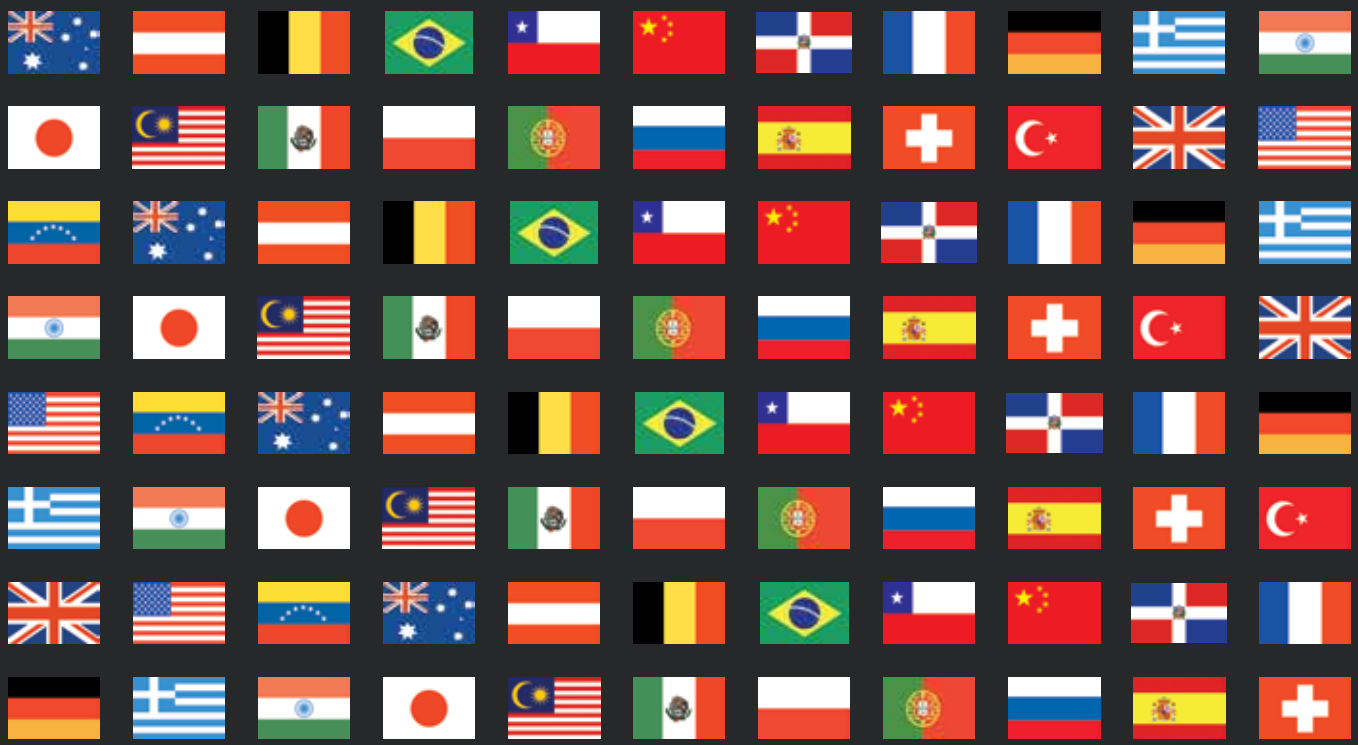
Copyright

In 23 jurisdictions worldwide

Contributing editors
Andrew H Bart, Steven R Englund and Susan J Kohlmann



2015

GETTING THE DEAL THROUGH

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Copyright 2015

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Getting the Deal Through – Copyright 2015

Germany

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Legislation and enforcement

1 What is the relevant legislation?

The Act on Copyright and Related Rights (the Copyright Act) serves as the main source regarding statutory legal regulations in Germany. Further legislation includes the Publishing Act as well as the German Art Copyright Act regarding copyrights of the arts and photography. With respect to the collection of licensing fees the Law on the Administration of Copyright and Related Rights has been passed.

2 Who enforces it?

Generally, the civil courts enforce the rights of the author. Identically, cases with respect to all legal disputes of a licensee on account of a legal relationship regulated under the Copyright Act will be enforced by the civil courts. Copyright litigation matters with respect to claims for payment of remuneration standing in connection with or resulting out of employment or service relationships are enforced by labour courts or administrative courts.

In cases where criminal Copyright Acts statutes are affected, the criminal prosecution authorities and the criminal courts are responsible for the respective enforcement.

3 Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

Generally, the provisions of the Copyright Act cover digital as well as non-digital works. Specific provisions that address the digital exploitation of works are, for example, contained in section 19a of the Copyright Act, which relates to the right of making works available to the public, especially via the internet.

4 Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

The Copyright Act is also applicable with respect to foreign-owned or foreign-operated websites that infringe copyright, provided that the website's content is available in Germany and intentionally addressed to German users. Indications for the intention to address German users might be the domain, the language of content, the website's design or links to other websites in German language or addressed to German recipients.

Agency

5 Is there a centralised copyright agency? What does this agency do?

Currently, no centralised copyright agency exists. Copyright protection begins with the creation of the work. In order to obtain copyright protection an entry of the work in a register is neither necessary nor possible. Notwithstanding the above, the German Patent and Trademark Office maintains a register of anonymous and pseudonymous works. This database does not serve to register all existing copyright works but is used to extend the term of protection of published anonymous or pseudonymous works. Besides, a total of currently 11 collecting agencies exist for the collection of licence fees and protection of rights of authors, such as the society for musical performing or mechanical reproduction rights (GEMA) or VG Wort.

Subject matter and scope of copyright

6 What types of works are copyrightable?

The Copyright Act generally includes works of literature, science and art as copyrightable works (section 1 of the Copyright Act). Section 2 of the Copyright Act provides a list of examples including literary works (writings, computer programs), musical, pantomime, artistic works (including architectural and applied arts) and their drafts, photographical, film works and representations of a scientific or technical nature (including drawings, blueprints, maps, drafts, tables and three-dimensional presentations).

Any copyright protection always requires a personal intellectual creation, having been developed personally by one or more human individuals.

7 What types of rights are covered by copyright?

Exploitation rights and moral rights are covered by copyright. Exploitation rights are the rights to exploit the work in material form which especially includes the right of reproduction, the right of distribution and the right of exhibition. The exploitation rights also encompass the right to communicate the work to the public in non-material form, which especially includes the right of recitation, performance and presentation, the rights of making the work available to the public, broadcasting, communication by video or sound carrier and communication of broadcasts and works made available to the public.

Furthermore, the Copyright Act grants moral rights (see question 14) to the author, according to which, among others, the creator is to be recognised and identified as the author of the work. Under the Copyright Act copyright owners are protected against the unauthorised use of their works. Provided certain criteria are met, measures in case of infringement of a copyright establish various types of claims for the owner, including forbearance, information, and damage claims. In addition, infringers of copyright may be charged under criminal law if certain prerequisites are fulfilled and if the infringer has acted wilfully and knowingly.

8 What may not be protected by copyright?

Protection under copyright law only covers creations that are in a tangible medium of expression. Ideas, findings, and methods are not copyrightable. The work does not have to be developed in its entirety, a creation to the extent that will allow it to be individually recognised will suffice.

In addition, official works such as statutes, decrees, and ordinances, as well as official head notes of court decisions and any other official works published in the public interest, are not protected by copyright.

9 Do the doctrines of 'fair use' or 'fair dealing' exist?

Despite the fair use doctrine not having been adopted as such, the Copyright Act contains numerous sections on limitations. Accordingly, statutory provisions in sections 44a to 63a of the Copyright Act allow for the use of copyrighted works in enumerated cases – provided the specific criteria expressly outlined are met. The limitations comparable to a fair use doctrine encompass the following examples: the duplication of works in specific cases of educational, scientific or private use; the distribution or reproduction of public speeches by broadcasting companies or newspapers; and the display of works in public libraries.

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

The standards regarding the threshold of a fair use differ and are laid down as specific criteria in the section 44a et seq of the Copyright Act. Among other requirements, standards may broadly be outlined as follows:

- private and personal use: a duplication within the private use requires that copies will exclusively be used within the personal sphere and are not related to commercial use;
- citations: quotations require that only parts of the work be used. Citations may be more extensive within scientific works as opposed to citations within musical or literary works;
- freedom of report: public speech, publications, and broadcasted commentary and reports on daily news may be used (partly subject to payment of fees) in the interest of informatory rights and the public interest in communication;
- cultural industry: recordings if used by broadcasting organisations for preparatory or demonstrating purposes; and
- education and science: duplication, collection of and making available to the public parts of works, if restricted to educational use in educational or ecclesiastical institutions with no commercial intention.

11 Are architectural works protected by copyright? How?

Architectural works are protected as a type of art as expressly itemised under section 2, No. 4 of the Copyright Act. Provided the threshold of individuality has been met, copyright protection may encompass family houses as well as, for example, factory or office buildings, churches, museums, bridges, memorials, places, gardens or interior design. Sketches, blueprints, and drafts of such architectural works are protected if they have been developed to an extent of individual creation. Should such sketches overcome the threshold of individual character in terms of drafting, a copyright protection may additionally come into play in view of the example rule of section 2, No. 7 of the Copyright Act (scientific or technical presentation).

12 Are performance rights covered by copyright? How?

Performance rights are part of related rights. Performers are protected by moral rights and exploitation rights (section 73 et seq of the Copyright Act). The moral rights encompass the right to be recognised as performer and to determine whether and how to be named as well as to interdict any detriment of the performance which might jeopardise the performer's reputation, to record the performance on a picture or sound carrier, to reproduce and distribute those records, and the right of communication to the public in different manners. Furthermore, the performer is granted the right to be remunerated.

13 Are other 'neighbouring rights' recognised? How?

The Copyright Act recognises as neighbouring rights the protection of editions of non-copyrighted works or texts, photographs, performing artists, producer of sound carriers, broadcasting organisations, database producers, press publishing companies or in connection with films or other types of moving images.

14 Are moral rights recognised?

Moral rights, which are not subject to transfer, are focused in sections 12 to 14 of the Copyright Act. The author of a work is protected with respect to the right of disclosure, namely, the right to decide when and in what form the work will be presented to the public. Further, the author holds the right to be acknowledged as the author of the work and to prevent others from naming anyone else as the creator (right of attribution) and the right to insist that the work not be mutilated or distorted (right of integrity).

Copyright formalities

15 Is there a requirement of copyright notice?

Copyright protection as such does not require any formal act such as copyright notice. For purposes regarding the future protection in a potential dispute, it is, however, helpful to consider means of establishing evidence at the time of creation of the work. Section 10 of the Copyright Act stipulates a rebuttable presumption that the person identified as the copyright owner is to be regarded as the author of a work, until evidence is presented otherwise.

Section 13 of the Copyright Act grants any author the right to be named as the author of his or her work. Accordingly, the author has to be named in the customary manner each time his or her work is used.

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

An author will not benefit from the rebuttable presumption outlined in section 10 of the Copyright Act in case of failure to display a copyright notice.

Should a third party have failed to name the author, the author can claim that his or her work must no longer be used without its rightful name, even if he or she permitted the use in principle. In case further requirements are met the author can demand for payment of damages as well.

17 Is there a requirement of copyright deposit?

No requirement for copyright deposit exists.

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

Owing to the lack of a respective legal requirement, the failure of copyright deposit remains without consequence.

19 Is there a system for copyright registration?

In Germany a system for copyright registration does not exist. One exception consists of the German Patent and Trademark Office's register of anonymous and pseudonymous works (see question 5).

20 Is copyright registration mandatory?

Copyright registration is not mandatory.

21 How do you apply for a copyright registration?

In order to apply for registration in the register of anonymous and pseudonymous works an author has to file a written application with the German Patent and Trademark Office indicating the author's name, place and date of author's birth and the title of the work or other designation. In addition, the application must encompass the date and nature of the first publication of the work. If applicable, the application has to include the date of author's death, the pseudonym under which the work was published, and the publishing company.

22 What are the fees to apply for a copyright registration?

The fee for registration in the register of anonymous and pseudonymous works is €12 for one single work, €5 for the second to tenth work, and €2 for the eleventh and following works, if filed simultaneously.

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

As no requirement for copyright registration exists, failure of registration does not lead to any legal consequences. For purposes regarding the future protection in a potential dispute, it is, however, helpful to consider means of establishing evidence at the time of creation of the work.

In case of anonymous and pseudonymous works a registration in the respective register leads to an extension of the term of copyright protection to 70 years after the death of the author. Should the author decide against registration, the term of protection will expire 70 years after the publication of the work or, if not published, after its creation.

Ownership and transfer

24 Who is the owner of a copyrighted work?

The creator of a work is the owner of the copyright. As the creation of a copyrighted work is required to be a personal intellectual creation of a human individual, only natural persons may be authors.

25 May an employer own a copyrighted work made by an employee?

German law does not permit the assignment or transfer of a copyright itself. Accordingly, an author is limited to the granting of exploitation rights

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with respect to the copyrights owned by him or her. Therefore, an employer does not automatically own a copyrighted work made by an employee. But an employee is obliged to grant exploitation rights to the employer if this is agreed in the employment contract or – in case of the lack of such an agreement – if such an obligation results out of the employment's nature or purpose. Within an employment relationship – whether under a public, private or freelance employment relationship – generally, the creator principle is applicable. The relations between authors and their employers or clients are guided by the contractual provisions agreed.

If a respective contract contains no provision regarding copyrights, German courts will presume that the rights to exploit the work within the boundaries of the purpose of the contract have been granted by the employee or contractor. Beyond that, an employer will be forced to contractually acquire and respectively agree with the author to be granted further exploitation rights.

Courts distinguish between 'compulsory works' which are created in carrying out the employment duties and 'free works', which are created 'on occasion' of employment or completely outside the same. The distinction may have an impact on remuneration.

Section 69b of the Copyright Act provides special provisions for employed authors of computer programs who create the program, in either carrying out the duties or following the employer's instructions. Unless otherwise agreed, the employer is exclusively entitled to exercise all economic rights in the computer program. The German Federal Court of Justice held that section 69b excludes the additional remuneration of the author.

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

A hiring party will not own a copyright in the work of the author as the copyright itself is not transferrable. The scope of usage rights held by the hiring party is subject to the agreement between the hiring party and the independent contractor. In order to avoid uncertainties about the scope of exploitation rights, and for evidentiary purposes, it is advisable to stipulate respective details between the parties in writing.

27 May a copyrighted work be co-owned?

Copyrights in a work are held by various authors as a joint ownership if created mutually and not exploitable in divided parts. However, as dissolution of such joint ownership is not possible the co-authors may stipulate the legal relationship between them in a respective agreement. Term of the co-owned copyright is calculated on the basis of the longest living author.

28 May rights be transferred?

Copyright itself always stays with the author and cannot be transferred, with the exception of legal succession at the time of the death of the author because the copyright is inheritable.

In order for the work to be used, authors may grant exploitation rights, which are transferable and licensable.

29 May rights be licensed?

Copyrights may be licensed either for particular forms of exploitation or for all usage rights. The grant may be exclusive or non-exclusive and may be limited in respect of territory, time or content. The holder of a non-exclusive exploitation right is entitled to use the work within the authorised scope without excluding third parties, whereas the holder of an exclusive exploitation right is not only entitled to prevent third parties and the author himself from the use of the work but also to grant exploitation rights.

30 Are there compulsory licences? What are they?

Under special circumstances which are laid down in section 42a of the Copyright Act, an author who has granted an exploitation right in a musical work to a producer of sound carriers, is obliged to grant an exploitation right to the same extent on reasonable conditions to any other producer of sound carriers.

31 Are licences administered by performing rights societies? How?

Some types of exploitation rights, as well as claims for remunerations, are administered by performing rights societies upon the request of authors and holders of related rights. It is applicable where collective exploitation is practical or prescribed by statutory law. The activities of the performing rights societies are subject to the Law on the Administration of Copyright and Related Rights. The most important principles with regard to activities of the performing rights societies include, among others, the obligation to administer the author's rights upon his or her request (section 6), the obligation to grant to anyone upon request exploitation rights on reasonable terms and conditions (section 11), the obligation to establish tariffs on remuneration which it demands in return for the grant of exploitation rights (section 13), the distribution of revenues to the authors according to a fixed distribution plan (section 7), and the settlement of rate disputes (section 14 et seq). The performing rights societies are required to hold an official licence and are supervised by the German Patent and Trademark Office.

32 Is there any provision for the termination of transfers of rights?

Not applicable as the copyright is not transferrable itself (see question 28).

With respect to exploitation rights the author and the holder of the exploitation rights may agree on the duration of time for which the exploitation rights are granted.

An author is generally entitled to revoke an exploitation right in case the holder of an exclusive exploitation right either does not exercise the right at all or exercises it inadequately and thereby affects the author's legitimate interests detrimentally. The author is further entitled to revocation if his or her conviction is not represented by the work any more and thus a further exploitation cannot be expected. The revocation is subject to certain prerequisites and the author normally has to adequately compensate the exploitation rights holder. The Publishing Act contains special provisions relating to the termination of exploitation rights.

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

This is not possible.

Duration of copyright

34 When does copyright protection begin?

Copyright protection begins with the creation of the work by the author.

35 How long does copyright protection last?

Copyright protection lasts for the lifetime of the author and 70 years thereafter (section 64, Copyright Act). In case of anonymous and pseudonymous works, which are not registered, copyright protection will expire 70 years after the publication of the work or, if not published, after its creation (see question 23).

Different statutory law protection periods are applicable with respect to related rights. The terms range from 1 year up to 70 years depending on the nature of the related right; the calculation is always based upon certain events specified in the respective provisions such as release or publication. For example, the protection for a photograph generally expires 50 years after the photograph was first released.

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

The copyright term begins with the creation of the work by the author. As no registration process is required the time of creation is decisive for the duration. The publication of the work might be relevant for anonymous and pseudonymous works, as well as related rights. For example, the rights of a database's producer generally expire 15 years after its publication.

37 Do terms of copyright have to be renewed? How?

No renewal of copyright protection exists once the initial time period for protection has lapsed.

38 Has your jurisdiction extended the term of copyright protection?

The copyright term of 70 years after the death of the author was established in 1965 and since then has not been extended. The terms of the related

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Update and trends

At the European level copyright related reform proposals are currently being discussed which could – once implemented – also have an impact on German copyright law with respect to particular issues such as digital matters, unification of limitations on copyright and duration of copyright.

rights of performers and producers of audio recordings was recently partially extended to 70 years.

Copyright infringement and remedies

39 What constitutes copyright infringement?

Briefly summarised, any exploitation of a copyrighted work which is carried out without the prior consent of the author constitutes an infringement, provided it does not fall under the limitations of copyright. Besides, if a holder of an exploitation right exceeds the rights granted to him or her by the author, he or she also infringes copyright unless the use falls under the limitations of copyright. The violation of 'absolute rights', which are effective against anyone, is penalised – such absolute rights are the author's exploitation rights and moral rights.

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

Under German Copyright law not only the offender is liable but also instigators and accomplices. Further, the principle of *Stoererhaftung* (which constitutes a form of liability for a breach of duty of care) is acknowledged: if someone who – without being an offender, instigator or accomplice – has been involved in the unlawful interference in a deliberate and appropriately causal manner, he or she may be held liable for the infringement, provided it was legally and practically possible and reasonable to prevent the violation of the law.

41 What remedies are available against a copyright infringer?

Provided certain criteria are met, measures in case of infringement of a copyright establish various types of claims for the owner, including forbearance, disclosure of information, and damage claims as well as destruction of the unlawfully produced or distributed copies and the recall of these copies from the channels of commercial distribution (sections 97, 98 and 101 of the Copyright Act).

The author or, under certain circumstances the holder of an exclusive exploitation right, is entitled to send a cease and desist letter to the infringer requesting a declaration regarding forbearance of the infringing behaviour possibly accompanied by additional claims (eg, declaration to provide detailed information with respect to the infringing use and the obligation to reimburse damages and attorneys' fees) stipulating an equitable contractual penalty for any further breach. The entitlement to send a cease and desist letter requires that the threat of repetition of the infringement exists.

Instead, or following such a cease and desist letter the infringed party may file an application for a preliminary injunction at court requesting the forbearance of the infringing behaviour. Such application is restricted to being filed within a certain time after the rightholder has received knowledge about the infringement and the identity of the infringer.

Instead of a preliminary injunction the infringed party may bring an action to court, requesting forbearance. Such action may further encompass claims with respect to the provision of detailed information, damages, destruction and recall of the unlawfully produced copies.

A damage claim requires, among others, that the infringer has acted intentionally or negligently.

The claim may further be extended to reimbursement for the legal costs of the proceedings such as court fees and attorney's fees calculated on the basis of respective statutory law.

Upon report of the infringed party, the criminal prosecution authorities will commence criminal investigation and possibly prosecution in case criminal statutes are applicable. Criminal copyright prosecution partially requires application of the infringed party, unless the criminal prosecution authorities regard it to be necessary on account of a particular public interest.

42 Is there a time limit for seeking remedies?

Generally, the time limit for civil remedies in cases of copyright infringement is subject to the provisions of the German Civil Code. Accordingly, claims are normally time-barred within the standard statute of limitations of the German Civil Code stipulating a time period of three years.

An application for a preliminary injunction needs to be filed within a certain time period after having acquired knowledge of the infringement and the identity of the infringer. Statutory law does not provide a time limit; it is subject to the jurisdiction of the courts and may differ from district to district. Some courts will not allow the preliminary injunction to be filed later than one month after having acquired knowledge.

Criminal prosecution which is not in the public interest requires the infringed party to file a respective application within three months of obtaining knowledge of the infringement and the identity of the infringer.

43 Are monetary damages available for copyright infringement?

Section 97, paragraph 2 of the Copyright Act provides a claim for monetary damages. The injured party is entitled to choose between three types of calculation.

- Type 1: The damages are calculated based on a fictive licence analogy. Accordingly, the infringer is obligated to pay a royalty which reasonable parties would have agreed upon, being aware of the true legal situation and the circumstances of the individual case. Whether or not the injured party had been willing to grant a licence and whether or not the infringer would have acquired such a licence is irrelevant. If no licence practice of the author has been established (which would prevail), the damages are calculated on the basis of branch or industry tariffs.
- Type 2: The party whose rights have been infringed is entitled to claim any profit generated by the infringer as a result of the infringement. Whether the injured party would have generated this amount of profit is irrelevant. The infringer cannot argue that the profit exceeds the usual royalties.
- Type 3: The party whose rights have been infringed is entitled to claim the actual loss caused by the infringement such as incurred sales decrease or verifiable loss of profit.

As long as the claim is not extinct by performance or has not been subject to a final judgment the calculation basis is subject to determination by the injured party.

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

Yes, the Copyright Act (section 97a) and section 91 et seq of the German Code of Civil Procedure provide a claim for reimbursement, especially of attorneys' fees. The fees will only be reimbursed in accordance with the calculation standards under specific German statutory law.

45 Are there criminal copyright provisions? What are they?

The Copyright Act contains criminal and regulatory fine provisions.

Section 106 of the Copyright Act stipulates that the reproduction, distribution or communication to the public of a work or an adaptation of a work without the consent of the author in a way other than approved by law is punished by imprisonment of up to three years or a fine. Any attempt is punishable. The same is applicable in similar cases such as the event of the affixing of a designation of the author to the original artistic work without the author's consent.

Section 108 of the Copyright Act criminalises the infringement of related rights, for example, special kinds of exploitation of a photograph without the rightholder's consent in a way other than approved by law. Any attempt is punishable.

Further, the Copyright Act stipulates an enhancement of imprisonment in case of the acts having been committed on a commercial scale or

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when circumventing technological measures without the consent of the rightholder in order to get access to the copyright protected work.

46 Are there any specific liabilities, remedies or defences for online copyright infringement?

In cases of online copyright infringement the party whose rights have been infringed is entitled to claim disclosure of information about the identity of the infringer including the traffic data from the access provider. With regard to the principle of data protection, the disclosure requires a prior judicial order, which must be applied for by the infringed party.

47 How may copyright infringement be prevented?

The author or rightholder can use either technical measures in order to prevent third parties from infringing his or her rights, for example, protection systems which prevent the reproduction of a DVD, or provide electronic information which identify works or their authors or the conditions for use in order to serve the rights' management.

Relationship to foreign rights

48 Which international copyright conventions does your country belong to?

Germany is a signatory to, among others, the Trade Related Aspects of Intellectual Property (TRIPS) Agreement, the Berne Convention for the Protection of Literary and Artistic works, the Copyright Treaty (WCT) and the Universal Copyright Convention.

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

The most important obligations include:

- the obligation to grant protection to foreign authors to the same extent that German authors are protected;
- minimum standards of duration of copyright protection;
- the provision of certain exploitation rights;
- the so-called 'three-step test' to determine limitations and exceptions; and
- to provide legal remedies against the circumvention of technological measures.

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