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Section III.B: The digitalizing of literary and musical works

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National Report for Germany

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1. Exclusive Rights[**]

1.1. Does your law include, as part of the exclusive reproduction right, the right to authorize temporary reproduction, and if so, through an explicit provision or an interpretation on the basis of a non-specific provision?

I. Exclusive Rights

1. Temporary Reproduction

In German law, the exclusive reproduction right includes the right to authorize further temporary reproduction only partially. The right to allow (or not allow) temporary reproduction is limited by Sec. 44a Copyright Act (Urheberrechtsgesetz (UrhG)).

2. Limitation of the copyright in Sec. 44a UrhG

In order to implement Art. 5 para 1 directive 2001/29/EC (InfoSoc-directive), the German legislator provided a new limitation of the copyright in sec. 44a UrhG.

According to para 1 of this provision, temporary acts of reproduction that are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (1) a transmission in a network between third parties by an intermediary, or (2) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance do not need the permission of the rightholder.

In particular, the provision intends to privilege the following acts of reproduction relating to online use of contents:

a) Browsing

Browsing means the display of websites via HTML, Java or any similar programming language. In this process, information that is received from the chosen server, is reproduced in the computers RAM or graphic memory. This reproduction is always an act of reproduction in terms of the exclusive reproduction right.[1] The storage of information in a computer's RAM is always temporary; it necessarily ends with the computer's shutdown.[2]

[**] The report follows closely the questions formulated by the General Rapporteur

[1] *v. Welser* in Wandtke/Bullinger, UrhR, 2nd. Ed. 2006, Sec. 44a Rn. 3.

[2] *v. Welser* in Wandtke/Bullinger, Sec. 44a Rn. 3.

b) Caching

During the process of caching, information is reproduced in temporary storage. This storage provides the information to the user.[3] Depending on the location of the storage, distinctions are made between proxy and client caching.

(1) Client Caching

Client Caching corresponds to browsing technically as well as legally. For this reason, it takes part in the privilege provided by sec. 44a UrhG.[4]

(2) Proxy-Caching

Proxy caching corresponds to client caching with the exception of one significant difference. The location of the storage is usually not the location of the end user, rather it is located on a special proxy server. Compared to client caching, the act of reproduction is usually longer (up to several weeks). Despite these differences proxy caching is privileged by Sec. 44a UrhG, which intends to accelerate browsing and to save bandwidth. Therefore, legally there is no difference between browsing and client caching on the one hand and proxy caching on the other – so long as there is no economic significant difference. This understanding of Sec. 44a UrhG also correspondes to recital 33 InfoSoc directive, which states that the national exceptions should include acts which enable browsing as well as acts of caching.

3. Temporary acts of reproduction not covered by Sec. 44a UrhG.

Acts of reproduction that are not covered by Sec. 44a UrhG need to be permitted by the rightholders. This is also true for many temporary acts of reproduction. Theoretically, all acts of digital reproduction could be considered temporary since all electronic storing devices have a shelf life.[5] Thus, in order to define the scope of Sec. 44a UrhG, only such acts of reproduction, which are made during the process of the digital transmission of a work or are subject matter of related rights only in technical purposes, and which are removed after a negligible period,[6] are deemed to be temporary under this section. As a result, all acts of reproduction, that are not intended to enable browsing or caching, are not covered by sec. 44a UrhG.

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[3] *v. Welser* in Wandtke/Bullinger, Sec. 44a Rn. 4.

[4] *v. Welser* in Wandtke/Bullinger, Sec. 44a Rn. 5.

[5] *Dreier* in Dreier/Schulze, UrhG, 2nd. Ed. 2006, Sec. 44a Rn. 4.

[6] *Dreier* in Dreier/Schulze, Sec. 44a Rn. 4

1.2. Does your law provide, explicitly or on the basis of interpretation, the right of making available works and subject matter of related rights through digital networks? If it is provided explicitly, by which words has it been described?

4. Right of making available to the public, Sec. 19a UrhG

By means of the "*Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft*" of 2003 (act of reforming the copyright act with respect to the information society), sec. 19a UrhG was embedded in the German intellectual property rights act in order to implement art. 3 para. 1, 2 InfoSoc-Directive. Before inserting the new sec. 19a UrhG, this right was already provided by sec. 15 UrhG – not explicitly but on the basis of interpretation (innominated rights).[7]

Sec. 19a UrhG provides a definition of the right of making available to the public:

"The right of making available to the public is the right to make the work available by wire or wirelessly so that everyone as a part of the public has the choice to receive it wherever and whenever he likes to do so."

The term "wired or wireless" covers any public transmission or spreading of the work. The definition of "public" as mentioned in Sec. 19a UrhG is in accordance with the definition given in Sec. 15 para. 3 UrhG. Therefore, a reproduction is public if it is appointed to a number of persons of the public. Any person who is not personally related to the work's originator or to people to whom the work is made available an incorporal way, belongs to this public.[8] The common membership of two or more users in a file sharing system does not qualify as a "personal relationship" within the meaning of this section. Thus, works made available by means of file sharing systems are made available to the public. In this context, in order to render the question of whether the work is made available to the public easier, the BGH (and inferior courts) have established some classifications:

a) No personal relationship (communication to the public):[9]

correctional facilities (prisons)[10]

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[7] BGH GRUR 2003, 958 – Paperboy.

[8] Cf. BGH (German Federal High Court) in BGHZ (Vol.) 113, 159, 161 (official collection of decisions of the German Federal High court); BGH in: GRUR (Gewerblicher Rechtsschutz (Journal)) 1996, 875; BGH GRUR 1984, 734, 735

[9] For further examples see Dreier/Schulze, § 15 Rn. 44.

[10] BGH GRUR 1994, 45 - *Verteileranlagen*; GRUR 1984, 734 - *Justizvollzugsanstalten*.

hospitals[11]

nursing homes[12]

sanatoriums[13]

lounges in schools[14]

company parties[15]

b) Personal relationship (no communication to the public):[16]

- patients in double bedrooms[17]
- workgroups in companies[18]
- school classes[19]

Further the recipients must have the choice as to where and when they would like to receive the work. This condition is not fulfilled, if the recipient only has the choice to receive or not to receive the work. It is necessary to allow him to decide when and where he wants to start the transmission and receive the files. This distinguishes the right of making available to the public from broadcasting. In the case of broadcasting, the user only has the choice whether he would like to receive a special broadcast, but he does not have the option to determine the time when it begins.

5. The right of making available of "subject matter of related rights" (ancillary copyrights)

Since the implementation of sec. 19a UrhG, the right of making available ancillary copyrights is provided explicitly. Before enacting sec. 19a, this question was a matter of many controversial academic discussions. Now, the right of making available ancillary copyrights is ascribed to the rightholders by specific provisions as follows:

a) Performing artists

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[11] BGH GRUR 1994, 797 – *Verteileranlage im Krankenhaus*.
[12] BGH GRUR 1975, 33 – *Alterswohnheim*; BGH GRUR 1992, 386 - *Altenwohnheim II*.
[13] BGH GRUR 1972, 614 – *Landesversicherungsanstalt.*
[14] BGH GRUR 1983, 562, 563 – *Zoll- und Finanzschulen.*
[15] BGH GRUR 1955, 549 – *Betriebsfeiern*.
[16] For further examples see Dreier/Schulze, § 15 Rn. 45.
[17] BGH GRUR 1996, 875 - *Zweibettzimmer im Krankenhaus*.
[18] KG ZUM 2002, 828, 830.
[19] LG München I, Urt. v. 30.03.2004, Az. 210 4799/04; *Schricker/v. Ungern-Sternberg* § 15 Rn. 72.

Sec. 78 para. 1 No. 1 UrhG: „The performing artist has the exclusive right to make his performance available to the public (sec. 19a)"

b) Producers of phonograms

Sec. 85 para. 1 sentence 1 UrhG: "The producer of a phonogram has the exclusive right to reproduce and distribute the phonogram and to make it available."

c) Broadcasting organisations

Sec. 87 para. 1 no. 1 UrhG: "The broadcasting organization has the exclusive right to […] make its broadcast available."

d) Producers of movies

Sec. 94 para. 1 sentence 1 UrhG: "The producer of a movie has the exclusive right to […] make the storing device, where the movie is recorded, available."

Due to the implementation of sec. 19a, the protection of ancillary copyrights regarding the right of making available is now at the same level as the protection of works.[20]

2. Limitations and Exceptions

II. Limitations and Exceptions

2.1. In which way have digital technologies been taken into account in the drafting of provisions on limitations and exceptions, or in their interpretation?

1. Limitations and digital technologies

The reception of the development of digital technologies in German copyright law with regard to limitations and exceptions is often considered as insufficient. Before the implementation of the InfoSoc directive, some special rules were developed by jurisdiction. In the course of the implementation of the InfoSoc directive, some provisions concerning digital technologies have been provided. Many others, which are considered as necessary, are still in the stage of (pre-)drafts. The development can be divided into three sections.

a) Interpretations of old provisions before the implementation of the InfoSoc directive (particularly "electronic (or digital) press review")

New interpretations of provisions on limitations and exceptions took place mainly in the range of sec. 49 UrhG. In this regard, a decision of the BGH concerning electronic press re-

[20] *Dreier* in Dreier/Schulze, § 19a, Rn. 3.

views is of particular importance.[21] Although the case took place before the implementation of the InfoSoc directive, it was obviously influenced by its Art. 5 para. 3 c). As a limitation of the copyright, the provision allowed the reproduction and distribution of individual newspaper articles. Whereas the traditional doctrine upheld a restrictive interpretation of limitations regarding the technological circumstances when the limitation had been codified,[22] the Federal High Court extended the application of the limitation contained in sec. 49 UrhG to digital substitutes of such press reviews. However, the Court tried to balance the needs of information society with the interests of authors in a salomonic way by stating that only graphical files might be used in order to prevent a excessive exploitation of works like in a databases. Hence, even though users may copy and distribute electronic copies of press articles they must not digitalize them in a way that allows for database use. Moreover, and in accordance with the prevailing opinion, the Court restricted the use of these digitalized press reviews to a limited circle of users inside corporations or governmental bodies rather than to anyone.[23] This fundamental decision is still highly controversial.

For that type of review, appropriate compensation must be paid to the rightholder. The compensation can only be claimed by collecting societies.

Following amendments of the UrhG left this jurisdiction untouched and took it for granted. Even in the forthcoming fundamental change of german copyright law (so called Second Basket = Zweiter Korb) the legislator obviously does not intend to change anything substantial.[24]

b) New provisions due to the implementation of directive 2001/29/EC

During the implementation of directive 2001/29/EC a number of new provisions concerning limitations and exceptions were enacted. For further details see question 2.2.

c) Actual drafts of the Copyright act

Originally, a larger number of provisions concerning digital technologies were supposed to be enacted. But due to the short period of time for the implementation, the project failed.[25] The

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[21] BGH GRUR 2002, 963; similiar BGH GRUR 2005, 670, 671 – Wirtschaftswoche.

[22] BGH GRUR 1955, 492 – Grundig-Reporter; BGH GRUR 1997, 459 – CB-Infobank, BGHZ 144, 232, 235 f. = GRUR 2001, 51 - Parfumflakon; BGHZ 150, 6 = GRUR 2002, 605, 606 - Verhüllter Reichstag

[23] *Melichar* in Schricker, § 49 Rn. 12.; *Engels* in Möhring/Nicolini, UrhG, 2. Aufl., § 49 Rn. 9; weitere Nachweise bei BGH GRUR 2002, 965.

[24] Cf. Draft of Copyright Act, 22.March 2006, http://www.bmj.bund.de/media/archive/1174.pdf (only in German).

[25] *Dreier* in Dreier/Schulze, vor § 44a ff., Rn. 6.

legislator preferred to discuss the issue more thoroughly and, thus, to initiate a second legislative process for the remaining provisions.[26]

As a preliminary result, on September 27, 2004, the Bundesjustizministerium (federal ministry [department] of justice) published a first draft (Referentenentwurf, RefE)[27], followed by the final draft of 22. March 2006, that, facing the possibilities of digital reproduction technologies, contains new provisions on rewards for the rightholders. Furthermore, digital reproductions for private purposes are upheld in general; however, the preconditions to copy are about to be defined more appropriate with regard to file-sharing networks, for instance by requiring that the master itself was not obviously being produced or made available in an illegal way (sec. 53 para 1 UrhG). The privilege for free digital copying for private purposes is flanked by an extension of royalties and levies on copying devices.

2.2. In particular, what limitations and exceptions have been provided in respect of the rights of electronic reproduction and making available?

2. Limitations with respect of electronic reproduction and making available

The implementation of the InfoSoc directive yielded a number of new provisions to answer the challenges of the new digital technologies.

a) New provisions

(1) sec. 44a UrhG – Vorübergehende Vervielfältigungshandlungen (temporary acts of reproduction)

see question 1.1

(2) sec. 45a UrhG – Behinderte Menschen (disabled persons)

The provision implements Art. 5 III lit. b) InfoSoc directive. It limits the reproduction and distribution rights of originators to the benefit of disabled persons. Appropriate compensation must be paid to a collecting society.

(3) sec. 52a UrhG – Öffentliche Zugänglichmachung für Unterricht und Forschung

[26] BT-Drucks. 15/38, 15.

[27] The draft is available (in German language) at http://www.bmj.bund.de/media/archive/760.pdf, the second draft zweiter RefE vom 3. Januar 2006, s. http://www.urheberrecht.org/topic/Korb-2/bmj/2006-01-03-Gesetzentwurf.pdf, the final draft of 22.March 2006 at http://www.bmj.bund.de/media/archive/1174.pdf

The new provision of sec. 52a UrhG is a limitation of the right of making available to the benefit of educational and research purposes. It is the implementation of Art. 5 para. 3 a) InfoSoc. However, the limitation will expire by December 31, 2006 (sec. 137k UrhG). It is still unclear whether there will be specific limitations in the new draft of the copyright act; the actual draft does not provide for such limitations.

(a) Limitations of the right of making available in sec. 52a para. 1 UrhG

Para. 1 of sec. 52a UrhG contains the limitation of the right of making available for educational (no. 1) and research purposes (no. 2).

According to sec. 52a para. 1 no. 1, all kinds of schools, universities and colleges ("Schulen" and "Hochschulen") as well as noncommercial institutions for (vocational) education and training are allowed to make available small works, small parts of published works, and individual articles in newspapers and journals without the rightholder's permission. The works that are made available must be accessible only by a number of persons, which is limited by the educational purpose.

According to no. 2, the same privilege does apply to research purposes. In contrast to no. 1 ("small parts of published works"), no. 2 allows to make available "parts of published works". This difference indicates that bigger parts of works can be made available for research purposes than for educational purposes. For educational purposes, there is a limit of 20 % of the whole work,[28] for research purposes, the part must be smaller than 50 %.[29]

For educational as well as for research purposes, the making available must be necessary for the intended purpose. Only noncommercial purposes are privileged.

(b) Exceptions of the limitation

As an exception of sec. 52a para. 1, works that are intended to be used for education in schools (i.e. school books) must not be made available without the rightholder's permission, sec. 52a para. 2 sentence 1. This exception was provided due to the intervention of school book publishers who were being afraid of losing their primary market.[30] The exception does not apply to educational institutions other than schools.[31]

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[28] *Lüft* in Wandtke/Bullinger § 52a, Rn. 5; *Loewenheim* in Schricker, Urheberrecht, 2. Aufl. 1999, § 53 Rn. 31.

[29] *Lüft* in Wandtke/Bullinger § 52a, Rn. 12.

[30] BT-Drucks. 15/538, 78f.

[31] for further details on the term "schools" see *Lüft* in Wandtke/Bullinger § 52a, Rn. 8.

The permission of the rightholder is also necessary for the making available of movies, which started in cinemas during the last two years, sec. 52a para. 2 sentence 2. Movies being published on VHS or DVD, are not included.[32]

(c) Reproductions

According to sec. 52a para. 3, the right of making available according to para. 1 includes the right to make reproduction that is necessary for the making available.

(4) Compensation

Every legal use of works which is covered by sec. 52a para. 1 UrhG entails an appropriate compensation, which can only be claimed by a collecting society, sec. 52a para. 4.

b) Changed and adapted provisions

(1) Sec. 46 UrhG – Sammlungen für Kirchen-, Schul- oder Unterrichtsgebrauch (collection for use in churches, schools, or education institutions)

The amendment of sec. 46 UrhG, the so called „School Book Law", extends the limitation to the benefit of collections for religious or educational purposes to the new right of making available (sec. 19a UrhG). Currently, making available digital content for privileged purposes does not require the rightholder's permission.[33] Thus, an equal standard for digital and analogue media is achieved by means of sec. 46 UrhG.[34] The new provision is based on Art. 5 para. 3 a) InfoSoc directive.

(2) Sec. 50 UrhG – Berichterstattung über Tagesereignisse (reporting of daily news)

Sec. 50 UrhG allows the use of works for the purpose of reporting of daily news by broadcasting (or similar) companies, newspapers or any other kind of media. The former version of sec. 50 covered only privileged reporting via radio or TV. This privilege was then extended to written works, thus encompassing new online-services, too.[35] Sec. 50 UrhG implements Art. 5 para. 3 c) InfoSoc-Directive.

(3) Sec. 52 UrhG – Öffentliche Wiedergabe (communication to the public)

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[32] *Lüft* in Wandtke/Bullinger § 52a, Rn. 19.
[33] *Lüft* in Wandtke/Bullinger, § 46 Rn. 1.
[34] BT-Drucks. 15/38, 19.
[35] BT-Drucks. 15/38, 19.

Until the amendment, sec. 52 only allowed the communication to the public of previously released works. The release of a work requires the previous reproduction of it, sec. 6 para. 2 UrhG. Thus, the limitation of the right of communication to the public is extended to published works in terms of sec. 6 para 1 UrhG. Also works that have been made available to the public with the permission of the rightholder are included. The right of communication to the public is limited to non commercial purposes, sec. 52 para 1 UrhG. The rightholder may make a claim for appropriate compensation.

(4) Sec. 53 – Vervielfältigungen zum privaten und sonstigen eigenen Gebrauch (reproductions for private purposes)

The right to make private reproductions has been recently adapted to new digital technologies and is still subject to further reforms. For further details see question 2.3.

(5) Sec. 56 – Vervielfältigung und öffentliche Wiedergabe in Geschäftsbetrieben (reproduction and making available in businesses)

Sec. 56 limits the copyright to the benefit of business companies, in particular for dealers of electronic equipment. They are permitted to use works without permission for demonstration purposes. No compensation has to be paid to the rightholder. Due to the implementation of Art. 5 para. 3 b) InfoSoc-directive, businesses selling or repairing devices for electronic data processing were added to the privileged circle of persons. Beside the right of reproduction, the right of making available (sec. 19a UrhG) was added to the privileged acts of use of works.

The reproductions must be deleted as soon as the purpose of demonstration no longer requires it.

(6) Sec. 58 – Werke in Ausstellungen, öffentlichem Verkauf und öffentlich zugänglichen Einrichtungen (works in exhibitions, public sales and public facilities)

Sec. 58 UrhG contains a limitation of the copyright on works of fine art and photographs that are part of a public exhibition or are intended to be sold in a public sales event. The organizer of the exhibition or the event is allowed to reproduce, distribute, and make available works without the permission of the rightholder, so long as such is necessary for the purpose of the event.

Thus, sec. 58 now allows the use of works in digital offline and online media.[36]

[36] *Lüft* in Wandtke/Bullinger, § 58 Rn. 6.

(7) Sec. 60 UrhG – Bildnisse (portraits)

The costumer of a portrait is allowed to reproduce and distribute the portrait for non commercial purposes without the rightholder's permission. The costumer's right of reproduction is explicitly limited with regard to analogue reproductions. The reason for the limitation on analogue reproductions is the missing authorization of such a limitation in the InfoSoc directive.

2.3. In respect of private reproduction, does your law distinguish between analogue and digital reproduction and if so, in which way?

Does the law explicitly or by interpretation require that the permitted private copy is made from a legally made copy and/or from a copy made available legally?

3. Distinction between analogue and digital methods of reproduction

In German copyright law, sec. 53 UrhG is the all-dominant provision for analogue as well as for digital methods of reproduction for private use. Due to the implementation of the InfoSoc directive, sec. 53 UrhG was substantially altered in order to follow the aim of recital 38 InfoSoc directive. *("Due account should ... be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them."*) Additionally, an adaptation to the authorizations in art. 5 para. 1 and 2 was necessary.[37]

a) Sec. 53 I UrhG Einzelne Vervielfältigungen natürlicher Personen zum eigenen Gebrauch (single acts of reproductions by persons for private use)

Sec. 53 para. 1 UrhG allows single acts of reproduction of a work on any storage medium for the private use by a (natural) person. This right includes analogue as well as digital methods of reproduction. A person is only allowed to make the copy himself. If the person uses the service of another person or company, the service must be free of charge. Commercial reproduction services are limited to analogue reproductions, sec. 53 para. 1 sentence 2 UrhG. Efforts of the industry to eliminate the privilege of digital copying for private purposes were rebuffed several times by the legislator, just recently by the new draft of the Copyright Act of 22nd. March 2006.[38]

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[37] BT-Drucks. 15/38, 20.

[38] See above N. 24.

b) Sec. 53 para. 2 UrhG

Sec. 53 para. 2 applies to persons as well as for corporations. It allows single reproductions

(1) for personal scientific purposes

(2) if the copy is intended to be part of a personal archive. The original piece of work has to be the reproducer's property.

(3) for the personal information in connection with the reporting of current events, if the work is broadcasted via radio.

(4) for other personal use,

(a) if the matter of reproduction is only a small part of a published work or a single article, which is published in newspapers or magazines,

(b) if the work is exhausted for at least two years.

Sec. 53 para. 2 sentence 1 is applicable to both, digital and analogue methods of reproduction.

Sentence 2 limits the right of private digital reproduction for an own archive (sec. 53 para. 2 sentence 1 no. 2) to non-commercial purposes. According to sentence 3, the same limitation applies to the rights in sec. 53 para. 2 sentence 1 no. 3 and 4.

c) Requirement of a legally made master copy

The right of private single reproduction by (natural) persons (sec. 53 para. 1 sentence 1) explicitly requires a master copy that is not *obviously* made illegally. In general, if the copied song or film is not yet released, most of commentators argue in favour of an obvious illegality.[39] The same applies to recordings of concerts that are obviously made without the rightholder's permission.[40] For any other works that are spread via file sharing systems the user is not able to check the legal quality of the master copy. For instance, it can not be excluded that the master copy had resulted out of back up copy which only later on was made available at the internet. Thus, these copies of works (i.e. songs, movies, pictures) can not be considered in general[41] to be obviously made illegally. The legislator intended to create a rule being followed by the overwhelming majority of the population.[42] However, the draft of Copyright Act of March 2006 will extend this restriction of "obvious illegality" to making

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[39] *Lüft* in Wandtke/Bullinger, § 53 Rn. 13 with more references.

[40] *Lüft* in Wandtke/Bullinger, § 53 Rn. 13.

[41] There is an abundant discussion in Germany on the issue of digital copying for private purposes which can not be reviewed here, cf. www.privatkopie.net etc.

[42] BT-Drucks. 15/38, 39.

copies available to the public (in the sense of sec. 19a UrhG), thus rendering sec. 53 UrhG more precisely and undercutting acts of file-sharing.

The right to make reproductions for a personal archive (sec. 53 para. 2 sentence 1 no. 2) even requires a own master copy, which is part of the reproducer's own property.

3. Relation between Limitations and Contracts

Is it legally possible to extend the protection by contract thereby undermining limitations and exceptions under the law?

III. Relations between Limitations and Contracts

A general statement about a contractual restriction of limitations and exceptions is impossible for German copyright law. Some limitations are already mandatory by their wording, e.g. Sec. 55a, 69g para. 2, 87e, 95b para. 1 sub. 2 UrhG, concerning other limitations there are many differences to regard when drafting licences:

As a result of private autonomy and freedom of contract, a restriction on limitations is in general accepted as far as it has been stipulated in an individual contract.[43] However, as far as these restrictions are fixed in general contract terms they are mostly void, even in B2B-relations if the other party is being treated unfairly, according to Sec. 307 para. 1 BGB. An unfair treatment is presumed whenever a clause diverges substantially from the overall concept of German law (Sec. 307 para. 2 no. 1 BGB). Since limitations of German copyright law are considered as exceptional restrictions of the constitutionally granted (intellectual) property (Art. 14 GG) they are qualified as general standards from which deviation is barely allowed. Therefore, a restriction of the limitations and exceptions by general terms and conditions of trade and business is in general void. Moreover contractual clauses diverging from limitation that serve a public interest or extending limitations to the detriment of public interest (i.e. the freedom of reporting) are not accepted.[44]

4. Technical Measures and Rights Management Information

4.1. Please describe the protection, if any, against circumvention of, and against "secondary" acts related to, technical protection measures, including legal sanctions.

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[43] *Dreier* in Dreier/Schulze, vor Sec. 44a ff. Rn. 9.

[44] *Dreier/Senftleben* in Lejeune, Der E-Commerce-Vertrag nach amerikanischem Recht, 116.

In German Copyright law, protection against circumvention of technological measures and against preparative ("secondary") acts is provided by sec. 95a UrhG. The provision is based upon art. 6 para. 1-3 InfoSoc-directive.

IV. Technical Measures and Rights Management Information

1. Protection against circumvention of technological measures

Sec. 95a para. 1 UrhG provides protection against most attempts to circumvent effective technical devices. With regard to the wording, it is quite similar to. 6 para 1 InfoSoc directive.

In particular, the requirements are:

a) Effective Technological Devices

A definition of the term "technological device" is provided by sec. 95 para. 2 sentence 1 UrhG corresponding with the definition in Art. 6 para. 3 InfoSoc-directive. It states that legal protection for technological devices is granted only if the work or ancillary copyright is protected by German copyright law (UrhG).[45] Technological devices are hardware and software solutions as well as technologies that are part of the subject-matter of protection itself.[46] The term "technological" is supposed to provide a distinction from legal (contractual) protection.[47] All technologies of protection are protected, not only digital ones.[48]

According to sec. 95 para. 2 sentence 2 UrhG and art. Art. 6 paragraph 3 InfoSoc directive, a technological device is

> "*deemed 'effective' where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.*"

According to the prevailing opinion in Germany a technological device is considered effective, if the circumvention is impossible for the *average user* without additional technological support.[49] Hence, not all protection devices are encompassed by Sec. 95a UrhG if they even do not prevent a average user from making copies.

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[45] *Dreier*, § 95a Rn. 3, 9; BT-Drucks. 15/38, S. 26.

[46] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 12; *Wand*, Technische Schutzmaßnahmen und Urheberrecht, 2001, S. 41.

[47] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 12; *Wand*, S. 166.

[48] i.e. blue-coloured prints to prevent the reproduction of books, a safe for the storing of manuscripts; a lot of examples for technological devices can be found at *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 18 ff.

[49] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a, Rn. 50; *Spindler* GRUR 2002, 105, 116; *Hoeren* MMR 2000, 515, 520.

b) Circumvention

Sec. 95a UrhG prohibits all acts that render possible the access to or the use of the protected work, particularly the manipulation and elimination of technological devices.[50] Controversially discussed is the classification of a "circumvention" of technological devices by making a perfect copy including the copy protection.[51] Some authors deny the applicability of sec. 95a UrhG to these 1:1 copies, since the copy protection is not intended to prevent "perfect" copies.[52] Drawing on the provision's ratio, others consider the 1:1 copies prohibited by sec. 95 UrhG.[53]

c) User's Notice or (gross) negligent ignorance of the purpose of circumvention

As a subjective requirement, the user must have notice, that the purpose of his acting is the circumvention of technological measures. Gross negligent ignorance is also sufficient. Contrary to the wording, slight negligence does not qualify.[54]

2. Protection against preparative acts

Para. 3 of sec. 95a UrhG provides protection against preparing acts for circumvention. It is the (exact) implementation of art. 6 paragraph 2 InfoSoc directive.

It prohibits the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological devices.

In the context of sec. 95 III, the prohibition of advertisement is particularly problematic. Due to the fact that reports on products incriminated by sec 95 fall within the scope of the freedom of press, the prohibition of advertisement could cause friction with the latter. Therefore, one

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[50] *Wand*, S. 105; *Wandte/Ohst* in Wandtke/Bullinger, § 95a Rn. 53.

[51] A common software that is used for making 1:1 copies (in Germany) is called "CloneCD/DVD"

[52] *Strömer/Gaspers* K&R 2004, 14, 18; differentiating *Arlt*, Digital Rights Management Systeme, 2006, S. 117 ff.

[53] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 55; *Ernst* CR 2004, 39, 40; *Stickelbrock* GRUR 2004, 736, 739.

[54] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 63.

may not consider reports on the functionality of products circumventing effective technological devices to be advertisement, as such would otherwise contravene freedom of press. Even a report on an advertisement made by the offerer of such a product himself is deemed to be no advertisement in terms of sec 95 as long as the report keeps adequate distance,[55] e.g. by referring to the illegality of the product. [56]

In contrast, generating a hyperlink to the website on which the product is offered is not protected by the freedom of press. It constitutes an illegal advertisement in terms of sec 95.[57] Consequently, the rightholder may make a claim for the removal of the interference and injunctive relief.[58]

3. Legal Sanctions

Legal sanctions for the circumvention of technological measures are provided by civil as well as by penal law.

a) Civil Sanctions

(1) Claims under basic civil law

The violation of sec. 95a UrhG is sanctioned by claims under basic civil law. According to sec. 823 para. 2, 1004 BGB the rightholder may claim removal of the interference and injunctive relief.[59]

(2) Special Claims in copyright law, sec. 97 et seqq.. UrhG

(a) Removal of the interference, injunctive relief and damages, sec. 97 UrhG

Applicable is also the special copyright law stipulation of sec. 97 UrhG.[60] According to this provision, a rightholder may claim removal of the interference and, in case of intention or negligence, damages in case of infringement of his copyrights. He may also seek for injunc-

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[55] OLG München GRUR-RR 2005, 372, 373 – *AnyDVD.*

[56] OLG München GRUR-RR 2005, 372, 373 – *AnyDVD.*

[57] OLG München GRUR-RR 2005, 372 – *AnyDVD.*

[58] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 88; OLG München MMR 2005, 768, 771 – Heise online; *Dreyer* in Dreyer/Kotthoff/Meckel § 95a Rn. 45; a.A. *Arlt*, S. 209; *ders.* MMR 2005, 148, 149.

[59] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 88; OLG München GRUR-RR 2005, 372 – *AnyDVD*; *Dreyer* in Dreyer/Kotthoff/Meckel § 95a Rn. 45; a.A. *Arlt*, S. 209; *ders.* MMR 2005, 148, 149.

[60] *Arlt*, S. 209 f.; *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 88, 90; *Dreier* ZUM 2002, 28, 38; Loewenheim/*Peukert* § 82 Rn. 6; a.A. *Spieker* GRUR 2004, 475, 478; *Dreyer* in Dreyer/Kothoff/Meckel § 95a Rn. 43;

tions. In fact, the legal protection of technological devices is not ranked among the genuine copy right, but it is considered to be protected in a similar way by copyright law.[61]

(b) Destruction or Abandonment, sec. 98 and 99 UrhG

By these provisions, the rightholder may also file a claim for the destruction or abandonment of the duplications as well as destruction or abandonment of the means of productions.

The impact of limitations and exceptions on the application of sec. 98, 99 UrhG is still disputed.: While some authors contend that an infringement of sec. 95 a UrhG states a violation of the rightholder,[62] others infer that if the copy itself is legal, e.g. because a limitation is applicable, such is not a violation of the rightholder rather than a violation of sec. 95a UrhG.[63] However, there is no precedence addressing this issue.

b) Criminal Sanctions

German copyright law also provides for criminal sanctions, sec. 106 et seqq.. UrhG. sec. 108b para. 1 no. 1, para. 3 UrhG is applicable to the circumvention of technological devices.[64] The criminal action does not apply if the infringer acts only for private purposes. Moreover sec. 109 UrhG requires a demand for a penalty by the damaged rightholder in order for the prosecutor to take action, Sec. 108 UrhG imposes a punishment of up to one year (three years if the offender acts professional) of imprisonment or a fine. In case of a conviction the victim may also demand the publication of the judgment if he has a legitimate interest (sec. 111 UrhG). Sec. 110 UrhG provides for a forfeiture of duplications. Violation of paragraph three of sec. 95 a UrhG, sec. 111a UrhG is sanctioned as a regulatory offense with a fine of up to 50.000 Euro.

4.2. Please describe the protection, if any, against manipulation of rights management information and related "secondary" acts, including the legal sanctions.

4. Protection against manipulation of rights-management information

a) Overview

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[61] *Arlt*, S. 209 f.; *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 89, *Bechtold* in Hoeren/Sieber, Handbuch Multimediarecht, 2005, chapter 7.11 Rn. 63; *Hertin*, Urheberrecht, 2004, Rn. 226.

[62] *Wandtke/Ohst* in Wandtke/Bullinger, § 95a Rn. 90; *Hertin*, Rn. 226; *Peukert* Lowenheim/Koch, Handbuch des Urheberrechts, München 2003 § 82.

[63] *Arlt*, S. 213 ff.; *ders.* MMR 2005, 153; *Spieker* GRUR 2004, 475

[64] *Dreier* in Dreier/Schulze, § 95a Rn. 13.

Protection against manipulation of information about rights-management is provided by sec. 95 c UrhG, which implements art. 7 InfoSoc-directive.[65] The definition of the term "rights-management information" corresponds to the definition in art. 7 para. 2 InfoSoc-directive, whereas acts prohibited by art. 7 para. 1 are regulated by sec. 95 c para. 1 UrhG (art. 7 para. 1 a): removal or alteration of any electronic rights-management information) and sec. 95 para. 3 UrhG (art. 7 para. 1 b): distribution, importation for distribution, broadcasting, communicating, or making available works or other ancillary copyrights to the public from which electronic rights-management information has been removed or altered without authority). Thus, sec. 95 c para. 1 UrhG sanctions direct acts of manipulation, sec. 95 c para 3 "secondary" acts related to manipulation.

Corresponding to art. 7 InfoSoc-directive, it is in addition required that the infringer acts knowingly or can be reasonably supposed to know about the removal or alteration of electronic rights-management information.

b) Legal sanctions

The legal sanctions are the same as for sec. 95a UrhG.[66]

4.3. In which way has the conflict between the legal protection in relation to technical protection measures on the one hand and limitations of, or exceptions to rights on the other hand been solved in your law, in particular regarding private reproduction? Have there been any agreements between relevant associations, court cases or factual problems at all in this respect?

In order to solve the conflict between technological devices and exceptions and limitations, the legislature introduced a number of exceptions concerning the prohibition of a circumvention of technical protection devices in sec. 95 b UrhG.

5. Privileged limitations and exceptions (except private reproductions)

According to sec. 95b para 1. UrhG, the privileged limitations and exceptions are:

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[65] *Arlt (N. 52)*, S. 145; *Dreier*,ZUM 2002, 28, 39 f.; *Reinbothe* ZUM 2002, 43, 51; *Spindler* GRUR 2002, 105, 119.

[66] *Wandtke/Ohst* in Wandtke/Bullinger, § 95c Rn. 33ff.

- sec. 45 UrhG Limitation concerning use in judicature and for purposes in public safety

- sec. 45 a UrhG Limitation concerning disadvantaged people

- sec. 46 UrhG Collections for use in education /

- sec. 52a UrhG making available for purposes of education and research

- sec. 47 UrhG Use in school broadcasting

- sec. 55 UrhG duplication of works by broadcasting companies

a) Private Reproduction and Reproduction for other uses

The limitation granted for private reproduction (sec. 53) is privileged by sec. 95b UrhG only to some extent:

(1) Reproduction for private purposes by a person

It is only allowed to circumvent technological devices with respect to reproduction by analogue means, in particular printing on paper or any similar medium effected by the use of any kind of photographic technique or by some other process having similar effects, sec. 95b para. 1 No. 6 a), 53 para. 1 UrhG. Thus, the circumvention of digital technological devices, such as DRM-Systems, is not allowed. The private use has no right to claim the removal of DRMs in order to make private copies. Hence, the limitation of Sec. 53 UrhG is ineffective in case of DRM-protected digital contents.

(2) Reproduction for the own scientific use, sec. 95b para. 1 no. 6 b)

Sec. 95b para 1 assigns to private persons as well as companies for their own scientific use, except for commercial purposes, a right to claim the removal of protection devices against the rightholder. However, it is highly disputed whether these persons may circumvent the protection devices on their own in case the rightholder does not respond to their claim. The limitation on reproduction on paper or similar reproductions, as set forth in sec. 95b para. 1 No. 6 a), does not apply to No. 6b).

b) Reproduction for own archives, sec. 95b para. 1 no. 6 c)

The claim to remove protective divides to make reproduction for purpose of own archiving is limited to reproduction on paper or similar reproduction or to archives that are not for direct or indirect economic or commercial advantage.

c) Information about current events, sec. 95b para. 1 no. 6 d)

The removal of technical devices protecting broadcasts about current events may only be claimed in case of analogue reproduction, for instance by printing on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects. Since the provision relates only broadcasts, it de facto eliminates the alternative of reproduction by printing. Therefore, only the reproduction "on any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects", remains applicable.[67]

d) Reproduction for other personal use, sec. 95b para. 1 no. 6 d)

The limitation provided by sec. 53 para. 2 no. 4 UrhG privileges other personal use, if it concerns only small parts of a published work or single articles in newspapers or journals. In addition, works wich are no longer available for more than the last two years are privileged. The removal of technological protection devices may be claimed according to by sec. 95b para. 1 no. 6 d) only in case of (1) analogue reproductions, e.g. by printing on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects or (2) a simply analogue use.[68]

e) sec. 95b para. 1 no. 6 e)

For the purpose of sec. 53 para. 3 (education), the claim to remove technological devices is not restricted to any specific reproduction technique.

6. Rendering the circumvention possible

In case of the applicability of these privileged limitations and exceptions, the rightholder must ensure that the beneficiary of the limitation or exception has access to the necessary means to benefit from it. To ensure that the beneficiary is able to identify the rightholder, the person using technological devices has to provide the necessary contact information together with the work (sec. 95 d UrhG). The beneficiary may claim the necessary means to remove the protecting devices from the rightholder according to sec. 95 b para. 2 UrhG.

The refusal of the rightholder to give the requested necessary means to the beneficiary or withholds his contact information (sec. 95d UrhG see above) states a regulatory offence (sec. 111a UrhG).

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[67] *Wandtke/Ohst* in Wandtke/Bullinger, § 95b Rn. 32.

[68] *Wandtke/Ohst* in Wandtke/Bullinger, § 95b Rn. 33.

7. Agreements, factual problems etc.

Up to now, there are obviously no court cases or agreements related to the enforcement of removal of anti-copying devices under the new legal provisions with regard to limitations granted by sec 95b UrhG. However, as already mentioned, the interpretation of sec. 95a is essential in a case which is now being presented to the Supreme Constitutional Court. In a nutshell, the case relates to the freedom of press versus "advertising" for tools which allow for removal of anti-copying devices by hyperlinks. The High Regional Court (Oberlandesgericht) Munich stated that the placing of a hyperlink in an article about such a removal tool may be qualified as an illicit advertising under sec. 95a UrhG.[69]

4.4. In which way, if at all, does the law or practice take into account the extent to which technical measures preventing private reproduction are in fact employed in respect of the remuneration for private reproduction?

8. Situation de lega lata

Collecting royalties by collecting societies is regulated by the Urheberrechts-wahrnehmungsgesetz (WahrnG). Sec. 13 para. 4 WahrnG states that the extent of use of DRM systems and technical protection devices must be taken into consideration within the calculation of royalties and compensations. With regard to the legislative motives, the royalties shall be flexible regarding DRM systems in order to prevent a double payment. In fact, a royalty is not excluded if a work is published only with technical protection devices.[70] However, tariffs of collecting societies are not known which take into account the existence and spreading of DRM-systems. Appendix 1 of the UrhG fixes royalties for wide range of applications and technical devices – which often had been subject to criticism due to its inflexibility.

9. De lege ferenda: The new draft

The new draft of the Copyright Act (March 2006) provides for new regulations on royalties which, in sum, shifts the responsibility of fixing royalties from the state/legislator to the rightholders, collecting societies and the debtors of royalties, in particular producers and im-

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[69] OLG München, 28.07.2005 – 29 U 2887/05, GRUR-RR (Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungsreport) 2005, 372; cf. *Spindler* GRUR-RR 2005, 369 ff with more references..

[70] *Gerlach* in Wandtke/Bullinger, § 13 UrhWahrnG Rn. 15.

porting vendors of copying devices. The new proposal of Sec. 54a para 1 UrhG requires (among other criteria) that royalties have to be established with respect to the use of DRM-Systems, thus excluding these kind of works from calculations.

5. How are licensing contracts interpreted which were concluded at a time when internet uses where not yet known? Are there statutory rules or is there case law resulting in an interpretation according to which new, then unknown digital uses would not be covered by a non specific licensing agreement?

V. Licensing contracts and digital uses

Under Sec. 31 Abs. 4 UrhG any contract regarding a use, which was unknown when the contract was conducted, is void. An agreement about unknown types of use is currently impossible. Sec. 31 Abs. 4 UrhG is applicable only to license agreements of authors, not on agreements of performers.[71]

Therefore, the definition of a "new" type of use is essential to German law. The use of new technology alone does not indicate automatically that the use itself is new. According to the jurisdiction, the use has to be "economically and technical self containing".[72]

This general rule is flanked by sec. 31 para 5 UrhG which codifies the so called "Rule of Purpose" stating that only types of use have to been taken into account which were either explicitly enumerated in the agreement or are suitable to fulfil the purpose of the contract.

In general courts in Germany assume that the use of the internet (as a form of publication etc.) has been known to the public since 1995.[73] Hence, licence agreements before 1995 do not provide in most cases for the use of the internet when transferring rights so that the rightholder may claim additional royalties for the internet use.[74]

However, this fundamental principle in German Law shall be amended substantially: The new draft of the Copyrights Act (March 2006) allows in general for agreements of transferring even unforeseen new types of use following the Anglo-Saxon model. Nevertheless, the con-

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71 BGH 10. Oktober 2002, Az: I ZR 180/00 - GRUR 2003, 234-236

72 BGH 1. Zivilsenat, Urteil vom 19. Mai 2005, Az: I ZR 285/02

73 OLG Munich, 22. 5. 2003 – Az: 29 U 5051/02 NJW-RR 2003, 1627.

74 Cf. LG Munich I ,10.3.1999, Az: 21 O 15039/98 CR 2000, 467-469: The court ruled that an agreement regarding the "exclusive broadcasting" does not cover the broadcasting via internet, since both parties were aware that this is another type of use.

sent to a new use granted by the author may be withdrawn, if the licensee did not start exploiting the new type of use. Moreover, the author is entitled to claim additional reimbursements for these new types of use. Finally, Sec. 137l UrhG provides for a grace period of one year after the new Copyright act will have passed the parliament. If authors do not state their own interest in new types of use within this year publisher are assumed to make use of these new types, regardless of the entitlement of author to claim additional reimbursements. Thus, even old contracts not stipulating new types of use are transferred into the new digital era.

6. Collecting societies

6.1. Which rights in digital uses are administered by collecting societies in your country?

VI. Collecting societies

A number of rights of digital uses are administered by collecting societies:

The GEMA (society for musical performing and mechanical reproduction rights), one of the largest collecting societies for authors of music works (songwriters, componists) has fixed special rates for music distributed online. Web radio stations are able to conduct license agreements with fixed rates depending upon the potential number of recipients, hours of broadcasting, fraction of music and gain of the company. They also provide those agreements for music-on-demand services one for download applications and one for streaming applications. License agreements are also available for video-on-demand. The GVL, which is the collecting society for performing artists, offers similar agreements.

Also, background music used on websites is administered by the GEMA offering special agreements for private, professional and non-profit websites.

The VG Wort, the collecting society for authors, administers the rights concerning online publication of texts. In particular, works of rightholders being distributed via online radios are administered by the VG Wort. Finally, the VG Bild-Kunst, the collecting society for artists has special rates for the making available art works on websites.

6.2. Do they employ digital rights management, and if so, in which cases?

German collecting societies do not employ DRM systems up to now. Since there are still no technical standards for those DRM systems, the possibilities of collecting societies are limited, even if they would attempt to employ DRM systems.

7. Secondary Liability

7.1. Under what conditions, if at all, and in which way are internet service providers and software providers liable under secondary liability rules for non authorized peer to peer file sharing by individual users?

VII. Secondary Liability

In general, the liability of providers/producers of peer-to-peer-file sharing is not extensively discussed in German Law. There is only one court case still pending which is related to this issue.

As a matter of principle, service and software providers are liable for indirect injuries under Sec. 97 para. 1 UrhG. However, sec. 97 UrhG distinguishes clearly between liability for damages, requiring at least negligent actions, and injunctions which just resume a secondary liability in form of a contribution to infringement acts. The extent of this liability is, however, intensively disputed.

1. Liability Privileges for Service Providers (Sec. 9-11 TDG)

a) Service Providers

In general, sec. 9 – 11 TDG, implementing Art. 12 ss. Of the E-.Commerce-Directive, provide for a general exemption of liability for access and host providers if they had no knowledge of third party actions. However, these rules do not apply in case of peer-to-peer-file sharing software as these systems operate without a central agency /(provider) coordinating the data flows. Only in the famous case of Napster, one might construe an argument in favour of applying sec. 9 – 11 TDG to this kind of server as Napster established the contacts between the users of the systems. However, even these systems fall out of the scope of sec 9 – 11 TDG as they constituted in principal search engines which are exempted from the application of the ECRL and the TDG.

b) Software Providers

Persons who create software with the intention of making it available to a peer-to-peer file sharing service do not render possible the usage or the access to a communication net as they just provide for the necessary software and not the technical means of acceding to the net it-

self. Therefore, Sec. 2 para. 2 no. 3 TDG is not relevant, and no privileged position as to liability of Sec.Sec. 9 - 12 TDG arises.[75]

2. (Limited) Liability according to general provisions (sec. 97 UrhG)

a) Legal use

If the product is used for preponderantly legal purpose, there is no liability of the software provider for copy right infringements of the users. File sharing software can be used as a technical way to copy or to make available files through actions which do not interfere with copyright. The crucial point is how users really use the software. If users "abuse" the software mostly for illegal purposes, the producer is obliged to give a hint, that the purpose of the product is limited to legal purposes.[76]

b) Producer's Ability to Control

Currently, the software producer has no technical capability to distinguish between legal and illegal use of the software.[77] Thus, there is no efficient possibility for the producer to technically avoid copyright infringements.[78] The lack of control is a strong argument to deny the liability of software developers. Due to the decentralized structure of P2P-Systems, software producers are nearly incapable of controlling the users' actions. Thus, obviously there is no appropriate way to specify some of the software producer's duties of control.

c) Duties to inform

Nevertheless, producers may still have the duty to indicate to the user that the software's purpose is only a legal one. However, these hints are largely discarded by users, as it is widely known. Furthermore, the software's producers shall indicate that the product is neither exclusively meant to be used for infringement of rights nor was it created for such a purpose. The producer must not promote any illegal usage of his software.[79] Nevertheless, liability may even under German law (sec. 826 Bürgerliches Gesetzbuch) be construed for peer-to-peer file sharing networks which are explicitly designed and advertised by their producers in order to alleviate the infringement of copyrights as it had been decided by the U.S. Supreme Court in the Grokster Case.

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[75] *Spindler/Leistner*, GRUR Int. 2005, 773, 787.

[76] *Spindler/Leistner* GRUR Int. 2005, 773, 791.

[77] Prof. Huizer in his expertise for the KaZaA appeal judgement in the Netherlands. A German non-authorized translation is available at http://www.eff.org/IP/P2P/BUMA_v_KaZaA/ 20020328_KaZaA_appeal_judgement.html.

[78] *Spindler/Leistner* aaO., 792.

[79] *Spindler/Leistner*, GRUR Int. 2005, 773, 794.

7.2. What legal possibilities do rightholders who would like to sue individual users of file sharing networks have in order to identify the individual users?

3. Legal Possibilities of rightholders to sue individual users of file sharing networks

a) Sec. 101a UrhG

In order to identify individual users, rightholders depend on claims for information against access providers. However, the principally predestined claim for information concerning piracy under Sec. 101a UrhG, which was added to the Copyright law in 1990 as part of the Product Piracy (and counterfeiting) Act, is not applicable to access providers due to the mere fact that Sec. 101a UrhG requires the physical reproduction or dissemination of copies.[80] Nevertheless, the LG Hamburg extended the range of application of Sec. 101a UrhG towards digital reproductions.[81] However, most courts, in particular the High Regional Courts (OLG Hamburg, OLG München and OLG Frankfurt)[82] clearly denied such an extension of Sec. 101a UrhG.

b) General Information Claim (Competition Law)

Still, plaintiffs may refer to the general claim for information developed by case law, based in the unfair competition law and in Sec. 242 BGB. The general liability privileges of the ECRL and of the TDG do not apply to these claims. However, the claim for information depends on the responsibility of the provider (in a broad sense), i.e. the provider must be the proper party with respect to the plaintiff's claim. It is sufficient that an injunction may be imposed upon the access provider. According to court decisions, the indirect (or contributory) liability for infringements, with regard to injunctions, depends on the existence of duties do to control and verify infringements. Whereas an access provider might have an obligation to examine content under certain circumstances when the content resides on a central server (e.g. FTP server) a corresponding duty is probably inappropriate in the case of P2P networks, which are characterized by the fact that the content changes constantly.

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[80] *Spindler/Dorschel*, CR 2005, 38, 39f.

[81] LG Hamburg, Urt. vom 7.7.2004 – 308 O 264/04; *Nordemann/Dustmann*, CR 2004, 380, 386.

[82] OLG Frankfurt, Urt. v. 25.1.2005 - 11 U 51/04, MMR (Multimediarecht) 2005, 241 m. Anm. *Spindler*; OLG Hamburg, Urt. v. 28.4.2005 - 5 U 156/04, CR (Computer und Recht) 2005, 512 m. Anm. *Dorschel*; OLG München, Urt. v. 24.3.2005 - 6 U 4696/04, MMR 2005, 616;

However (and apart from this and decisive), data protection prohibit any disclosure of information of providers to third parties, thus rendering a civil claim for information ineffective. The surrendering of personal data without the user's acceptance would violate the duties of the telecommunication provider under the telecommunication data directive.[83]

7.3. Please describe the liability of persons who set links from their own website to another one.

4. Liability for Hyperlinks

Under German law, hyperlinks are not regulated by the TDG – in contrast to other countries such as Austria or Finland. The legislator had left the whole issue deliberately to the courts to develop case rules out of general principles of tort law. Hence, it is necessary to distinguish between the liability for copyrights and liability for content such as privacy, defamation etc. Moreover, liability may differ according to the action or negligence: Setting a hyperlink might be qualified different in contrast to liability due to not controlling hyperlinked contents once the hyperlink had been set (after-set controls):

With respect to copyright liability a person setting hyperlinks may be held liable for various acts (and reasons). First, the linking act itself may constitute an infringement of third party copyrights: If the hyperlink is incorporated into the graphic representation of a homepage in such a way that renders it impossible for the user to realize that the content is not stemming from the author (frames and inline links) is considered to constitute a infringement of copyrights as well as an act of unfair competition. However, the German Federal High Court (BGH) recently handed down a sentence stating that a so-called deep link that acceded directly a content in a complex homepage without passing the entrance homepage does not infringe copyrights of the homepage owner. As hyperlinks belong to the most powerful tools of communications specific to the Internet their use is commonly known and accepted. Only if homepage owners explicitly prohibit the use of deep links they must not be set.[84] Second and generally, persons who alleviates the access to illegal, copyright infringing contents by setting hpyerlinks and thus enhancing illegal behaviour are contributory liable.

For all kinds of liability – be it copyright, defamation or other types - it is even more complicated to define fundaments and borders of a liability for installing a hyperlink that refers to a

[83] *Spindler/Dorschel*, CR 2005, 38 40f.

[84] BGH Urt. v. 17.7.2003 - I ZR 259/00, NJW 2003, 3406 = GRUR 2003, 958 – Paperboy.

content that has changed after it was created – the liability for desisted control. The very reason for establishing these duties can be found in the multiplication of the probability of violating third party copyrights or rights. The ability to erase the link gives the person who set it effective physical control. However, the responsibility these duties to control are limited to certain cases, depending upon the social function of hyperlinks, the relevance and the degree of danger for protected rights (copyrights). Hence, not everyone setting hyperlinks is required to control every content permanently. As the German Federal High Court stated a press organ is not obliged to control the content on which a hyperlink had been set in a thorough and intense manner; a control of evidence might be sufficient.[85]

Furthermore, more intensive controls are appropriate if the link is associated with a type of recommendation by the linked homepage, especially if the linked homepage has a similar content to the linking homepage. If the external content's utilisation is commercial, the duties of control increase due to the gained economic profits.

However, the German High Federal Court also stressed the point (often neglected by german doctrine) that the link setting person is liable for injunctions after the person had been informed about the illegality of the content (by a third party).[86]

8. Applicable Law: Under what conditions, under statutory rules or case law, is an act of infringement qualified as domestic?

VIII. Conflict of Laws

Traditionally, German principle of conflict of laws in Intellectual Property are governed by two main guidelines: The principle of territoriality and the location of infringements.

Concerning the principle of territoriality upheld ever since by jurisdiction[87] it states that national law decides about existence, elements, and limitations of copyright. Accordingly, the accrual of a copyright, its assignment, its limits, and infringing acts are assessed under the law of the state where the infringement of the right occurs. Hence, only if an infringement occurs in Germany German copyright law will be applicable.

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85 BGH, Urt. v. 1.4.2004 - I ZR 317/01, NJW 2004, 2158 = GRUR 2004, 693 - Schöner Wetten.

86 BGH op.cit.

87 BVerfGE 81, 208, 222 – Bob Dylan – = NJW 1990, 2189; BGH I ZR 175/00 7.11.2002 NJW 2003, 1609 = ZUM 2003, 225 (226) – Felsberg -; BGHZ 136, 380, 385 f., 389 f., 392 = NJW 1998, 1395 – Spielbankaffaire

Thus, on the second level the location of infringement has to be determined comes into play which is different to conflict of laws in torts.[88] These locations of infringement acts may differ according to the type of copyright which had been infringed. However, there are scarcely clear lines in German jurisdiction concerning conflict of laws in copyright law with respect to internet cases so that the following thoughts might be considered as preliminary.

1. Reproduction (Upload and Download)

Within the scope of reproduction, the act, as well as the infringement of the right, occurs where the reproduction takes place[89], i.e. where the new file is saved.[90] Therefore, it is not necessary to distinguish between the place of the action and the place of effect. The place where the user may exploit the reproduction is relevant, thus where the copy is made.

In terms of reproduction, there is no difference between a reproduction in a computer's RAM or on a hard drive. Both acts are reproductions. As previously mentioned, since the implementation of Art. 5 para 1 InfoSoc-Directive as Sec. 44a UrhG, temporary reproductions (in a computers RAM or cache), which are an integral part of a technical process, are not protected by copyright law (question 1.1).

Hence, an illegal download establishing a copy of a protected work on a computers hard disk, which is located in Germany, constitutes a domestic infringement of the copyright law.

Concerning the process of uploading a file on an internet-server, distinctions have to be made: The uploading of a file leads (first) only to reproductions on the server so that the location of the relevant act depends in principle on the location of the server. However, due to the fact that a server can be set up and hosted all over the world, even if the provider has his seat in Germany, there is a danger of "forum shopping". Thus, the seat of the provider of the server should be preferred as the relevant location rather than the server itself.[91]

2. Making Available

With regard to making a work available to the public the place of retrieving the data is important. Referring to the server's location as the point of origin is impossible because of the same

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[88] BGHZ 136, 380 (386) – Spielbankenaffaire -; BGH, GRUR 1982, 727 (729); BGH, 7.12.1979 I ZR 157/77 GRUR 1980, 227, (229 f.) - Monumenta Germaniae Historica -

[89] BGH GRUR 2004, 421, 422 - *Tonträgerpiraterie durch CD-Export*; BGHZ 80, 101 [104] = GRUR 1981, 587 = NJW 1981, 1906 - *Schallplattenimport I*; BGHZ 126, 252 [256] = GRUR 1994, 798 = NJW 1994, 2888 - *Folgerecht bei Auslandsbezug*.

[90] *Dreier* in Dreier/Schulze, vor §§ 120 ff., Rn. 33; *Spindler*, IPRax 2003, 412, 416.

[91] *Spindler* IPRax 2003, 412, 416.

dangers already mentioned, in particular forum shopping "by the internet". Nevertheless, the place of retrieving data by the user cannot be considered as a jurisdictional basis for the affected legal system without certain modifications. Otherwise, such a principle would lead to incontrollable range of applicable jurisdictions wherever the data might be retrieved, in prinicipal globally (Bogsch-Theory).[92]

The problem may be solved by referring to the right to make available to the public as mentioned in Art. 3 InfoSoc-Directive. An infringement of this right may be noticed at the moment the content is made available to the public, i.e. when it is posted on to the internet. Moreover, users are not receiving data actively when the content had been made available; rather, they have to look up the relevant content so that the act of making a content available to the public has a "passive" characteristic (in contrast to push-services). Hence, it is not the place where the data is received is relevant, but the place where it is offered. The habitual place of residence of the person who posts the content on the internet is relevant here, not the location of the server.[93]

Therefore, an infringement of copyright is considered to be domestic if content concerning copyright is reproduced by downloading it in Germany, or if someone who has his habitual place of residence in Germany makes it available to the public.

[92] Following the Bogsch-Theory: LG Hamburg GRUR-RR 2004, 313 – *thumbnails*; *Gerlach* in Hilty/Peukert, Interessenausgleich im Urheberrecht, 2004, p. 62.

[93] *Spindler* in Leible, Die Bedeutung des internationalen Privatrechts im Zeitalter der neuen Medien, 2003, p. 174; *Dreier* in Dreier/Schulze, vor §§ 120 ff., Rn. 41