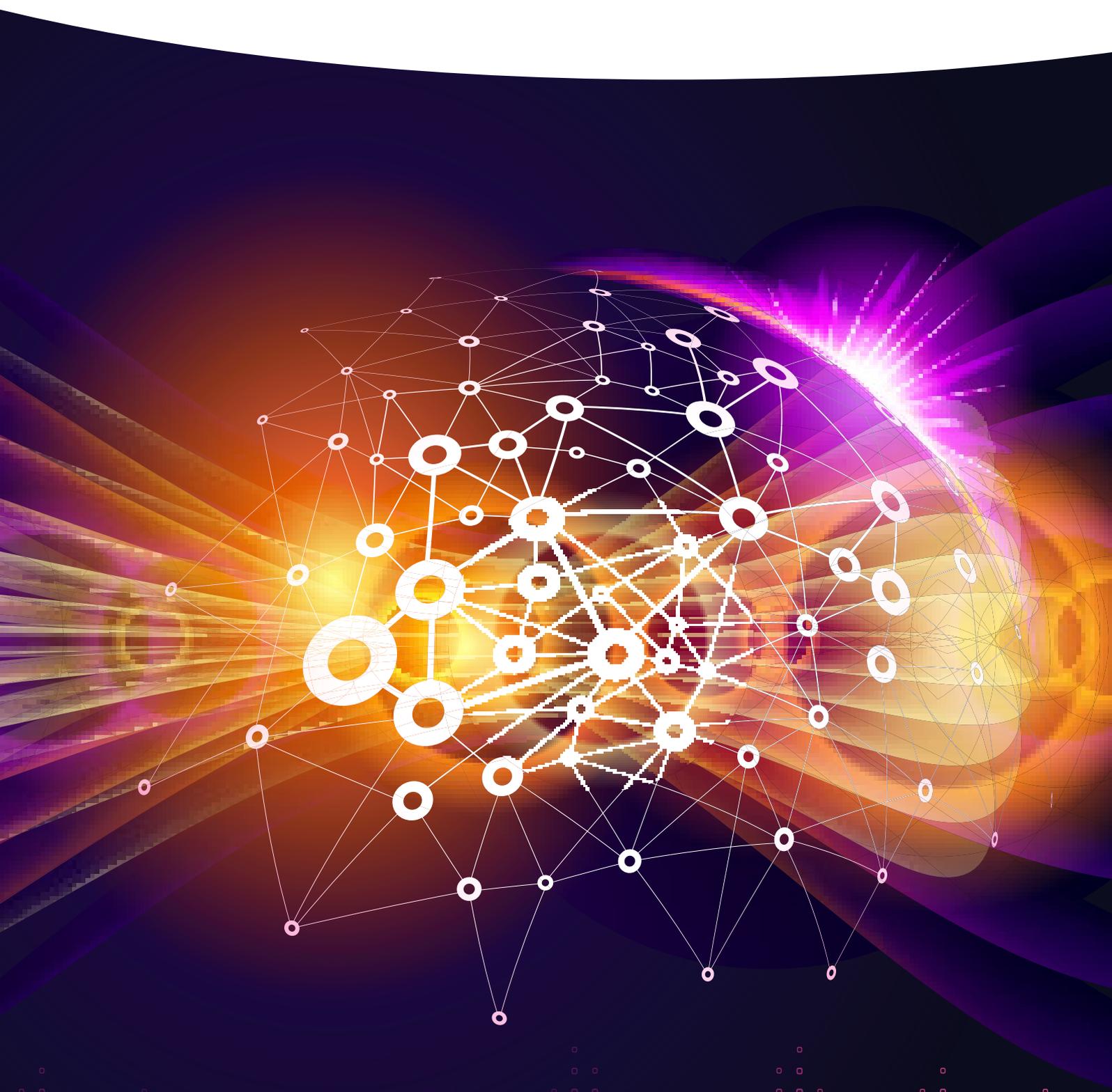




TERRALEX®

# CROSS-BORDER COPYRIGHT GUIDE 2019



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We are delighted to present the TerraLex Cross-Border Copyright Guide 2019, the fourth edition of this invaluable guide.

Copyright rules across national boundaries are becoming increasingly relevant to businesses, particularly as the digital market makes its impact felt on all industry sectors. Issues such as digital content portability, pirated content and copyright licensing models now appear high on legislative agendas around the world and businesses need to be nimble enough to operate in an environment in which the creative industries operate globally, but copyright law still varies by jurisdiction.

This Guide draws together contributions from copyright experts in territories we have found are key to global businesses. We hope you will find the Guide a useful resource for getting to grips with the framework of copyright law in each of those territories, safe in the knowledge that if further specialist advice is needed, it's only a call or email away.

We at RPC have very much enjoyed pulling together the contributions from enthusiastic and expert contributors and are grateful to everyone who has taken part in this project.

Wishing all our readers a happy and successful 2019.

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TerraLex was selected as the Global Network of the Year at The Lawyer's 2018 European Awards.

# Germany

SKW Schwarz, Magnus Hirsch/Yvonne Schäfer



## 1. Legislation and regulation

### 1.1 What are the main sources of copyright law?

The main source of copyright legislation in the Federal Republic of Germany is the Act on Copyright and Related Rights (Copyright Act of 9 September 1965). There are some further legal statutes like the *Verwertungsgesellschaftengesetz* (VGG) or the *Verlagsgesetz* that govern performing rights associations and the relationship between publishers and authors. Furthermore, there are international conventions by which the Copyright Act has been ratified, such as the revised Berne Convention on Industrial Property or TRIPS.

## 2. Subsistence of copyright

### 2.1 What type of works can be protected by copyright?

Article 2 of the Copyright Act defines works as the author's own intellectual creations, and contains a list of protected works in literary, scientific and artistic domain. This list is not exhaustive.

#### Literary works

The Copyright Act protects literary works, such as written works, speeches and computer programs. Literary works include all individual linguistic creations such as scientific writings, lectures, prose and plays, including libretti for operas. Excluded from copyright protection are official publications such as court decisions.

#### Musical works

Musical works are works consisting of music, without any words or actions that are intended to be performed with the music. Music is defined as a combination of sounds for listening to. It is not the same as mere noise.

#### Pantomimic works

By pantomimic works (including works of dance), thoughts, feelings and stories are expressed through individual movements and gestures.

### Artistic works

Artistic works include works of architecture and of applied art and drafts of such works that are of an individual character and have a distinctive element. Mere functional features are not protected by copyright.

### Photographic works

Photographic works are protected (including works produced by processes similar to photography) which express a particular artistic conception.

### Cinematographic works

Cinematographic works are protected (including works produced by processes similar to cinematography) which contain an intellectual creation.

### Illustrations of a scientific or technical nature

Illustrations of a scientific or technical nature (such as drawings, plans, maps, sketches, tables and three-dimensional representations) are protected.

Articles 3 and 4 of the German Copyright Act contain further types of works that can be protected:

### Adaptations

Translations and other adaptations of a work which are the adapter's own intellectual creations are protected as independent works without prejudice to the copyright in the adapted work. The insubstantial adaptation of an unprotected musical work is not protected as an independent work.

### Collection works

Collections of works, data or other independent elements which by reason of the selection or arrangement of the elements constitute the author's own intellectual creation (collections) are protected as independent works without prejudice to an existing copyright or related right in one of the individual elements.

### Database works

A database work within the meaning of the German Copyright Act is a collection whose elements are arranged systematically or methodically and the individual elements are individually accessible by electronic or other means. A computer program (Article 69a Copyright Act) used in the creation of the database work or to provide access to its elements does not constitute an integral part of the database work.

Furthermore, Art. 69a of the German Copyright Act contains a regulation for protection of computer programs:

### Computer programs

Computer programs are programs of any form, including the drafts and their preparatory design material. Protection applies to any form of a computer program if it represents individual works (ie they are the result of the author's own intellectual creation).

## 2.2 What is required for works to qualify for copyright protection?

Only the author's own intellectual creations constitute works within the meaning of the Copyright Act. That means the protected works, by their nature, represent a particular artistic creation or a particular concept.

A certain minimum standard of effort is necessary to qualify a work for copyright protection.

In particular, a work needs to consist of four elements:

- **personal creation:** There has to be a result that was made by the creative, formative influence of a human being. A creation is not qualified as personal if it is made by machines or animals
- **perceptible formation:** This element differentiates from ideas that are not manifested in any formation. For a perceptible formation, it is sufficient that it is an improvisation
- **intellectual content:** The author has to create a world of ideas or emotions that have an "exciting" effect on the observer
- **individual personal character or threshold of originality:** A significant level of individuality and originality has to be met. Mere routine acts are not protected. The necessary level of originality varies for the different kinds of works.

As a general rule, Germany provides copyright protection if:

- the author is a national of Germany, of another Member State of the European Union or of another state covered by Agreement in the European Economic Area, or
- the work was first published in Germany or a state which is a signatory to one of the various international conventions which Germany is a party to.

### 2.3 What rights does copyright grant to the rights holder?

This question depends upon the agreement between the author as rights holder and a rights holder who has been granted rights by the author. Every rights holder can be granted the right to use a work in a particular manner, but only the author has further rights such as moral rights (see 2.4 below) and some exclusive rights with regard to the work.

The German Copyright Act guarantees the author rights concerning his or her intellectual and personal relationships to the work and in respect of the use of the work. Those are the moral rights of authors and exploitation rights.

The author has the right to exploit their work in material form, which includes:

- the right of reproduction
- the right of distribution
- the right of exhibition.

The author also has the exclusive right to communicate their work to the public in non-material form, which includes:

- the right of recitation, performance and presentation
- the right of making the work available to the public
- the right of broadcasting
- the right of communication by video or audio recordings
- the right of communication of broadcasts and of works made available to the public.

Further rights of the author are:

- right of access to copies of works
- right of resale
- right of remuneration for rental and lending.

In case of infringement of copyrights, a rights holder has the following rights:

- right to require cessation of infringement and to damages
- notification
- claim to destruction, recall and release of copies
- pecuniary compensation
- right of information
- entitlement to presentation and inspection.

### 2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

Yes. The German Copyright Act sets out the following moral rights:

- right of publication
- recognition of authorship
- right to prohibit the distortion or any other derogatory treatment of their work.

Moral rights are applicable to all kind of protected works.

### 2.5 What is the duration of copyright in protected works?

Rights are protected while the author is alive plus 70 years from the time of their death. This rule is valid for works where their author had not been dead for over 70 years in 1965.

<b>Category of work</b>
Literary, scientific and artistic
<b>Duration</b>
Copyright expires 70 years from the end of the calendar year in which the author dies. Where a work has a joint author/co-author, 70 years from the end of the calendar year in which the last known author dies.
Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was created or made available to the public.
<b>Category of work</b>
Audio recordings
<b>Duration</b>
The right shall expire 70 years after the release of the audio recording. If the audio recording was not released within 70 years of production, but was used lawfully for communication to the public, the right shall expire 50 years after the latter. If the audio recording has not been released or lawfully used for communication to the public during that period, the right shall expire 50 years after the production of the audio recording. The time limit begins at the end of the relevant calendar year.
<b>Category of work</b>
Films
<b>Duration</b>
For films, the reference point is the end of the calendar year in which the last living author dies. Copyright then lasts 70 years afterwards.

## 3. Ownership

<b>Category of work</b>
Broadcasting organisation
<b>Duration</b>
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
<b>Category of work</b>
Database
<b>Duration</b>
The rights of the producer of a database expire 15 years after the publication of the database, but after 15 years following its production if the database was not published within that period. The time limit begins at the end of the calendar year in which the work was published or produced.
<b>Category of work</b>
Photographs
<b>Duration</b>
The right of a photographer expires 50 years after the photograph was released or, if its communication to the public occurred prior to that date, 50 years thereafter, although the right will expire 50 years after production if the photograph was not released or legally communicated to the public within this period. The time limit begins at the end of the relevant calendar year.
<b>Category of work</b>
Recognition of a performer and derogatory treatment of the performance
<b>Duration</b>
The rights shall expire with the death of the performer, but not before 50 years have passed since the performance, if the performer has died prior to expiry of that period of time, and not prior to expiry of the period of time applicable to the rights of exploitation. The period begins at the end of the relevant calendar year. If a work is performed by several performers together, the death of the last participating performer shall be decisive.

### 2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, to object to derogatory treatment or to privacy lasts for the life of the author plus 70 years.

### 3.1 Who is the first owner of a copyright work?

The first owner of the copyright is the author. This even applies if a work was created by a person in the course of their employment. The employee is the author and first owner of the copyright. However, there can be an agreement that the employer has a right of transferring rights of use from the employee. With regard to computer programs, such a right to transfer is granted by Art. 69b of the Copyright Act. The author is the creator of the work. That is the only definition German law provides.

### 3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person or where there is an assignment of the whole or of part of a work. To qualify as joint authors, it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright. Joint owners have their own individual rights with respect to the work that can be assigned independently of the other or others, but the consent of all joint authors is required for licensing or use of the copyright work.

### 3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in Germany; it arises automatically upon creation of the work. There is no registration system that is comparable to the registration of trade marks or patents. However, the author may register his or her work with the German Office for Patents and Trademarks (DPMA) under a pseudonym or even anonymously. Such a registration is useful with regard to the duration of copyright. Furthermore, there is the possibility of a notarial deposit of the protected work. The notarial deed can give proof of the authorship and the date of creation of the protected work. A copyright notice (eg ©) together with the author's name creates a presumption that the named person is the author.

## 4. Infringement

### 3.4 What steps should you take to validly transfer, assign or license copyright?

No special form has to be met to validly transfer, assign or license copyright. However, a contract by which the author grants rights in respect of unknown types of exploitation, or where he/she undertakes the obligation to do so, must be drawn up in writing. For purposes of evidence, an assignment of copyright must be in writing, signed by or on behalf of the copyright owner.

### 3.5 Can moral rights be transferred, assigned or licensed?

No. Moral rights can be waived but they cannot be assigned.

Owners of copyright can take legal action if any of their exclusive rights have been infringed.

This can be infringement of rights of exploitation or appropriation of a work under its own name (plagiarism). Often rights are infringed by producing and purchasing unlawful copies of works.

### 4.1 What acts constitute primary infringement of copyright?

German law does not differentiate between primary and secondary infringement as, for example, UK law does.

### 4.2 What acts constitute secondary infringement of copyright?

As stated above, German law does not differentiate between primary and secondary infringement.

### 4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be carried out in relation to copyright works despite the fact that they might be protected by copyright. They include (amongst others):

<b>Act</b>
Temporary acts
<b>Description</b>
Temporary acts of reproduction are permissible if they are transient or incidental and constitute an integral and essential part of a technical process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other protected subject matter to be made, and which have no independent economic significance.
<b>Act</b>
Administration of justice and public security
<b>Description</b>
It is permissible to make individual copies of works for use in proceedings before a court, arbitration tribunal or authority or to have such copies made.

<b>Act</b>
Persons with disabilities
<b>Description</b>
The reproduction of a work for non-commercial purposes is permissible for persons whose access to the work is not possible or is made considerably more difficult by the already available means of sensual perception because of a disability, if such reproduction is necessary to facilitate access and its distribution is exclusive to such person(s).
<b>Act</b>
Collections for religious, school or instructional use
<b>Description</b>
Reproduction, distribution and making works available to the public is permissible after publication where limited parts of works, of small-scale literary works and of musical works, or of individual artistic works or individual photographs are incorporated in a collection which combines the works of a considerable number of authors and is intended, by its nature, exclusively for instructional use in schools (but not in music schools), in non-commercial basic and further training facilities or in vocational training facilities or for church use.
<b>Act</b>
Education broadcasts
<b>Description</b>
Schools, teacher training and further training institutions may make individual copies of works to be used as part of a school broadcast by transferring the works to video or audio recording mediums. The same shall apply to youth welfare institutions and state image archives or comparable institutions under public ownership. The video or audio recording mediums may only be used for teaching purposes. They must be deleted by the latest at the end of the academic year following the transmission of the school broadcast, unless the author has been paid equitable remuneration.

<b>Act</b>
Public speeches
<b>Description</b>
It is permissible to reproduce and distribute speeches relating to current affairs or delivered during public negotiations before state, local authority or church bodies. It is not, however, permissible to reproduce and distribute the speeches in the form of a collection predominantly containing speeches by the same author.
<b>Act</b>
Newspaper articles and broadcast commentaries
<b>Description</b>
It is permissible to reproduce and distribute individual broadcast commentaries and individual articles, as well as illustrations published in connection therewith, from newspapers and other information sheets devoted solely to current affairs in other newspapers or information sheets of this kind, and it is permissible to communicate such commentaries, articles and illustrations to the public, if they concern current political, economic or religious issues and do not contain a statement reserving rights. The author shall be paid equitable remuneration for the reproduction, distribution and communication to the public, unless the reproduction, distribution and communication to the public is of short extracts of several commentaries or articles in the form of an overview. It is permissible without limitation to reproduce, distribute and communicate to the public miscellaneous news items of a factual nature and news of the day which has been published via the press or broadcasting; protection granted under other statutory provisions shall remain unaffected thereby.
<b>Act</b>
Reporting on current events
<b>Description</b>
For the purposes of reporting on current events by broadcasting or similar technical means in newspapers, periodicals and other printed matter or other data carriers mainly devoted to current events, as well as on film, the reproduction, distribution and communication to the public of works which become perceivable in the course of these events shall be permitted to the extent justified by the purpose of the report.

<b>Act</b>
Quotations
<b>Description</b>
<p>It is permissible to reproduce, distribute and communicate to the public a published work for the purpose of quotation so far as such exploitation is justified to that extent by the particular purpose. This is permissible in particular where:</p> <ul style="list-style-type: none"> <li>• Subsequent to publication individual works are included in an independent scientific work for the purpose of explaining the contents</li> <li>• Subsequent to publication passages from a work are quoted in an independent work of language</li> <li>• Individual passages from a released musical work are quoted in an independent musical work.</li> </ul>
<b>Act</b>
Published work
<b>Description</b>
<p>It is permissible to communicate to the public a published work if that communication serves a non-profit-making purpose for the organiser, if participants are admitted free of charge and, in the case of a lecture or performance of a work, if none of the performers is paid a special remuneration. Equitable remuneration shall be paid for the communication.</p> <p>The obligation to pay remuneration shall not apply to events organised by the youth welfare service, the social welfare service, geriatric and welfare service, the prisoners' welfare service, or to school events insofar as they are only available to a specific, limited group of persons on account of their social or educational purpose. This shall not apply where the event serves the profit-making purpose of a third party; in such cases, the third party shall pay the remuneration. It is also permissible to communicate to the public a published work in a religious service or at a religious celebration organised by a church or religious community. The organiser shall, however, pay the author equitable remuneration.</p>
<b>Act</b>
Making works available to the public for instruction and research
<b>Description</b>
It is permissible for small, limited parts of a published work to be made available to the public, to the extent that this is necessary for the purpose of instruction and research and is justified for the pursuit of non-commercial aims.

<b>Act</b>
Communication of works at terminals in public libraries, museums and archives
<b>Description</b>
So far as there are no contractual provisions to the contrary, it is permissible to make published works available from the stocks of publicly accessible libraries, museums or archives, which neither directly nor indirectly serve economic or commercial purposes, exclusively on the premises of the relevant institution at terminals dedicated to the purpose of research and for private study.
<b>Act</b>
Reproduction for private and other personal uses
<b>Description</b>
It is permissible for a natural person to make single copies of a work for private use on any medium, insofar as they neither directly nor indirectly serve commercial purposes, as long as no obviously unlawfully produced model or a model which has been unlawfully made available to the public is used for copying.
<b>Act</b>
Incidental works
<b>Description</b>
It is permissible to reproduce, distribute and communicate to the public works if they are to be regarded as works incidental to the actual subject matter being reproduced, distributed or communicated to the public.
<b>Act</b>
Works in exhibitions, on public sale and in institutions accessible to the public
<b>Description</b>
<p>Reproduction, distribution and making available to the public of artistic works and photographic works which are exhibited in public or intended for public exhibition or public sale by the organiser shall be permitted for advertising purposes to the extent necessary for the promotion of the event.</p> <p>Furthermore, it is permissible to reproduce and distribute those works in lists issued by public libraries, educational institutions or museums in connection with an exhibition with respect to content and time, or to take inventory, and with which no independent gainful purpose is served.</p>

## 5. Remedies

Act
Works in public places
Description
It is permissible to reproduce, distribute and make available to the public works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorisation shall only extend to the façade.
Act
Portraits
Description
Reproduction, as well as distribution for which no payment is received and is not for commercial purposes, of a portrait by the commissioner of the portrait. If the portrait is an artistic work, exploitation is only permissible by photography.

#### 4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The decision of the German Federal Court of Justice (BGH) ruled that the operator of a homepage does not infringe copyrights if they are embedding on their homepage, via “framing”, content that is available on another homepage for every user of the internet with the permission of that content’s rights owner (Decision dated 9 July 2015, Case I ZR 46/12). However, that case did not deal with the question of what will apply if the content is provided on another homepage without permission of the copyright owner.

#### 4.5 Is a licensee of copyright able to bring an infringement action?

An infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved. An exclusive licence authorises the licensee to exercise a right which would otherwise be exercisable exclusively by the copyright owner. One such right generally is the right to bring an infringement action.

A non-exclusive licensee cannot bring infringement actions unless specifically agreed otherwise with the author. Without that specific agreement, only the author (who remains the copyright holder) is allowed to bring infringement actions.

#### 5.1 What remedies are available against a copyright infringer?

The German Copyright Act in conjunction with the German Code of Civil Procedure provides the following remedies for the rights holders:

- interim injunction (including cease and desist orders, search orders, freezing orders and disclosure orders)
- bringing an action
- delivery up of infringing articles
- seizure or forfeiture of infringing articles
- customs seizure actions.

#### 5.2 Are there any specific remedies for online copyright infringement?

The German Copyright Act does not provide any specific remedies for online copyright infringement. However, the ECJ ruled in its case C-314/12 that internet providers have to block illegal websites if there is a judicial order. Thus, where it appears that a website is displaying illegal infringing material, rights holders can seek an injunction from the court ordering the provider to block the website. However, it is established under German common law that access providers are not obliged to establish barriers for music that is offered unlawfully (*OLG Köln*, decision dated 18 June 2014, case 6 U 192/11).

#### 5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the Copyright Act. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence. If an offence is committed by a company and it is proven that an individual officer of the company consented to committing the offence, that officer can also be liable for the criminal act. Each offence requires a level of intention, knowledge or belief on behalf of the potential culprit, and each carries various penalties:

Criminal act
Reproducing, distributing or communicating a work or an adaptation or transformation of a matter to the public other than those permitted by law. Any attempts shall be punishable.
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person’s copyright.

<b>Penalty</b>
Imprisonment of not more than three years or a fine. Where the offender acts on a commercial basis, the penalty shall be imprisonment of not more than five years or a fine.
<b>Criminal act</b>
Affixing to the original of an artistic work the designation of author without consent of the author or distributing an original bearing such designation
Or
Affixing to a copy, an adaptation or transformation of an artistic work the designation of author in a manner which gives the copy, adaptation or transformation the appearance of an original, or distributing a copy, adaptation or transformation bearing such designation.
<b>Relevant intention, knowledge or belief</b>
The knowledge, or having reason to believe, that the action is infringing a person's copyright.
<b>Penalty</b>
Imprisonment of not more than three years or a fine, unless other provisions impose a more serious sentence.
Where the offender acts on a commercial basis, the penalty shall be imprisonment of not more than five years or a fine.
<b>Criminal act</b>
Infringement of technological measures and rights management information.
<b>Relevant intention, knowledge or belief</b>
The knowledge, or having reason to believe, that the copy is infringing a person's copyright. Intention of enabling for himself/herself or a third party access to work which is protected.
<b>Penalty</b>
Imprisonment of not more than one year or a fine.

#### 5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is three years to bring a breach of copyright. Time begins to run from the end of the year the damage is suffered and of the rights holder's knowledge of the infringement. Without such knowledge, the limit is 10 years. Interim injunctions must be brought immediately upon rights holders becoming aware of the infringement. The time limit for filing a criminal complaint is three months. Time begins to run from the date of knowledge of the copyright infringement.

#### 5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

The general rule in Germany is that the unsuccessful party pays the statutory attorneys' fees and disbursements of the successful party and court costs. This even applies for costs of a cease and desist letter and in many instances even covers all costs incurred.

## 6. Enforcement

### 6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

Civil law matters can be brought to ordinary courts. If the claim is worth less than €5,000, the action has to be brought to the local court. If the claim is worth €5,000 or more, action has to be brought to the regional court. Recourse to the courts is permitted in respect of all legal disputes by means of which a claim is asserted on account of a legal relationship regulated under the Copyright Act. As regards copyright litigation matters resulting from employment or service relationships which have as their object only claims for payment of an agreed remuneration, recourse to the labour courts and the administrative courts shall remain unaffected or shall even prevail.

### 6.2 Are there any other ways in which you can enforce copyright?

#### Customs seizure

A copyright holder may request detention and seizure of infringing copies by the Customs authorities.

#### Arbitration Board under the Law on the Administration of Copyright

The Arbitration Board under the Copyright Administration Law mediates disputes between collecting societies and users of copyright works such as concert organisers, discotheque operators, broadcasting organisations or producers of phonograms. The Arbitration Board is integrated into the German Patent and Trade Mark Office (DPMA). If the parties cannot find an amicable agreement in front of the Arbitration Board, the Board submits a settlement proposal to the parties. If this proposal is not contested, its effect is similar to a court judgment.

#### Criminal proceedings

Criminal proceedings can be brought on the grounds described in 5.3 above, and pursued through criminal courts.

### 6.3 What agency bodies are responsible for promoting and/or enforcing copyright? What do they do?

The German Patent and Trade Mark Office (together with the Federal Cartel Office – *Bundeskartellamt*) is the supervision authority of collecting societies that are responsible for promoting and/or enforcing copyright. Collecting societies are subject to government supervision since they have a monopoly position and hold rights in trust. The German Patent and Trade Mark Office acts as the supervisory authority on the basis of the Copyright

Administration Law. There are no further agency bodies that actively enforce copyright. The German police or Public Prosecution Department will target criminal activity, but it is up to the rights holder or the rights management agency to spot infringing work and take action.

### 6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain the permission of the rights holder. However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collection societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

<b>Agency</b>
GEMA Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
<b>Who represents</b>
Musicians
<b>Agency</b>
GVL Gesellschaft zur Verwertung von Leistungsschutzrechten mbH
<b>Who represents</b>
Artists, phonogram producers and video producers
<b>Agency</b>
VG-Wort Verwertungsgesellschaft Wort – Rechtsfähiger Verein kraft Verleihung
<b>Who represents</b>
Creators and publishers
<b>Agency</b>
VG Bild-Kunst Verwertungsgesellschaft Bild – Kunst
<b>Who represents</b>
Artists, photographers and graphic designers

<b>Agency</b>
VG Musikedition Verwertungsgesellschaft – Rechtsfähiger Verein kraft Verleihung
<b>Who represents</b>
Musicians
<b>Agency</b>
GÜFA Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten mbH
<b>Who represents</b>
Film
<b>Agency</b>
VFF Verwertungsgesellschaft der Film- und Fernsehproduzenten mbH
<b>Who represents</b>
Film and TV producers and distributors
<b>Agency</b>
VGF Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH
<b>Who represents</b>
Film
<b>Agency</b>
GWFF Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten mbH
<b>Who represents</b>
Film and TV
<b>Agency</b>
AGICOA Urheberrechtsschutz Gesellschaft mbH – Association de Gestion Internationale Collective des Œuvres Audiovisuelles
<b>Who represents</b>
Film
<b>Agency</b>
VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH
<b>Who represents</b>
Media companies

<b>Agency</b>
VG TWF Verwertungsgesellschaft Treuhandgesellschaft Werbefilm GmbH
<b>Who represents</b>
Film
<b>Agency</b>
GWVR Gesellschaft zur Wahrnehmung von Veranstalterrechten mbH
<b>Who represents</b>
Artists, filmmakers, musicians

### 6.5 Are copyright levies payable? By whom, and in what circumstances?

In Germany, copyright levies have to be paid for usage and copying of works protected by copyright law. These are payable as an additional charge together with the surcharge on the price for the devices or media with which copies can be made. The copyright levy is mostly payable as a lump sum, which means that the customer does not need to pay a levy for every single use of the relevant device/media.

## 7. Copyright reform

### 7.1 What do you consider to be the top two recent copyright developments?

#### Liability of the subscriber for copyright infringements via unsecured WLAN/Wi-Fi (BGH, Judgment of 26 July 2018 – I ZR 64/17 – *Dead Island*)

A computer game manufacturer sued an IT specialist who had operated several open internet access points via WLAN and two Tor exit nodes for copyright infringement on the game *Dead Island*. The *Dead Island* program was offered for download via the defendant's internet connection in an internet exchange market.

The defendant claimed not to have committed any infringement himself. Under his IP address, he operates five publicly accessible WLAN hotspots and two wired incoming channels from the Tor network ('Tor exit nodes').

Since the actual infringer cannot usually be identified and sued, in instances like this, rights holders regularly take action against the operator of the network access point.

The German Federal Supreme Court (BGH) has ruled that there are, in general, no injunctive relief claims against operators of open WLANs with regard to copyright infringements committed by third parties via their access points. However, a blocking claim of the rights holder pursuant to section 7 (4) German Telemedia Act can be considered. The Federal Supreme Court referred the matter back to the Higher Regional Court in order to examine the question of whether the plaintiff is entitled to a right to block information of the defendant pursuant to section 7 (4) of the German Telemedia Act.

#### Upload of a photo – already published on another website – without the consent of the copyright holder (ECJ, Judgment of 7 August 2018 – C 161/17)

The photographer Dirk Renckhoff had granted the operators of a travel magazine portal the right to publish one of his photos on their website. A pupil in a school in North Rhine-Westphalia downloaded this photo from the travel magazine website, which was freely available, and used it for her school presentation. The school presentation was then published on the school's website.

The photographer was of the opinion that the use of this photo infringed his copyrights. He sued the state of North Rhine-Westphalia for an injunction and demanded damages.

The German Federal Supreme Court has asked the European Court of Justice (ECJ) to interpret the Copyright Directive. It was questionable whether the term "communication to the public" covers the posting of a photo on a website if the photograph has previously

been published on another website without any restriction preventing its downloading and with the consent of the copyright holder.

The ECJ answered this question in the affirmative (ECJ, Judgment of 7 August 2018 – C 161/17). The ECJ ruled that a new consent of the author is required in order to post a photo that is freely accessible on a website with the consent of the author on another website. This is due to the fact that such an inclusion would make the photo accessible to a new public. It is irrelevant that the copyright holder has not restricted the possibility of internet users using the photo.

### 7.2 What do you consider will be the top two copyright developments in the next year?

#### Copyright in the digital age

The efforts to create a new European copyright law have become more concrete this year. However, two points are very controversial:

- introduction of a Europe-wide ancillary copyright law for press publishers
- pre-filter content for platforms like YouTube.

The ancillary copyright law stipulates that headlines or excerpts of press texts may only be displayed on platforms with the permission of the publishers and against a fee.

The requirement to pre-filter content forces platforms to check whether the content infringes copyrights when uploading content in the future. This can reasonably only be done by using upload filters. The problem here is that the filters may remove more content than necessary, as this is the only way to achieve legal certainty.

Depending on what is decided, changes to the German Copyright Act might become necessary.

#### Right to block information with regard to copyright infringements via unsecured WLAN

With Judgment of 26 July 2018 – I ZR 64/17 – *Dead Island* – (see above) the German Federal Supreme Court referred the matter back to the Higher Regional Court in order to examine the question of whether the plaintiff is entitled to a right to block information from the defendant pursuant to section 7 (4) of the German Telemedia Act.

Section 7 (4) of the German Telemedia Act rules that in a case where a user makes use of a telemedia service in order to infringe the intellectual property right of another user and if there is no other possibility for the holder of this right to remedy the infringement of his right, the holder of the right may request the service provider concerned

to block the use of information in order to prevent the repetition of the infringement. The blocking must be reasonable and proportionate. A claim against the service provider for reimbursement of pre- and extrajudicial costs for the assertion and enforcement of that claim shall basically not exist.

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