

# Copyright

in 28 jurisdictions worldwide

Contributing editors: Stuart Sinder,  
Jonathan Reichman and James Rosini

# 2010



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### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

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Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
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ISSN 1748-8257

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# Germany

Stephan Dittl and Karoline Brandi

Salger Rechtsanwälte

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## Legislation and enforcement

### 1 What is the relevant legislation?

The main copyright statute is the Copyright and Neighbouring Rights Act (the Copyright Act). Other important copyright legislation includes the Act concerning the Law of Publication and the Copyright Administration Act, which codifies the rights and obligations of collecting societies.

### 2 Who enforces it?

The copyright laws are enforced by certain courts that have jurisdiction over authors' rights.

In cases of infringement, it is up to the author (or an exclusive licensee) to enforce his or her rights. However, some claims, such as the copyright levy related to the allowance of private copies, may only be enforced by collecting societies.

Criminal enforcement authorities may start a criminal prosecution upon the request of the person whose rights have been infringed.

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## Agency

### 3 Is there a centralised copyright agency? What does this agency do?

There is no centralised copyright office of public record for copyright registration. However, the German Patent and Trademark Office (DPMA) keeps a copyright register for a very specific purpose: in the case of anonymous and pseudonymous works, the author (or the author's heirs) may claim authorship within 70 years of publication or creation by entering his or her details and those of the respective works into the DPMA register.

The DPMA also acts as the supervisory authority for collecting societies on the basis of the Copyright Administration Act. Right-holders may assign some of their rights to the relevant collecting society. The most important collecting society is the Society for Musical Performing and Mechanical Reproduction Rights (GEMA), which administers authors' rights for musicians and songwriters.

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## Subject matter and scope of copyright

### 4 What types of works are copyrightable?

Under the Copyright Act, works are defined as personal intellectual creations in the area of literature, science and art. Section 2 itemises as examples:

- works of language, such as writings, speeches and computer programs;
- musical works;
- works of pantomime, including choreographic works;
- works of fine art, including works of architecture, applied art and plans for such works;

- photographic 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.

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### 5 What types of rights are covered by copyright?

Both exploitation and moral rights are protected. For exploitation rights, a distinction is made between material and non-material exploitation.

- Material exploitation includes the right of reproduction, distribution and exhibition.
- Non-material exploitation includes the right of communication to the public: namely the right of recitation, performance and presentation; the right of making available; the right of broadcasting; the right of communication by means of video or audio recordings and the right of communication of broadcasts.

Exploitation rights have been partially harmonised by European Union directives, such as Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs.

Moral rights protection includes the right of publication, recognition of authorship and the right to prohibit any distortion or any other mutilation of the work which would jeopardise the author's interests.

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### 6 What may not be protected by copyright?

The Copyright Act does not provide protection for official works, such as laws, ordinances, official decrees and notices, decisions and official grounds of decisions.

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### 7 Do the doctrines of 'fair use' or 'fair dealing' exist?

There is no doctrine of 'fair use' as a general clause, but the Copyright Act provides a detailed and exhaustive catalogue of statutory limitations on copyright in the interest of the general public.

For instance, the German Copyright Act permits the reproduction of works by individuals for certain private or other personal uses. Other examples of legal limitations are:

- collections for religious, school or instructional use;
- public speeches reproduced and distributed in newspapers, periodicals or other information journals;
- the copying, distribution or public reproduction of copyrightable works for daily news reporting, using the means of radio broadcast, film and press within the scope necessary for pursuing this purpose; and
- quotations in independent scientific works, independent works of language or independent musical works.

The regulations regarding reproduction for private use provide for a right to equitable remuneration, which has to be paid by manufacturers, importers and dealers of appliances and mediums used for the making of reproductions. The copyright levy is usually included in the purchasing price. The levy may only be claimed by collecting societies (see question 2).

The catalogue of statutory limitations on copyright has been partially harmonised in the EU by the implementation of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

**8** What are the standards used in determining whether a particular use is fair?

The law itself (statutory limitations on copyright, sections 44(a)–63(a)) determines whether a particular use is fair, taking into consideration the interest of the general public.

**9** Are architectural works protected by copyright? How?

Yes, they are explicitly protected as works of visual art. Section 59 limits the exploitation rights of the copyright owner and grants the public a right to produce images of a building which may be distributed, made publicly available and presented ('liberty of the urban landscape'). However, reproducing the building itself, or copying the drawings, is not permitted.

**10** Are performance rights covered by copyright? How?

Performance rights enjoy protection as neighbouring rights. Performers are granted exploitation and moral rights. Exploitation rights include the exclusive right of fixation and recording, the right of reproduction and distribution, the right of rendering the performance perceivable and accessible to the public and the right of broadcasting, unless the performance has been fixed or recorded with the performer's permission. If the performance is broadcast after having been recorded with the performer's permission, he or she has the right to equitable remuneration.

Moral rights include the right to be mentioned and recognised as the performing artist and the right to prohibit any distortion or other mutilation of the performance which would jeopardise the performer's interests.

**11** Are other 'neighbouring rights' recognised? How?

The Copyright Act grants also protection for:

- scientific editions which consist of non-copyrighted works, if they represent the result of scientific analysis and differ in a significant manner from previously known editions of the works;
- posthumous works: those which have been legally published or performed in public for the first time after expiry of copyright. The same shall apply to works which have not been previously published and which were never protected in Germany, but whose authors have been dead for more than 70 years;
- photographs and products manufactured in a similar way to photographs;
- organisers of a performance;
- producers of phonograms and cinematographic works;
- broadcasting organisations; and
- the manufacturer of a database (section 87(a)).

**12** Are moral rights recognised?

Moral rights protection includes the right of publication, recognition of authorship and the right to prohibit any distortion or any other mutilation of the work which would jeopardise the author's interests. Moral rights always rest with the author or the author's heirs. They cannot be claimed by other persons.

Performers' moral rights include the right to be mentioned and recognised as the performing artist and the right to prohibit any distortion or any other mutilation of the performance which would jeopardise the performer's interests.

### Copyright formalities

**13** Is there a requirement of copyright notice?

There is no requirement for a copyright notice, because copyright protection comes into existence automatically upon the creation of any original work.

However, due to section 10 of the Copyright Act, the person designated in the customary manner as the author on copies of a work or on the original of a work of fine art shall be deemed the author of the work in the absence of proof to the contrary. Therefore, a copyright notice can be beneficial for the enforcement of copyright.

**14** What are the consequences for failure to display a copyright notice?

The only consequence is the non-applicability of section 10 of the Copyright Act (see question 13).

**15** Is there a requirement of copyright deposit?

There is no requirement of copyright deposit in Germany.

**16** What are the consequences for failure to make a copyright deposit?

Not applicable.

**17** Is there a system for copyright registration?

There is no such system except for the copyright register for anonymous and pseudonymous works of the German Patent and Trademark Office (see question 3).

**18** Is copyright registration mandatory?

Copyright registration is not mandatory.

**19** How do you apply for a copyright registration?

In order to apply for the registration of anonymous and pseudonymous works, one must submit a written request to the German Patent and Trademark Office (DPMA). The request must include the name, date and place of birth of the author, the pseudonym under which the work has been published, the title or a description of the work (if it has no title) and the date and nature of its first publication. The work itself does not have to be presented.

The request may be submitted by the author or, after his death, by the author's heirs. It may not be submitted by the licensee.

**20** What are the fees to apply for a copyright registration?

Fees for the registration of anonymous and pseudonymous works are €12 for one work. For the registration of several works, the fees are €12 for the first work, €5 from the second to the tenth work and €2 from the eleventh work on.

**21** What are the consequences for failure to register a copyrighted work?

Usually, there are no consequences, because copyright registration is not mandatory.

In the case of anonymous and pseudonymous works, failure to register the work means that the term of protection runs for 70 years after the publication or creation of the work, rather than being extended to 70 years after the author's death.

**Ownership and transfer****22** Who is the owner of a copyrighted work?

The owner is the author or his/her heirs. Ownership may not be assigned to third parties.

**23** May an employer own a copyrighted work made by an employee?

An employer may not own a work created by an employee, as ownership cannot be transferred.

However, the employer may be entitled to all of the employee's exploitation rights under specific circumstances. The employee is obliged to assign the rights of exploitation to his employer if this is provided in the employment contract, or if such obligation corresponds to the nature and purpose of the employment.

Specific rules apply for computer programs: where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer shall be exclusively entitled to exercise all the economic rights in the program unless otherwise agreed (section 69(b)).

**24** May a hiring party own a copyrighted work made by an independent contractor?

No, because ownership cannot be transferred. However, comprehensive exploitation rights are often granted to the hiring party on an exclusive basis. The respective agreement does not have to be in writing, but if the hiring party wants to get comprehensive and exclusive exploitation rights, it must prove that this was intended by both parties. Therefore it is advisable for the hiring party to use a written contract with a respective clause.

**25** May a copyrighted work be co-owned?

Yes. According to section 8 of the Copyright Act, copyrighted works are co-owned if two or more authors create a work that forms an inseparable unit, or if two works are combined into one integral creation. All co-authors are usually entitled to the rights to the entire work to the extent of their respective contributions to the work. Each joint author is entitled to assert claims arising from infringements of the joint copyright; however, he may demand payment only on behalf of all joint authors.

**26** May rights be transferred?

No, the ownership of copyright may not be transferred except in the case of legal succession. However, all exploitation rights may be licensed (see question 27).

**27** May rights be licensed?

Yes, the author may grant the right to use the work in a particular manner, or in any manner (exploitation rights). Exploitation rights may be granted as non-exclusive or exclusive rights and may be territorially, temporally or contentually limited (section 31).

**28** Are there compulsory licences? What are they?

The Copyright Act only provides for a compulsory licence for the producers of phonograms. If a producer of phonograms is granted the right to record a work and reproduce and distribute the phonograms, the author is obliged to grant equal rights to other producers of phonograms at reasonable terms and conditions.

Furthermore, the Copyright Act does not provide for exploitation rights, but rather for remuneration claims in some cases. For example, section 78 of the Copyright Act provides for equitable

remuneration of an artist whose performance has been broadcast after having been lawfully fixed on video or audio recording mediums and the recording having been published, even though the artist does not possess a respective exploitation right. Thus, a compulsory licence is not necessary.

**29** Are licences administered by performing rights societies? How?

Some exploitation rights and remuneration claims are usually licensed to collecting societies by the authors or neighbouring rightsholders. This is the case where collective exploitation makes sense or where administration by collective societies is provided or recommended by law (as in the example regarding the broadcasting of an artist's performance in question 28).

Performing artists and record labels are represented by the GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten mbH).

The details of administration are regulated by the Copyright Administration Act, which is also applicable for the collective administration of neighbouring rights.

**30** Is there any provision for the termination of transfers of rights?

The Copyright Act does not provide any right of termination. Therefore, such a right must be contractually agreed, if the duration of the licence is not limited. However, the Copyright Act stipulates a right of revocation in the following cases:

- If the holder of an exclusive exploitation right does not exercise such a right or exercises it insufficiently, and if thereby serious injury is caused to the author's legitimate interests, the latter may revoke the exploitation right. This shall not apply if the non-exercise or insufficient exercise is due mainly to circumstances which the author can reasonably be expected to remedy.
- An author may revoke an exploitation right if the work no longer reflects his conviction and he can therefore no longer be expected to agree to the exploitation of the work. The author's successor in title may exercise such right of revocation only if he proves that prior to his death the author would have been entitled to revoke and was prevented from so doing, or that he has done so by testamentary disposition. In the case of revocation, the author is obliged to equitably indemnify the holder of the exploitation right.

The Act concerning the Law of Publication stipulates certain regulations regarding the termination of a respective agreement:

- the publisher may terminate the contract if the purpose of the work ceases to exist after conclusion of the contract;
- if the contract of publication is limited to a certain number of editions or copies, the contractual relationship ends automatically when the editions or copies are exhausted;
- the Law of Publication additionally provides several rights of withdrawal, for instance in the case of delayed delivery of the work, defect or occurrence of unpredictable circumstances.

**31** Can documents evidencing transfers and other transactions be recorded with a government agency?

No.

**Duration of copyright****32** When does copyright protection begin?

Copyright protection begins with the creation of the work.

**33** How long does copyright protection last?

Copyright protection expires 70 years after the author's death or the death of the last surviving co-author.

Neighbouring rights have different terms; for example, scientific editions and posthumous works are protected for 25 years after publication, while photographs and artists' performances are protected for 50 years after publication.

**34** Does copyright duration depend on when a particular work was created or published?

In the case of anonymous or pseudonymous works, the term of protection is linked to the date of the publication or creation (if the work was not published) of the work and lasts for 70 years after that date (unless the work has not been registered – see questions 3 and 21).

The duration of protection for neighbouring rights is also usually linked to the publication of the work.

**35** Do terms of copyright have to be renewed? How?

No, they are not renewable: as copyright protection does not require registration but is linked to a certain date, no renewal or extension is provided.

### Copyright infringement and remedies

**36** What constitutes copyright infringement?

Any kind of unlicensed exploitation of a work constitutes a copyright infringement, provided that the use is covered by exploitation rights (see question 5) and not covered by legal exemptions for fair use (see question 7).

**37** Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Secondary liability exists for:

- persons who help or support the infringing person;
- furthermore, according to the so-called principle of 'disturbance liability': if a person somehow contributes deliberately and with causal connection to an infringement, the rightholder may claim injunctive relief against this person as a 'disturber' in order to prevent further infringements.

For example, the Federal Court of Justice has recently held that access to wireless networks must be reasonably restricted by the owner to allow access only to authorised users and to prevent illegal music downloads by third persons. This includes the implementation of a personal password and encryption of the WLAN itself. It is not necessary to meet the latest security standards, though, as this would require the defendant to regularly invest money in order to keep up to date. The author may not claim damages in this case.

**38** What remedies are available against a copyright infringer?

The injured party may bring an action for injunctive relief requiring the infringer to cease and desist if there is a danger of repetition of the acts of infringement, as well as an action for damages if the infringement was intentional or the result of negligence. Calculation of the damages can be based on a fictitious licence fee, the profits of the infringer or the actual loss sustained by the injured party (see question 40).

Moreover, authors, photographers and performers may recover, as justice may require, a monetary indemnity for the injury caused to them even if no pecuniary loss has occurred.

The Copyright Act stipulates the obligation of a warning letter demanding a cease and desist declaration of the alleged infringer before bringing an action. The injured party may claim the necessary (legal) costs of the warning letter.

In addition, the injured party may require the destruction or

recall of all unlawfully manufactured or distributed copies, or those that are intended for unlawful distribution and are in the possession or ownership of the infringer. The same applies to those devices in the property of the infringer that have predominantly served for the manufacture of these copies. Alternatively, the injured party may seek the restitution of those copies to the injured party for an equitable remuneration, which shall not exceed the costs of production (section 98).

The injured party may also claim the disclosure of information (section 101), the presentation of documents or the inspection of an object (section 101(a)) and the submission of banking, financial and trade documents in the infringer's possession (section 101(b)).

In urgent cases (if further infringements are expected), the injured party may apply for an interim injunction.

Finally, the injured party may report an offence to the police in order to start a criminal prosecution.

**39** Is there a time limit for seeking remedies?

For civil remedies, claims are usually time-barred three years after the end of the year in which the entitled person becomes aware of the infringement and the identity of the infringer, or 10 years after the date of the infringement, irrespective of such knowledge.

If the rightholder wants to apply for an interim injunction, he has to prove urgency. There is no respective legal time limit, but most of the courts deny urgency if the infringed party has not applied for the interim injunction within one month of becoming aware of the infringement.

For criminal measures, an offence must be reported to the police within three months.

**40** Are monetary damages available for copyright infringement?

Yes, monetary damages are provided in section 97(II) of the Copyright Act. There are three different ways of calculation:

- the actual loss: to establish legal grounds for recovery, the plaintiff has to show that he or she has suffered a loss because of the infringement, for instance through a decline in sales figures;
- the successful claimant may also recover net profits that the infringer has made from the infringement. This remedy aims to prevent the defendant enriching himself at the plaintiff's expense;
- compensation based on a licence analogy: the rationale behind this assessment is that the infringer must not be in a better position than he would have found himself in if he entered a licence agreement with the rightholder. Hence, the plaintiff is entitled to reasonable royalties for an infringement.

The infringed party has the right to ask the infringer for the relevant information in order to calculate the damages in all three ways, and may then demand the highest amount.

**41** Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, but the amount that can be claimed is limited to the calculation according to the respective statutory provisions, even if the infringed party has to pay a higher amount to his attorney because of a fee agreement.

In addition, attorneys' fees and costs can be claimed for cease and desist letters (section 97(a(II))).

**42** Are there criminal copyright provisions? What are they?

The Copyright Act provides for the punishment of the following intentional copyright infringements:

- Section 106 criminalises the unauthorised exploitation of copyrighted works. Any person who, other than in a manner allowed by law and without the rightholder's consent, reproduces, dis-

tributes or publicly communicates a work or an adaptation or transformation of a work shall be liable to imprisonment for up to three years or a fine.

- Section 107 criminalises the affixing of a designation of author to the original of a work of fine art or the distribution of an original bearing such designation without the author's consent. It also includes the affixing of a designation of author on a copy, adaptation or transformation of a work of fine art in such a manner as to give the copy, adaptation or transformation the appearance of an original, as well as the distribution of a copy, adaptation or transformation bearing such designation. Such an act is punishable by up to three years' imprisonment or a fine.
- According to section 108, the infringement of neighbouring rights is punishable by up to three years' imprisonment or a fine.
- Section 108(a) handles unlawful exploitation on a commercial basis: where the person committing the acts referred to in sections 106 to 108 does so on a commercial basis, it is punishable by up to five years' imprisonment or a fine.
- Section 108(b) criminalises the evasion of technical measures without the rightholder's permission, as well as the removal or change of information affixed by the rightholder for the exercising of his rights and the distribution of works after having removed or changed this information (up to one year's imprisonment or a fine).

However, infringements are only prosecuted on the request of the infringing party, unless the prosecuting authorities deem that ex officio prosecution is justified in view of particular public interest.

#### 43 Is online copyright infringement actionable?

Yes – no exception is made for online copyright infringement.

According to section 101 of the Copyright Act, rightholders may claim disclosure of the infringer's identity against the internet provider. As this information is protected by the secrecy of telecommunications disclosure, the rightholder must request a judicial order declaring the permissibility of the data disclosure.

#### 44 How may copyright infringement be prevented?

For copyright material issued to the public in an electronic form, the rightholder may use technical protection devices. Section 95(a) of the Copyright Act prohibits the circumvention of efficient technical measures for the protection of copyrighted works without the rightholder's consent.

#### Update and trends

One current topic is the application of the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, which aims to harmonise copyright and related rights in the various EU member states. The Directive has been implemented in two steps (2003 and 2008), and the national courts now have to ask the European Court of Justice for the interpretation of the respective regulations. While formerly international conventions granted only minimum rights, and the German provisions used to guarantee high protection anyway, the level of copyright protection might now decline; because of the harmonised interpretation of copyright regulations within the entire EU, the orientations of other member states have to be considered. This could lead to a lower unitary level of copyright protection.

For example, the European Court of Justice recently instructed the German Federal Court of Justice to construe the author's distribution rights in a restricted way: the concept of distribution to the public of the original of a work or a copy thereof applies only where there is a transfer of the ownership of that object. The Federal Court of Justice had obviously not expected such a construction, as there was no such condition under German law before, but had to apply it. This was a new development for German copyright jurists and we will have to wait and see whether more restrictions will be introduced into German copyright law.

Another hot topic is the next step for copyright reform. During summer 2010, several hearings will take place. In particular, there will be discussion of whether a new neighbouring right for publishing companies should be created.

#### Relationship to foreign rights

##### 45 Which international copyright conventions does your country belong to?

The most important international copyright conventions to have been signed by Germany are:

- the Berne Convention in its (revised) version of the Paris Act of 1971;
- the Universal Copyright Convention (1952) as revised in Paris 1971;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), 1994;
- the World Intellectual Property Organisation Copyright Treaty (WCT), 1996;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961;
- the Brussels Convention relating to the distribution of programme-carrying signals transmitted by satellite, 1974.

# SALGER

Rechtsanwälte

**Stephan Dittl**

**dittl@salger.com**

Darmstädter Landstraße 125  
60598 Frankfurt am Main  
Germany

Tel: +49 69 6640880  
Fax: +49 69 66408810  
www.salger.com

Additionally, several European Union directives, such as Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (which replaces Directive 91/250/EEC), and Directive 96/9/EC of 11 March 1996 on the legal protection of databases, have been implemented in Germany.

**46** What obligations are imposed by your country's membership of international copyright conventions?

Germany is obliged to grant a minimum level of protection: namely, the existence of certain exploitation rights and a minimum duration. Moreover, the same rights must be granted to Germans and to nationals from other member states.

Germany is obliged to implement the European Union directives within a certain time. Most of these directives are intended to harmonise national copyright legislations within the European Union.



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