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Copyright

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Foreword

The Copyright project group was constituted on 14 June 2010. At the project group's second meeting, its nine members with voting rights and 17 other members agreed on a three-pronged programme of work:

I. Copyright in the digital society: overview, and technical, social and economic challenges

II. New forms of distribution/remuneration and business models on the Internet

III. Copyrights and users' rights

The drafting of the programme of work was driven by the project group members' desire to reach the most comprehensive possible consensus. This was evidenced by the numerous subpoints for the proposed chapters, which covered nearly every aspect of copyright. The project group remained true to this idea throughout its work, even though it required considerable additional effort at times.

A public hearing, to which the Study Commission invited ten expert witnesses, was held on 29 November 2010 to examine the development of copyright in the digital society. This hearing was broadcast over the Internet and received a commensurate response in the media. The quality of the hearing was an enrichment for the further work done by the project group and has also left its traces in the present text.

As a result of the breadth of the mandate for the group's work, the desire to reach consensus and the fact the hearing on copyright was held late for organisational reasons, the project group was not able to keep to the schedule that had been laid down, and this progress report has been published with some delay. The quality of the work on the text should not have suffered under the time pressure.

Working methods

Once the programme of work had been drawn up, the members of the project group agreed that each parliamentary group and each expert member should submit their own texts on the subpoints, which would then be discussed in the project group. In consequence, a large number of texts were drawn up, reflecting the most diverse views on the topic of copyright, priorities and proposals for reform in this field. The points of conflict between the members' views were identified and discussed at the group's meetings. Some points on which no agreement could be reached at a meeting prompted new lines of enquiry. Smaller, cross-party working groups often came together to work on them so that the dialogue was constantly being continued in the periods between the actual meetings as well.

The sheer volume of the texts on the first two chapters, which were also difficult to compare in some respects, threw up various difficulties when it came to the drafting of a consolidated text. A different working method was therefore agreed for the third thematic complex, which covers important points such as the enforcement of copyright on the Internet and the role played by the collecting societies. Each parliamentary group chose a number of sections, then drew up draft texts for them, to which the other members were able to add their notes and suggested amendments. In this way, a basic text that had already been critically annotated and amended by each member in advance was produced for each subpoint.

At a time when two thirds of the work to be done by the Copyright project group had already been concluded, the Study Commission agreed to set up an online participation platform. In consequence, it was possible for interesting proposals to be introduced into the project group's discussions by third parties.

The Study Commission adopted the text of the present publication on 27 June and 4 July 2011. The result is an overview of the current problems in this field drawn up to a very great extent in consensus, as well as recommendations for action, some of them highly diverse, that are intended to address these problems. Where no agreement could be reached on certain points, the contrasting opinions, and the arguments for and against them have been juxtaposed in order to represent the general societal discussion that is still being conducted. In some places, contradictory or quantitatively inadequate data allowed no conclusive assessment of the issues. Given this was the case, the project group identified areas where research was needed and unanimously decided to commission a study of remuneration models and their impacts on authors' economic situation. Possible alternative remuneration models were also to be highlighted. Unfortunately, this study was blocked at a meeting of

the Study Commission by the votes of the governing coalition parliamentary groups and the expert members they had nominated.

We would like to thank all the members of the project group, everyone who took part in the discussion via the Study Commission's online participation platform, all the staff of the Study Commission Secretariat, the parliamentary groups, the expert members and the Members of the German Bundestag on the project group for their friendly cooperation.

Johannes Kahrs, Member of the German Bundestag (Social Democratic Party of Germany (SPD))

Chairman of the Copyright project group

Dr Jeanette Hofmann, expert member

Deputy chairwoman of the Copyright project group

1 Copyright in the digital society: overview, and technical, social and economic challenges

1.1 The Internet and digital technologies as tools for creative activities, self-marketing and distribution/transformed constellation of actors

With its diverse, richly varied range of creative content and information, the Internet is serving authors to an increasing extent as a medium of inspiration and research for their original work. Works have always been created by building on what has been done in the past, adapting it, linking it with new ideas, teasing out associations, borrowing or simply taking inspiration from it. The Internet and other digital technologies offer attractive, convenient access to the legacy of the past and so encourage creative activities.

It is easier today than ever before to publish original works in open electronic networks. 'At the same time, content of assured quality can be accessed rapidly and directly. This motivates (and tempts) people to access content that is already available. This content is available – from a technical perspective – as building blocks that are always at users' disposal for them to adapt and develop further. The ability to publish one's own original work and the ability to access immediately modifiable content at any time have been key factors in the birth of a new type of user: the "prosumer", who consumes content (as earlier), but at the same time also produces or disseminates new content. The term "user-generated content" (UGC) is one eye-catching label for this phenomenon.'[1]

Authors are able to interact with users or other creative professionals via social networks and various other electronic forms of exchange, which offers those users direct influence on the creative process, as well as simplifying collaborative activities.

The most prominent example of such methods are the texts published by the online encyclopaedia *Wikipedia*. This platform allows every user to get involved as an author at the same time, even if in practice the group of those who take this step remains relatively small. What is interesting is that considerable energies are evidently being set free here, although no financial rewards are provided for. To this extent, only other motives such as solidarity or the need to gain acceptance for one's own opinion can come into question as incentives. This communal creation of works, which is found for instance in the field of free software development – although sometimes with a commercial background –,[2] has remained restricted to particular areas of creative activity to date.

Creativity has been democratised by the Internet. The possibility of producing and distributing original works is open to everyone today. However, this does not mean that each individual who creates works today is also capable of marketing them commercially. For example, capital is needed and, occasionally, professional support as well to help a piece of music become a mass success that will allow the artists who recorded it to earn their living from it. For instance, marketing is assuming an ever more significant role in the music business. The production of films to the standards expected in the cinema and on television is still dependent on considerable financial resources as well.

However, the new digital public sphere is not always commercial. It is focussed on both artistic recognition and commercial success, as well as participation, exchange and dialogue. Some citizens transcend their role as consumers by copying pre-existing material, adapting it and incorporating it into new contexts: Remixes and mash-ups are created that make reference to users' cultural environment in a specific fashion. For example, when fans re-edit scenes from their favourite films and post them on a video portal, they usually do this with a desire to get closer to the director's original intentions. They may also wish to comment on current affairs, as in the collaged agitprop films put together by political activists opposed to the plans for a

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[1] Written Statement by Prof. Dr Karl-Nikolaus Peifer for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-D, p. 2, online: http://www.bundestag.de/internetenquete/dokumentation/2010/Sitzungen/20101129/A-Drs__17_24_009_D-_Stellungnahme_Prof__Peifer.pdf.

[2] 'Free software' is software that can be used, studied, modified and communicated by any person without restriction. In this respect, the 'free' refers not to the price, but to the freedoms the software grants the individual.

new railway station at Stuttgart. As a rule, bloggers too do not want the kind of success aspired to by a publishing house that publishes a newspaper. Many are not interested just in financial profits, but in participation and the ability to influence public discourses in targeted ways.

However, one thing must not be forgotten when judgements of this kind are being made: People have always engaged in individual creative activities in private settings. However, the methods described here are gaining a different quality, particularly due to their use in commercial settings (for example on the YouTube Internet video portal), and the ways they are used clash with current law. There is evidently a desire to see uses that earn Internet enterprises money, and that they engage in without authorisation from authors and holders of related rights declared permissible under a new exception, although no thought appears to have been given to a remuneration mechanism for this.[3]

In this context, citizens are consumers, users (within the meaning of copyright law and in other senses)[4] and authors all at the same time. In principle, this new kind of participation in the public sphere is welcome. However, it also means that people will come into conflict more frequently with copyright law, the development of which has not kept pace with that of the media world. Placing the publication of remixes and mash-ups on a legal basis would require the comprehensive clearance of rights, something citizens would not be in a position to carry out without expert legal knowledge.

The Internet also offers authors and their partners completely new forms of distribution. These make it possible for them to break away from the intermediaries they have relied on until now, at least some of the time, and therefore exert more direct influence on the exploitation of their creative work. The increasing extent to which authors are performing ‘intermediary’ services for themselves (layout, recording, self-distribution, for instance) allows them not least to capture a greater financial share of the yields that are earned. This means writers can, for example, make their texts and books directly available on appropriate platforms and end devices once they have converted them into digital forms, with or without the involvement of a publishing house. Online rights exploiters (‘netlabels’, for instance) enable composers and performers to distribute and sell music digitally through comparatively convenient channels. Digital distribution therefore also makes it possible for the customer to emancipate themselves from the high street retailers. The consumer has access to online services from almost any location of their choice 24 hours a day. In consequence, they can enjoy an author’s works whenever they want, regardless of shop opening times. This may boost the demand for creative works and therefore increase the revenues received on the creative side as well. For many creative professionals and their partners, the Internet is a marketing tool that is becoming increasingly important as they seek to draw potential users’ attention to their original creative activities. The range of options extends from a classic Internet site as kind of a digital visiting card to profiles on social networks with attractive sample tracks or chapters, or even the free-of-charge publication of whole works and collections.

Everyone active in the creative industries – whether concert promoters, live musicians, music teachers, actors, writers or other artists – is able to use these methods to publicise their services (which also continue to be offered offline). At the same time, authors and performers have completely new and much more direct channels of communication to users and long-standing fans open to them. They can generate unprecedented levels of attention for their creative works through social networks or viral communication. Value is created either directly on the Internet or as a result of the effects this has in increasing the sales achieved by offline commercial activities (live performances or merchandising).

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3 Dissenting opinion of the Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude on this paragraph: ‘The fact that the creation of derivative and transformative works is treated exactly like piracy in current law, i.e. equated with a deliberate, criminal contravention of copyright, is hardly comprehensible. The provisions on quotations and free use are still rooted in the analogue world and have not as yet been adjusted in any way to the fact that, as a general rule, creative activity on the Internet today is derivative, i.e. builds on the use of pre-existing works.’

4 The term ‘user’ has different meanings. Media users or Internet users are not in themselves actually users of a work within the meaning of copyright law. A person is not a user within the meaning of copyright law until they make works available to the public, adapt them, reproduce them, etc., i.e. use a work in a manner that requires permission.

Although, with its ubiquitous and decentralised structure, the Internet is shaking up what are sometimes long-established value chains, it must not be forgotten that many of these phenomena are already familiar and date back to earlier changes in the media, for example when broadcasting developed. Nonetheless, the services provided by intermediaries have by no means become superfluous *per se* as a result.

1.2 Value and status of creativity in the digital world

1.2.1 Economic significance of the creative industries

When it comes to the economic analysis of the fundamental value of the creative industries [5] for the economy, reference is initially to be made at the European level to the European Commission's recently published *Green Paper: Unlocking the potential of cultural and creative industries*. This contains a very good account of the significance of this business segment for the economy in Europe.[6]

At the national level too, the significance of the culture and creative industries was investigated at length by a study conducted for the German Federal Government. This research report commissioned by the Federal Ministry of Economics and Technology (BMWi), *Culture and Creative Industries in Germany*, came to the conclusion that the culture and creative industries' contributed 2.6% of Germany's gross domestic product (GDP) in 2006.[7]

The reciprocal relationship between the arts and business has previously been examined by the German Bundestag's Study Commission on Culture in Germany.[8]

According to the monitoring report presented in July 2010 by the German Federal Minister of Economics and Technology, the number of people economically active in the arts sector has been rising continuously over the past few years and has now passed the million mark.[9] During the period from 2003 to 2009, the sector's turnover increased from €117bn to more than €131bn,[10] which is equivalent to growth of 12.3% overall and an average of 1.9% a year.[11] Even the economic crisis has only disrupted the culture and creative industries a little: Although their turnover declined from 2008 to 2009, this was a fall of just 3.5%, while the whole economy contracted by 8.5% over the same period.[12] In 2009, the culture and creative industries' share of total economic activity was 2.7%,[13] and so greater than that of the chemicals industry (2.2% [14]). Unlike the automotive industry, for instance, where 97% of turnover is generated by a handful of large corporations,[15] small and micro enterprises as defined by the European Union (up to €10m turnover a year) are responsible for a large proportion of the sector's turnover: In 2008, for example, small and micro enterprises contributed a higher share (43%) of the sector's sales than major companies with turnover of at least €50m (41%).[16] The figures demonstrate that creativity is becoming an ever more significant motor for the economy.

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5 On the 'culture and creative industries' and their eleven sectors, cf. the definition given by the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, pp. 333ff., online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.
The 'culture industries' encompass classic art forms such as music and theatre, while the 'creative industries' include sectors such as software/games and advertising. The figures from the German Federal Ministry of Economics and Technology (BMWi) are based on the definition adopted by the Study Commission on Culture in Germany.

6 Cf. European Commission: *Green Paper: Unlocking the potential of cultural and creative industries*, COM(2010) 183/3, pp. 2ff., online: http://ec.europa.eu/culture/documents/greenpaper_creative_industries_en.pdf.

7 Cf. Federal Ministry of Economics and Technology: *Gesamtwirtschaftliche Perspektiven der Kultur- und Kreativwirtschaft in Deutschland*, Research Report, 577, February 2009, p. 4, online: http://www.bmwi.de/Dateien/KuK/PDF/doku-577-gesamtwirtschaftliche-perspektiven-kultur-und-kreativwirtschaft-kurzfassung,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

8 Cf. the Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, pp. 333ff., online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

9 Cf. Federal Ministry of Economics and Technology: *Monitoring zu ausgewählten wirtschaftlichen Eckdaten der Kultur- und Kreativwirtschaft 2009*, July 2010, p. 21, online: http://www.bmwi.de/Dateien/KuK/PDF/doku-589-monitoring-zu-ausgewaehlten-wirtschaftlichen-eckdaten-2009,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

10 Cf. ibid., p. 11.

11 Cf. ibid., p. 23.

12 Cf. ibid., p. 5.

13 Cf. ibid., p. 5.

14 Cf. ibid., p. 4.

15 Cf. ibid., p. 8.

16 Cf. ibid., p. 8.

In the digital world, the culture and creative industries are not merely assigned an ancillary function, but contribute significantly to the creation of value in their own right. In many cases, it is also attractive content that makes the Internet interesting, and therefore ultimately an economic success for the information and communications technology (ICT) sector. For instance, creative content, and modern communications and entertainment technologies boost each other's sales. Very recently, it was underlined in the Federal Government's *ICT Strategy* that measures should be taken 'to promote social consensus on the role of the creative process, intellectual property [17] and their cultural and economic value'.[18]

1.2.2 Significance of the creative industries for creativity

Creativity has a social value that transcends the economic sphere. When this value is being weighed up, it is necessary to adopt a differentiated approach: Economic value in the sense of the creative industries' contribution to gross domestic product must not be confused with the value of creative activity for the communication society. The exchange value of knowledge goods should not be confused with the intellectual value of an author's immaterial goods ('intellectual property') and the aesthetic value of artistic products or artistic output as such.

The role of different economic actors in bringing forth creativity is not as clear as the economic significance of the creative industries. Even in the digital age, investment is usually necessary in order to promote creative activities and help the works that are created to become successes on the market. This investment includes not just financial resources, but also know-how. At present, unknown artists without financial support or appropriate partnerships are only rarely successful enough to be able to live from the proceeds of their work. As a rule, the commitment of a rights exploiter is also necessary today in order to make professional creative activities possible. Alternative models such as crowdfunding (voluntary payments by fans) have not become established, at least to date;[19] there are differing opinions as to their potential. What is certain is that – due to the uncertainty about its success that is inherent in the product – the professional production of creative content requires a system of venture capital funding, which is supplied at present above all by rights exploiters.

This certainly does not mean there is not increasing engagement in online creative activities outside the creative industries. Particularly in the digital sector, many new constellations are being trialled that are far removed from the classic rights exploitation models. Such innovative approaches to the exploitation of works are to be included in the discussion about how rights to immaterial goods should be shaped in future.

1.2.3 Transformation in creative output and its status

Alongside original artistic production and other creative activities, the possibilities of digital technology are giving increasing prominence to the adaptation and subsequent republication of existing materials. In recent years, a blossoming culture of remixes and mash-ups has grown up thanks to these techniques. Pieces of music and films are cut together in fresh ways, individual works are combined with one another anew and across the boundaries between different media. Artistic options of the kind discovered by the classic modernism of the 1920s have therefore advanced to become part of popular culture. Quite particularly, the satirical and critical forms of collage and montage have experienced a renaissance as this process has unfolded. It is not just the production of creative content, its distribution too is undergoing considerable change. The Internet allows almost free-of-charge reproduction and dissemination of self-generated digital content. The more production, distribution and reception come together in one place, as is characteristic of non-commercial creative activities, the more the character of the artistic activity itself changes. Such tendencies will not be comprehended adequately if they are

[17] On the term 'intellectual property' and its connotations, see section 1.3.

[18] Federal Ministry of Economics and Technology: *ICT Strategy of the German Federal Government: Digital Germany 2015*, p. 19, online: http://www.bmwi.de/English/Navigation/Service/publications,did=384382.html.

[19] Dissenting opinion of the Social Democratic Party of Germany (SPD) and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude on this sentence: 'Alternative models such as crowdfunding have developed and are finding application in fields of all kinds.'

regarded merely as attempts by amateurs to compete with professional artists. Rather, in the context of their mass dissemination, the products of that creativity can themselves become means of communication (video answers on YouTube, for example).

The more referentiality to other works becomes the subject of new creative output, the more the right of exploitation can have a constraining effect on creativity, if it means that products are no longer available to the general public. The right of exploitation is a precondition for the economic use of the original work and therefore for investment in new creations, but at the same time can also hinder the creative manipulation of references to previous works.

These developments also appear to be associated with a change in attitudes to the law of immaterial goods, although this is being supported by other processes as well: When the wider public gained access to the Internet, it was suggested by the computer industry and Internet service providers (ISPs) in their advertising for their products that content would be available free of charge online. The purchase of hardware apparently created an entitlement to be able to use all content gratis. It did not appear necessary for users to express their appreciation in a material form.

Since rights exploiters did not view the Internet as a relevant sales market at first, numerous content providers made a great deal of content available free of charge from the beginning.

In addition to this, it was not initially possible to pay on the Internet with an equivalent of cash. For these reasons, only a few business models for paid content have succeeded in developing through to the present day. For the most part, the creative industries have made content available free of charge, financing this with adverts, for example. They have been joined by filesharing sites, although it is often not possible for users to tell whether it is permissible under copyright law to copy the content made available on these sites. Those who explored the new world of the Internet assumed that, despite the fact it was necessary to pay for access to the Internet, it was not necessary to pay for access to content.[20] Since the original file remains in existence when a copy is made, it is difficult to inspire and lay foundations for a consciousness of such activities' illegitimacy and their comparability with the theft of material objects. Furthermore, most commercial, legal download services were complicated, while file-sharing sites were more user-friendly and therefore enjoyed ever greater popularity. Here, as in relation to the playability of purchased DVDs (country codes, compatibility with free software), the creative industry neglected to develop attractive products, instead relying to an increasing extent on the criminal prosecution of individuals who infringed rights, and campaigns with intimidating advertisements and slogans. However, it is also to be remarked that the market has changed in the mean time: there are numerous legal business models on the music market today – more than 40 in Germany at present, and the trend is moving in an upward direction.[21]

These considerations point to the significance of social norms in the field of immaterial goods. Particularly on the Internet, policymakers cannot assume that the rules of the law of immaterial goods will be fundamentally accepted and *de facto* automatically enforced by social rules.[22]

1.2.4 Fundamental requirements for a reorganisation of copyright

Apart from the fundamental legislative requirements that the wording of the law be precise, legally clear and comprehensible, the particular challenge when it comes to a reorganisation of copyright law is the drafting of a body of rules that can respond to the rapidly changing parameters for the creation, exploitation and use of copyright-protected works in appropriate forms.

Against the background of the development of digital technologies, the most important

[20] Dissenting opinion of the SPD, Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude on this sentence: 'Those who explored the new world of the Internet made use of the possibilities of technological progress that enabled them to access content without paying anything for it in return.'

[21] Cf. on this issue the survey of legal online music stores at *www.pro-music.org*, online: http://www.pro-music.org/Content/GetMusicOnline/stores-europe.php.

[22] Dissenting opinion of the SPD and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude on this sentence: 'Particularly on the Internet, it becomes clear that policymakers must bear in mind society's changed value system if they are to be capable of addressing this legislatively in an appropriate way.'

challenge for the legislature is to create clarity about the fact that the value judgements implicit in the legal framework apply just as much for digital use as for the physical world. By contrast, developments in digital society also influence how the analogue world is viewed. At the same time, however, the technological environment needs to be looked at when it comes to detailed issues of copyright. Furthermore, the legislature must also confront the accusation made after past reforms that it broke with the systematic approach enshrined in the legislation when it adopted excessively detailed regulations to govern individual cases thrown up by problems that affected specific interests.

The legislature can only address the rapid development of digital technologies by ensuring the provisions adopted are open to new forms of technological use. In view of this, louder and louder calls are being made for blanket clauses that would reduce the density of highly specific provisions in the legislation. Blanket clauses guarantee flexibility and open up opportunities for value judgements to be made in the case law. However, they are not unproblematic from the perspectives of clarity and legal certainty.

1.3 The concept of intellectual property

1.3.1 Definition and problems with the term

'Intellectual property' denotes creations of the mind: Inventions, literature, artistic works, and symbols, names, images and designs that are used in commerce. Intellectual property is divided into two categories: commercial property, which covers inventions (patents), trademarks, product designs and geographical designations; and copyright, which covers literary and artistic works such as novels, poems, plays, films, musical works, drawings, paintings, photographs, sculptures and architectural designs.

The concept of intellectual property was translated into legal practice in the German states in the early 19th century. Apart from the tradition of legal theory, it is also founded on a view of the author that developed out of the aesthetic worship of the genius. The term 'intellectual property' suggests an analogy with property in physical commodities, for instance as regards its character as an absolute right – i.e. a right that excludes all others. Of course, this analogy goes back to the natural law justification of 'rights to immaterial goods'. The introduction of the concept of 'intellectual property' is therefore associated with a particular, historically determined view of the author. 200 years later, this view is under discussion as a result of new possibilities for collaborative activity and an increasing blurring of the dividing line between the 'producer' and the 'consumer'.[23]

In consequence, when there is talk of intellectual property it is necessary to distinguish between the dispute over the term and the debate about the concepts on which it is founded.

A problematic term

The term 'intellectual property' is unclear, its usage is controversial, and it therefore needs to be fleshed out. In certain circumstances, it anticipates answers to questions that have not even been aired by policymakers as yet. The exact meaning of intellectual property is constantly being redefined by policymakers.[24]

The term is also regarded as problematic because it equates the legal status of immaterial goods linguistically with that of material goods. This is not consonant with the time limitations on the exclusive rights over immaterial goods or the fact that immaterial goods are non-rivalrous, i.e. can be used by many people without being exhausted. Physical property is finite and characterised by its scarcity – and its use reflects these attributes. This is not true of immaterial goods, which also cannot be stolen in the same sense. The differences between them and both moveable and immovable goods are taken into account by the time limitations on exclusive rights. Since the discussion frequently turns precisely on the differences between immaterial goods and physical property, it would be advisable to use language that differentiates between them as well – as this will open up fresh conceptual spaces.

The proponents of the concept of intellectual property argue that intellectual property displays more features in common with than

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[23] Cf. the term 'read-write' society coined by Lawrence Lessig in Lessig, Lawrence: *Remix*, 2008, p. 28.

[24] From a perspective informed by the philosophy of language, a precise choice of terms is absolutely essential for any substantive debate. Cf. Wittgenstein, Ludwig: *Philosophical Investigations*, 1958.

differences from property in physical commodities. The exclusive right of exploitation, which grants copyright to the creator, is similar in many respects to the exclusive rights over property in physical commodities. Furthermore, the term is found in international agreements, is generally accepted in the English-speaking countries and has gained currency in the German case law to an ever greater extent as well. The tradition of Roman law appears negligible compared to the current significance of the term.

On account of the differences that have been cited, 'intellectual property' is condemned by the term's opponents as a 'polemical ideological concept' that 'is intended to make demands for the content of the law to be determined in certain ways seem inevitable consequences of the nature of the matter in the eyes of the legislature', so removing them from political discourse.[25] For instance, 'intellectual property' could suggest that the author or right holder's interest in comprehensive protection should be privileged over the general public's interests in access.[26]

1.3.2 Fundamental concepts

The arguments familiar from the discussion of the term come up once again when the fundamental concepts that underlie this field are debated. This apparent redundance makes the examination of these concepts more difficult because the arguments put forward are very similar, but serve different ends. Whether immaterial goods should be equated linguistically with property is a quite different question from that of how far immaterial goods actually do have legal features in common with property.

In this respect, rights to immaterial goods certainly share some characteristics with material property. For instance, they have the effect of excluding third parties and therefore remove the good in question from common ownership. However, the consumption of immaterial goods is non-rivalrous, and they can be reproduced with marginal costs close to zero, particularly in the digital age. This subjects these rights to a markedly higher pressure for justification than applies for material goods because it follows from this non-rivalry that the benefit for the general public will be greater the more intensively and broadly they are used. Account was taken of this aspect of the matter during the conceptional development of the law of immaterial goods to the extent that, in contrast to material property, rights to immaterial goods are always held for limited periods, something that in itself is indicative of their high societal value.[27] These considerations consciously restrict the legal positions of creative professionals or the individual in favour of the general public.

Historically, it is to be observed that terms of protection have been extended again and again. At the same time, new exceptions have been introduced, while new methods of reproduction have made the enforcement of rights more difficult.

Aims of legal protection for immaterial goods

Intellectual property and other competing concepts are associated with currents in the history of ideas and normative concepts whose impacts have been felt through to contemporary interpretations of constitutional law. In essence, it is a question of whether the primary or even exclusive purpose of the law of immaterial goods should be the assignment of a good's intellectual and material value to a person (in copyright: the creator) or whether other interests should be taken into account at this level. In the conception represented by intellectual property, the link between the creator and the work is comparable with the link between the owner and the physical commodity in its absoluteness. It is also a logical consequence of this that all other interests are (merely) taken into account in this concept as limitations.

Other concepts also take account of further interests when it comes to the aims of copyright law. The following interests are mentioned in the literature:

– Incentives for creative work: Under an incentive model, creators would no longer sell their works after they had been produced in order to recoup the production costs, but would receive financial incentives for new works. They would accordingly be less reliant

[25] Cf. Rehbinder, Manfred: *Urheberrecht*, 2004, para. 79, quoted in Pahlow, Louis: *Lizenz und Lizenzvertrag im Recht des Geistigen Eigentums*, 2006, p. 192.

[26] Cf. Pahlow, Louis: *Lizenz und Lizenzvertrag im Recht des Geistigen Eigentums*; 2006, p. 193.

[27] Cf. Niemann, Ingo: *Geistiges Eigentum in konkurrierenden völkerrechtlichen Vertragsordnungen*, 2008.

on the sale of their works; exclusive rights would be renounceable.

- Optimisation of value creation: From an economic point of view, it would be necessary to investigate whether the exclusive rights associated with the concept of intellectual property or freer availability of information and knowledge would deliver greater added value for society.
- Participation of users.

In such conceptions, copyright itself is the product of a balance of interests. Given a generally utilitarian approach (one oriented towards the maximum benefits for the greatest number of people), the question arises of which interests should be taken into account and how they should be weighted relative to one another.

The opponents of the concept of intellectual property refer to, among other things, the Roman legal tradition, in which there can only be property in physical commodities, but not in immaterial goods. Rights to immaterial goods are viewed as an equivalent to property that can be used to assert, transfer and exploit rights over incorporeal objects.

Viewed historically, the concept of intellectual property was applied in the law of immaterial goods on the grounds that the authors who it made owners were consequently given better opportunities to earn money. In his *Geschichte und Wesen des Urheberrechts*,[28] *Eckhard Höffner* compared the earning opportunities enjoyed by authors firstly under a legal system for immaterial goods founded on intellectual property and secondly under a regime that did not have such a foundation. He came to the conclusion that the copyright system based on intellectual property had led to a decline in the numbers of published products and the average levels of remuneration for authors, although a few top earners had achieved increases in profits.

The following (and possibly other) arguments need to be discussed:

- copyright exclusively serves the interests of the creator;
- copyright primarily serves the interests of the creator, but also takes account of the general public's interest in creative activities;
- copyright primarily serves the interests of the creator, but also takes account of the general public's interest in creative activities and users' interests in participation;
- copyright serves the balance between individual and general interests.

Intellectual or material foundations

The concepts also differ with regard to the question of what are viewed as the foundations for the assignment of rights over creative goods to persons. In line with the conception of intellectual property, this follows (in the pure doctrine) from the ideal link between the creator and their work (natural law theory). In contrast to this, others view the product as the central foundation for the protection of rights, for instance in countries that follow the copyright approach (reward theory). Current proposals for the reform of the law of immaterial goods see it as an unfounded assumption that all works could be assigned absolutely to a creator on the basis of an 'ideal link', particularly in the field of digital works. Especially when it comes to creations intended for commercial purposes, the product stands in the foreground (reward theory/incentive theory).

Classically, there are four theoretical foundations for the assignment of rights. The first two arguments, which have been discussed above, place the inventor and their entitlements at the centre of attention, whereas the third and fourth put the focus on society. However, these latter theoretical foundations relate above all to industrial property rights.

The natural law theory, which accepts that, by its nature, an intellectual product is the property of the creator in question,[29] played a major role above all in the early period of protection for industrial property and the debate about free trade in the 19th century. On account of sustained criticism of its validity, modern arguments hardly draw on this theory any longer.[30] The second

[28] Cf. Höffner, Eckhard: *Geschichte und Wesen des Urheberrechts*, 2010.

[29] Cf. Karres, Natalie: *Das Spannungsfeld zwischen Patentschutz und Gesundheitsschutz aufgezeigt am Beispiel der patentrechtlichen Zwangslizenz*, 2007, p. 72.

[30] Cf. Hestermeyer, Holger: *Human Rights and the WTO*, 2007, p. 30; Niemann, Ingo: *Geistiges Eigentum in konkurrierenden völkerrechtlichen Vertragsordnungen*, 2008, p. 17.

foundation, reward theory, goes back to the English philosopher *John Locke* and derives more from the concept of justice. The approach posits that it is only just to let the inventor receive some reward for their efforts. This theory too plays a subordinate role today, especially in international contexts.[31]

In the modern discussion about commercial protective rights, greater importance attaches to the incentive theory and the disclosure theory, which place a stronger emphasis on the interests of the general public. The disclosure theory assumes a contract between society and the inventor, who is granted special protection in return for the disclosure of their invention. This theory is only applicable to patents and not to copyright or other types of intellectual property. When patents are registered, fundamental information has to be disclosed before a patent can be obtained. This is intended to permit innovations to be derived from these patents.[32]

The incentive theory is represented most prominently in the current debates. The highly promising profits expected of a monopoly position are supposed to create incentives for high-risk research and development activities. [33] The cultural heritage is the foundation for cultural activities. It is argued that every artist can (and must) draw on an infinite corpus of knowledge/art/language, etc. in order to be able to make their individual contribution ('dwarfs on the shoulders of giants'[34]). The remix and mash-up culture, whose significance for the digital society has been mentioned again and again, has its forerunners in the many historic works created by adapting earlier achievements. Large parts of our high culture arose in this way. The Homeric epics are written versions of works that had been passed down orally, Goethe's Faust was based on a long tradition of material that extended from late-medieval chapbooks to the version by the English poet *Christopher Marlowe*. Kleist's *Amphitryon*, which has enjoyed renewed popularity in 2011, the anniversary of the author's death, is based on, among other things, the work of the same title by *Molière*, whose sources can in turn be traced back to ancient Rome. New knowledge and new information are only gained from the study of extant sources. Exchanging information and drawing on existing knowledge are just as much parts of the creative process as the creative originality to which the concept of intellectual property appeals.

From a semiotic point of view, there is the additional consideration that intellectual works only unfold their full effect when they are used. Just as communication theory assumes in its sender-receiver model that information is always shaped by the intentions and prior knowledge of both sides, and is therefore never conveyed one-to-one, semiotics assumes that a creative work ultimately only comes into being when it is interpreted by the recipient. In brief, a novel needs readers, a film needs viewers, a piece of software needs users. Where there is any doubt, exclusivity of the kind inherent in the concept of intellectual property fundamentally fails to recognise this interactive dimension of creative activities.

1.3.3 Use of terminology

The Study Commission's examination of the appropriate terminology has been long and marked by controversy. Different terms are also used by specialists in the field: For example, the World Intellectual Property Organisation (WIPO), the European Union (EU) and the German Federal Government favour the term 'intellectual property'. By contrast, the Max Planck Institute for Intellectual Property and Competition Law in Munich, recently decided to replace *geistiges Eigentum* ('intellectual property') in its German title with *Immaterialrecht* ('law of immaterial goods').

The term 'intellectual property' often sparks heated debates and can be interpreted as implying a commitment to a particular understanding of the fundamental issues. The neutral term 'immaterial goods' is available as an alternative to 'intellectual property'.

Although it has not been possible to reach consensus on shared terminology, the Study Commission is in agreement that the conceptional differences about the legal system of immaterial goods frequently associated with the discussion of these terms cannot be resolved by disputes over words, but have to be explored by looking at the

[31] Cf. Liebig, Klaus: *Internationale Regulierung geistiger Eigentumsrechte und Wissenserwerb in Entwicklungsländern*, 2007, p. 47.
[32] Cf. ibid.
[33] Cf. ibid.
[34] Salisbury, John of: *Metalogicon*, ed. Hall, John Barrie, 1991, vol. III, chap. 4 (Corpus Christianorum Continuatio Mediaevalis (CCCM), 98, chap. XCVIII), p. 116.

concrete, substantive issues addressed in the individual chapters of this report.

1.4 Constitutional law and copyright

In continental European law, an author's work is protected both by their personal rights and also by property rights. In Germany, this protection is therefore guaranteed by Article 2(1) in conjunction with Article 1(1) and Article 14 German Basic Law (GG). Apart from the author's personal rights, copyright law assigns a work's value as property to the author. Article 14 GG – which guarantees property – is relevant to this aspect of the work's value.

Article 14 GG sets out what is termed a normatively shaped fundamental right, which means it requires formulation by the legislature. The danger that it may be eroded is countered with the construction of the institutional guarantee, under which an inalterable core of fundamental rights must remain preserved.

According to the case law of the German Federal Constitutional Court (BVerfG), as an institutional guarantee, Article 14 GG encompasses the assignment of the economic benefits of an original work in the sense of equitable remuneration, provided the interests of the common good are not deserving of precedence.[35]

1.4.1 Overview

Copyright balances the interests of property and the common good by combining entitlements to protection with exceptions. Account is taken of the principle that ownership imposes social obligations in that 'the holder of a right with value as property must accept the limits that are customary, socially adequate and reasonably acceptable in relation to their right.' [36] Furthermore, the Federal Constitutional Court has expressly recognised the general public has an interest that is worthy of protection in the most unhindered possible use of works, although a heightened public interest must be identifiable for this to apply.[37] The interests of the general community are protected constitutionally by Article 14(2) GG and to this extent set boundaries on the formulation of the right to property.[38]

With regard to attempts to weigh up between interests with value as property and the interests of the common good, the Federal Constitutional Court made the following points in its decision on use in churches and schools: Firstly, as a right of use, copyright is property within the meaning of the Basic Law. Secondly, 'the fundamental assignment of the economic value of a protected work to the author' must be ensured. Thirdly, the 'interest of the general community in unhindered access to cultural goods' provides grounds for particular forms of use to be possible even without the author's permission, provided the author receives some remuneration.[39]

However, exclusive rights and the entitlement to remuneration are not of equal rank. The standard case under current copyright law is the exclusive right: The author can themselves decide who may use their work on what conditions. Only in special cases (under the exceptions) is the author deprived of this right to prohibit uses. However, what remains for them as a general rule is an entitlement to some remuneration. In other words, if they are no longer able to forbid the use of their work, they should at least continue to receive financial compensation. Nonetheless, it is possible for the entitlement to remuneration to cease to apply as well, as for instance under the right to quote. However, this must then be justified by a particularly strong interest of the common good.[40]

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[35] Cf. Wieland, Joachim, in: Dreier, Horst (ed.), *Grundgesetz Kommentar*, vol. I, 2nd edition, 2008, Article 14, para. 59, citing BVerfG, judgement of 8 July 1971 – 1 BvR 766/66, *Entscheidungen des Bundesverfassungsgerichts* (*BVerfGE*), 31, p. 275 (p. 287).
Supplementary dissenting opinion of the SPD and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude: '*BVerfGE*: 31, p. 275 (p. 287): "Not every merely conceivable option for exploitation is safeguarded. Rather, parliament [...] has to ensure use that accords with the nature and social significance of copyright [...]; any statutory provision that defines the content of the law must take account of the interests of all parties concerned; it is in the nature of both the intellectual/creative product and the derivative product to become freely accessible after a certain period."'

[36] Maunz, Theodor: 'Das geistige Eigentum in verfassungsrechtlicher Sicht', *Gewerblicher Rechtsschutz und Urheberrecht* (*GRUR*), 1973, pp. 107ff.

[37] BVerfG, judgement of 7 July 1971 – 1 BvR 765/66, *BVerfGE*, 31, p. 229 (Headnote) – Privileged Use of Books in Schools.

[38] BVerfG, judgement of 15 October 1996 – 1 BvL 44, 48/92, *BVerfGE*, 95, p. 64 (p. 84) – Rent Control.

[39] *BVerfGE*, 31, p. 229 – Privileged Use of Books in Schools.

[40] BVerfG, judgement of 11 October 1988, 1 BvR 743/86, etc., *BVerfGE*, 79, p. 29 – Exclusion of

The exceptions from copyright are an expression of the balance of interests between authors, rights exploiters and users, and are formulated by the legislature. They are not prescribed in concrete terms by the Basic Law, but depend on the intensity of the encroachment and proportionality.

Apart from property rights concerns that affect rights of exploitation, personal rights aspects are of interest. Authors' personal rights are usually derived from general personal rights and are intended to protect the author 'in his intellectual and personal relationships to the work', as Section 11 Act on Copyright and Related Rights (Copyright Act, UrhG) expresses it.[41] For example, the right to be identified as the author and the author's right to resist distortions of their work are derived from the author's personal rights.

Constitutionally, the protective function of the state consists in preventing encroachments on citizens' general personal rights by third parties. When intrusions on personal rights are being judged, the first step is usually to inquire about the intensity of the intrusions. An encroachment on somebody's intimate sphere weighs more heavily than an encroachment on their private sphere. It also seems obvious to weigh up the same factors when it comes to infringements of authors' personal rights.

In the case law of the Federal Constitutional Court, the act of first publication is an important indicator for any judgement concerning the intensity of intrusions on personal rights. In a relevant ruling on this issue it states, 'that with its publication a work is no longer solely at the disposal of its owner. Rather, in accordance with the law, it enters into the societal realm and can therefore become an independent factor that plays a part in shaping the cultural and intellectual landscape of the age. With time, the private rights to dispose of the work lapse, and it becomes intellectual and cultural common property.'[42] In the view of the Federal Constitutional Court, the personal relationship of the author to their work therefore grows more tenuous upon its publication, while the general interest in the work increases. However, the decisive starting point for the Federal Constitutional Court is always that the created work and the intellectual effort embodied in it are the property of the author in the terms of property law. [43] In consequence, the yardstick for the examination of this issue is, and will remain, primarily the guarantee for the right of ownership laid down in the Basic Law. Accordingly, no argument for the permissibility of a limitation can be derived from the fact that an exception has been in force undisputed to date because this alone does not make it a generally recognised 'expression of the social tie of copyright'.[44] Rather, it is necessary for the different goods to be weighed up in each individual case. In this respect, the grounds that should justify the limitation of copyright would have to be all the more weighty, the more a statutory provision touched on the sphere protected by fundamental rights.[45]

1.4.2 Solutions involving the formulation of copyright law

It appears essential to the case law of the Federal Constitutional Court on the rights to immaterial goods that, according to the second sentence of Article 14(1) GG, the legislature may formulate and also limit rights that have been acquired within the scope of its power to define the content and limits of laws. When it comes to the drafting of the legislation, parliament is charged with formulating the goal of a complex balance between a large number of interests. This must be done against the background of a careful analysis of the current parameters for intellectual products, their production and their handling.

The fundamental, radical upheaval of digitisation is also changing patterns of behaviour and expectations with regard to the handling of works and content of all kinds. Furthermore, in the context of the Internet, in particular the Web 2.0, a fundamentally new environment is being created by the close links attributable to the communicative function of the medium and the opportunities it offers to

Entitlement to Remuneration for Musical Works Broadcast in Prisons.

[41] Act on Copyright and Related Rights of 9 September 1965, *Federal Law Gazette I* (*BGBl. I*), p. 1273, most recently amended by the Act of 17 December 2008, *BGBl. I*, p. 2586.

[42] BVerfG, judgement of 29 June 2000 – 1 BvR 825/98, *Neue Juristische Wochenschrift* (*NJW*), 2001, p. 598 (p. 599) – Germania 3.

[43] *BVerfGE*, 31, p. 229 (p. 239), 49, p. 382 (p. 392) – Privileged Use of Books in Schools.

[44] *BVerfGE*, 31, p. 229 (p. 244) – Privileged Use of Books in Schools.

[45] BVerfG, judgement of 25 October 1978 – 1 BvR 352/71, BVerfGE 49, p. 382 (p. 400).

integrate a work's content into a different setting and modify that content. In this respect, the traditional concept of protection in copyright law must not come into conflict with appropriate solutions that realise this balance.

Here, the constitutional perspective also faces the fundamental practical legal problem of the accurate documentation of the circumstances to be assessed. Conceptional adjustments to the copyright system are also required constitutionally where the enforcement of copyrights in the context of the Internet results in disproportionate practices and, in particular, encroaches on users' personal rights.

There is an institutional guarantee for copyright. There are however no concrete constitutional provisions for the introduction of further exceptions from copyright, which is why there are demands for the introduction of more flexible exceptions or a blanket exception, whose proponents cite the constitutional permissibility of these solutions.[46] At the same time, the discussion about the reform of copyright law is seeing claims made that there is a constitutional requirement for authors to be granted further rights of disposal. Generally, the advocates of this approach believe the exceptions are to be interpreted narrowly in the light of authors' constitutional position.

Subject to the upholding of this institutional guarantee, the principle of proportionality and the requirement of clarity and definiteness, the constitutionally protected position of the author must be brought into an equitable balance with the social obligations imposed by intellectual property and the interests of the general public in free access to copyright-protected works when exceptions from copyright are introduced.

On the one hand, therefore, the social obligations imposed by property are cited in calls for as far-reaching as possible a formulation of the exceptions, while on the other hand the German constitution's guarantee for the right of ownership is cited by those who would like to see the exceptions interpreted as narrowly as possible. However, the different political positions have one common denominator: The actual foundation for the exceptions from copyright consists precisely in the social obligations imposed by property.

There is agreement that a narrower interpretation of the exceptions would be just as constitutional as a broader interpretation.

The legislature could extend the exceptions to the benefit of users by defining the acts that were permitted. However, under certain circumstances, this would represent a definition of the content and limits of the law and any provisions adopted would have to satisfy the standards laid down for legislative interventions of this kind.

Where legal changes are necessary, the legislature can certainly remodel individual legal positions, provided it does not touch on the core content of the guarantee for the right of ownership. In so far as this the case, it is not possible to speak of expropriation.

The economic theory of public goods is also brought into play with a view to proportionality, and the balance of authors' and users' interests. As a rule, public goods are defined by the attributes of non-exclusivity and non-rivalry. No one can be excluded from their use and they can be enjoyed by infinite numbers of people without being worn out or depleted. Irrespective of their production costs, the costs of the dissemination of public goods tend towards zero.

These attributes lead to difficulties in the marketing of public goods. In current copyright law, these are countered by the granting of exclusive rights. However, this is only one possible response to the fact that creative works tend to have the character of public goods. For instance, free access to works could also have the consequence of more effective allocation.

To this end, exclusive rights would have to be revoked or limited as a matter of principle or made subject to certain preconditions. Fundamentally, the constitutional protection of property would remain upheld by the obligations to pay remuneration, but an extensive privatisation and monopolisation of property, regarded as it is as imposing particular social

[46] Cf. on this issue the Written Statement by Prof. Thomas Dreier for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-A, p. 3, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_A_-_Stellungnahme_Prof__Dreier.pdf.

obligations, would be limited in the public interest (on the theory of public goods, see section 1.7.2).

1.4.3 Copyright in other jurisdictions[47]

Terms of protection

International

As in Germany, a standard term of protection of 70 years *post mortem auctoris* (*p.m.a.*) applies in the USA, Russia and Australia. Mexico has a term of protection of 100 years *p.m.a.* [48] Canada, China and Japan's legal systems contain provisions for 50-year terms of protection in most instances.[49] Brazil too has a term of protection of 70 years. This is calculated from the end of the first January following the work's first publication. There are proposals for reform in Brazil that would extend the term of protection for authors' personal rights (*direitos patrimoniais*) to the length of the author's life plus 70 years after their death.[50]

Europe

Provisions on terms of protection have been harmonised to a very great extent at the European level. This was done in particular on the basis of the provisions set out in the Copyright Term Directive. [51] States such as Portugal and the Netherlands originally did not allow for any time limit on the protection of an author's '*droit moral*'. This provision, which is comparable to authors' personal rights in Germany, was repealed as a consequence of the harmonisation of European law and replaced with a term of protection of 70 years *p.m.a.* Spain has a period of protection of 80 years *p.m.a.* and therefore possesses the longest standard term of protection in Europe.[52] However, this only applies for works that were created up until 1987 and have been entered in a copyright register. In the mean time, Spain has adjusted its legislation to take account of the European Copyright Term Directive.

Exceptions

A large proportion of the industrialised states limit authors' rights in favour of the general public. Anglo-American legal systems feature the principle of fair use, according to which the holder of a copyright must accept a copyright-relevant, but unauthorised, use of their work under particular conditions (see on this topic, the extensive account in section 1.5). Copying for private purposes has hardly been regulated to date in international agreements. Since these are provisions that serve to balance divergent interests, the scope for action held by the nation states should be left as it is in this field. [53] The international copyright system therefore merely stipulates the application of a three-step test,[54] with which any limitation of this kind must conform.

At the European level, the Information Society Directive[55] contains provisions that spell out precisely how the law should be applied uniformly in Europe. According to the Directive, the Member States of the European Union are permitted to introduce provisions that allow the private use of copyright-protected materials.

Most of the European states have made use of this permission. For instance, France – like Germany – allows private audio and visual copies and has introduced a possible means of compensation in the form of an entitlement to remuneration from the manufacturers and importers of audio media. The level of the remuneration is determined as a flat rate and it is payable irrespective of any harm that is suffered or

[47] The following remarks are based on the account in Hilgers, Hans Anton/Nawarotzky, Klaus: *Einzelfragen zu Entwicklungen im Urheberrecht*, Progress Report, WD 7 – 3000 – 070/11, Research Services of the German Bundestag, 6 May 2011.

[48] Cf. Ladas & Perry LLP: 'Mexico – Copyright Law Amended', online: http://www.ladas.com/BULLETINS/2004/0304Bulletin/Mexico_CopyrightLaw.html.

[49] Cf. The Online Book Page: 'Frequently Asked Questions', online: http://onlinebooks.library.upenn.edu/okbooks.html.

[50] Cf. Brazilian Ministry of Culture: 'Consulta Publica Para Modernização Da Lei De Dereito Autoral', online: http://www.cultura.gov.br/consultadireitoautoral/lei-961098-consolidada/.

[51] Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, *OJ L*, 372/12.

[52] Cf. Walter, Michel/Lewinski, Silke von: *Europäisches Urheberrecht*, 2001, pp. 671ff.

[53] Cf. Ullrich, Jan Nicolaus: 'Clash of Copyrights', *Gewerblicher Rechtsschutz und Urheberrecht/Internationaler Teil* (*GRUR Int*), 2009, p. 283.

[54] Cf. Article 9(2) Berne Convention for the Protection of Literary and Artistic Works and Article 13 Agreement on Trade-Related Aspects of Intellectual Property Rights.

[55] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L*, 167, 22 June 2001, pp. 10-19).

whether such harm is substantiated. The particulars of the obligation to pay remuneration and the payment of the remuneration are stipulated by a commission.[56] Ireland and the UK are alone in not having made full use of this option. For instance, the UK allows just one private copy so that programmes can be watched subsequent to their transmission.[57]

Proposals for reform

On 12 June 2010, the Brazilian government brought forward a bill to amend the country's copyright law. This bill contains proposals for reform that have met with international media interest, even though deficiencies in enforcement continue to be criticised in Brazil.[58] *Inter alia*, the bill features possible sanctions for cases in which uses covered by exceptions are restricted or obstructed. These would be sanctions in civil law that could be imposed if the relevant provisions were contravened.

Apart from this, the proposed reforms have met with a positive echo in so far as they touch on digital rights management (DRM). According to the bill, the deployment of DRM systems should be prohibited if this restricts or obstructs the free use of works, radio and television programmes, and sound recordings that are to be assigned to the public domain. This does not constitute a contravention of Article 11 of the WIPO Copyright Treaty (WCT), which prohibits the circumvention of technical protection measures, because the proposed reforms make use of the limitations and exceptions allowed for special cases by Article 10 WCT. In consequence, the proposed Brazilian reforms contrast with the European and US legislation, which even prohibits the circumvention of DRM on works whose terms of protection have already expired, i.e. that are in the public domain.

At present, proposals for reform that would bring in graduated response are being discussed in a number of European states. This is a procedure based on what is known as the 'three strikes model' that culminates in the suspension of Internet access. A number of states have already introduced graduated response: the UK, New Zealand, France and South Korea. A government bill on this topic is currently going through the legislative process in Finland. Up until now, Ireland has relied on voluntary cooperation between the content industry and providers. Voluntary cooperation has also been discussed in the USA, where the Record Industry Association of America (RIAA) entered into talks on this issue in 2008. However, no reports about the actual experience of these systems have yet been forthcoming from any of these states.

Extended collective licence agreements

The copyright law of the Scandinavian countries features the rights clearance system of extended collective licence agreements. This system makes it possible for collecting societies and other organisations that bundle and negotiate large repertoires of rights (for example trade unions, copyright associations) to conclude binding licence agreements with users on a case-by-case basis on behalf of the right holders they represent. Such collective licence agreements are negotiated on a level playing field. A declaration of general validity, the precise form of which varies from jurisdiction to jurisdiction, is then attached to each agreement. This means it is also allowed to use works by 'outsiders', i.e. authors who are not members of the organisation, under such agreements. To safeguard their exclusive rights, authors nonetheless retain an individual right to prohibit uses that they assert by lodging an objection, with which they can protest against a work's use under the conditions that have been stipulated. However, the experience in the Scandinavian countries is that only a very few authors have taken up the option to object against a work's use. This 'Nordic' solution, which extends the collecting societies' authority so they can administer rights over works that are not represented individually but by type (extended licensing), as for example under Section

[56] Article 31 Act No. 85-660, Article L311-3, 5 French Intellectual Property Code (CPI).

[57] Cf. on this issue Endell, Christoph: *Möglichkeiten, Grenzen und Probleme des Urheberrechts – ein internationaler Vergleich,* Progress Report, WD 10 – 3000 – 153/10, Research Services of the German Bundestag.

[58] Cf. *heise online*: 'Urheberrechtsexperte: Brasilien versucht Ausgleich zwischen Interessen von Urhebern und der Öffentlichkeit', online: http://www.heise.de/newsticker/meldung/urheberrechtsexperte-Brasilien-versucht-Ausgleich-zwischen-Interessen-von-Urhebern-und-der-Oeffentlichkeit-1037185.html; Geist, Michael: 'Brazil's Approach on Anti-Circumvention: Penalties For Hindering Fair Dealing', online: http://www.michaelgeist.ca/content/view/5180/125/.

50(2) Danish Act on Copyright, appears to be favoured by the European Commission for the regulation of the future management of rights over orphan works.

1.5 Exceptions

1.5.1 Overview

Conflicts can arise between protection for creative activities and the interest in free access to information. In the digital society, citizens' need for information is rising in all areas of their lives. It is evident that this cannot mean people should receive free access to the creative output of third parties. It is just as obvious that the interests in access to information may also enjoy (fundamental) legal protection.[59]

In copyright law, this conflict is traditionally resolved by restricting the right to protection with exceptions. Both the guarantee for the right of ownership in Article 14(2) GG and the guarantee for freedom of information in Article 5(2) GG are subject to exceptions. As a matter of course, the exceptions from both these fundamental rights are to be interpreted in the context of the doctrine that laws that limit fundamental rights have to be viewed and interpreted in the light of the constitutional guarantees for other fundamental rights.[60/61]

Uses under the exceptions provided for in Article 14 GG do not require authorisation in principle, but are generally subject to the obligation to pay remuneration.[62] Exceptions make it easier to access copyright-protected works. One option that is often equivalent to the exceptions but can also supplement them as a means of broadening access is the introduction of collective rights management systems that allow large repertoires of content to be bundled and open up access to licences for all.

The catalogue of permissible exceptions from the right to reproduce, the right to disseminate and the right to make available to the public on demand is enumerated conclusively in Article 5 of the Information Society Directive.[63] In this respect, the specific feature of this catalogue that is also relevant to policymaking is that it does not oblige Member States to make use of these exceptions. If a Member State does apply them, however, the fundamental principles mentioned in the Directive are binding (for example, under Article 5(2b) Information Society Directive it is significant whether technical protection measures have been deployed when remuneration levels are being calculated).

Steps to increase the flexibility of the existing exceptions, in terms of both their range and their concrete formulation, would be possible within the parameters prescribed by European law. As a rule, however, the introduction of new exceptions will require prior amendments to fundamental aspects of EU law.

From the users' point of view, the current system of exceptions is usually felt to be as too narrow and ponderous. This applies above all with regard to the exhaustive character of the catalogue of exceptions in the Directive, parts of which were formulated against the background of analogue uses of works. In the mean time, a very great deal more is technically possible than is permissible under copyright law, leading to a perception that the German copyright system is failing to reflect technological progress. In the fields of education, academia and research, in

[59] Cf. Lüft, Stefan, in: Wandtke, Artur-Axel/Bullinger, Winfried (eds.): *Praxiskommentar zum Urheberrecht*, 3rd edition, 2009, '§§ 44aff.', preliminary remarks, para. 1: 'Since exceptions are sometimes used to take account of particular, constitutionally protected positions, it is necessary to bear those interests protected by the exceptions in mind, as well as the author's interests when it comes to their interpretation. In the individual case, this can result in an interpretation guided by the exact wording having to give way to a more generous interpretation that takes account of the general public's interest in information or use.' In so far as this is the case, reference is made to: BGH, judgement of 11 July 2002 – I ZR 255/00, *GRUR*, 2002, p. 963 – Electronic Press Digest; BVerfG, *NJW*, 2001, p. 598 – Germania 3; BGH, judgement of 20 March 2003 – I ZR 117/00, *GRUR*, 2003, p. 956 – Gies's Bundestag Eagle.

[60] Cf. Schemmer, Franz, in: Epping, Volker/Hillgruber, Christian (eds.): *Beck'scher Online-Kommentar*, 'Artikel 5', preliminary remarks.

[61] The Left Party parliamentary group voted against the text drafted for these two sentences and delivered a dissenting opinion (see section 5.1).

[62] For example, the exception for quotations in Section 51 UrhG is not formulated in such a way that it entails an obligation to pay remuneration. Sections 44a, 45, 47, 48, 50 UrhG and some other clauses also contain remuneration-free exceptions.

[63] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L*, 167/10, 22 June 2001).

particular, communication is taking place under massively changed conditions. Some intermediaries, such as broadcasting corporations, say their activities are being constrained by inadequate licensing models and excessively narrow exceptions. Considerable effort is required to clear rights, especially in the online sector, which impedes short-term exploitation, especially, so causing particular difficulties for private individuals.

Current copyright law has applied provisions designed for the analogue world to the digital world. In this respect the specific characteristics of digital technology have been taken into consideration where this has led to a strengthening of the right holders' position (introduction of a right to make available to the public; definition of reproduction so that even the momentary saving of content, regardless of the form in which this takes place, falls under this term). It has retained the previously existing analogue exceptions and to this extent taken users' interests into consideration as well. However, it has not as yet been examined whether these exceptions still fulfil their purpose adequately in the digital age and in particular whether they do so for uses on the Internet.[64]

1.5.2 Non-commercial, private adaptation

Increasing digitisation and worldwide networking are 'lowering the threshold for the production and distribution of content [...]. They are therefore "democratising" the creation of works and the ways in which they are disseminated to their audiences. Against this background, it is professional intermediaries who engage in the embodiment of content (for instance, book publishers, phonogram producers, film and video producers) who are experiencing the greatest structural changes because the value of their services may be appreciated and they may be used, but they are no longer required in all circumstances and for every kind of content. Some users of works are changing their role because the use of a work is often a prelude to the production of their own content. This is expressed in the concept of the "prosumer". At the same time, there are forms of use on the Internet that may involve the arrogation of copyright powers, but do not enter into economic competition with professional intermediary services in the true meaning of the phrase, for instance because they only serve social communication (e.g. the inclusion of protected content in users' own videos, the parodying of original videos by the addition of new sound tracks or altering of sequences of images, including "fan videos"). These uses are of a private nature and at most indirectly commercial (for the platform operators). Nevertheless, they are covered indiscriminately by current copyright law because, as a rule, they do not reach the threshold for free use (Section 24 UrhG).'[65] When it comes to the publication of a new work in a collaged form, the permission of a holder of related rights usually has to be obtained as well as the author's permission.

As the European Commission notes in its *Green Paper: Copyright in the Knowledge Economy*, [66] the Information Society Directive has not hitherto contained an exception that would allow the use of copyright-protected works for the purpose of creating 'new or derivative works'. Furthermore, as the European Commission remarks, the 'obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated.'[67]

In this field, there is discussion of the introduction of exceptions from copyright for user-generated content that would allow the private production of derivative works by users and link this to an obligation to pay remuneration. Such an exception has previously been considered at the European level, [68] but not pursued further. In practice, such uses only occur moderately

[64] Cf. on this issue the Written Statement by Prof. Dr Karl-Nikolaus Peifer for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-D, p. 10, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_D-_Stellungnahme_Prof__Peifer.pdf.

[65] Ibid., pp. 6f.

[66] European Commission: *Green Paper: Copyright in the Knowledge Economy*, COM(2008) 466 final, online: http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf.

[67] Cf. also on the necessity of such an exemption: Grassmuck, Volker: *re-mi-x-erogra-philist-er-kenntnisse*, 2011, pp. 199ff.; Hilty, Reto M.: *Sündenbock Urheberrecht?*, 2007, pp. 107ff.

[68] European Commission: *Green Paper: Copyright in the Knowledge Economy*, COM (2008) 466/3, online: http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf.

frequently. There is some evidence to suggest that even the industry they affect does not regard them as a serious threat, provided they are conceived in such a way that they only encompass the forms of adaptation and making available to the public that have been mentioned. However, an exception of this kind could only be enforced with difficulty at the level of European copyright law because it is not provided for in the 2001 Information Society Directive, which includes an exhaustive catalogue of exceptions from copyright or authorisation-free uses.

Steps to make this exception more flexible are being discussed at the European level too, but there is no prospect of the Directive being amended at present.

However, a proposal in this direction met with lively interest on the Study Commission's online participation platform. Above all during the phase prior to the official voting (on the experience with the participation instrument, see chapter 6), strong approval became apparent for a concrete legislative proposal that would amend the provisions on 'free use' in the German Copyright Act accordingly. The current Section 24 UrhG allows an independent work that has been 'created in the free use of the work of another person' to be published and exploited without the permission of the original author of the work being required. It has been suggested on the Study Commission's online participation platform that this arrangement be supplemented with provisions that would exempt unremunerated use for non-commercial purposes as a matter of principle. When this proposal was discussed, however, it was also controversial whether such a provision should only relate to creative uses (remixes, mash-ups) or whether a solution should be sought that would allow any non-commercial use. The project group's deliberations failed to arrive at a clear conclusion as far as this issue is concerned.

1.5.3 The exception for academic uses

In the analogue age, the interests of education, academia and research were protected, above all, by the privileged cases in which copying is permitted that are laid down in Section 53 UrhG. In the digital age, it should be possible for academic literature to be supplied rapidly and directly. However, the exceptions for this channel introduced in Sections 52a, 52b and 53a UrhG relate to quite specific kinds of use, which overwhelmingly has the consequence that the services on offer are only attractive to a limited extent from the users' point of view. The vacuum is only partly compensated for by pay portals. However, German libraries and universities have complained of excessively high costs, obligations to accept bundled products, restrictive licence provisions for campus-wide or off-campus access and the abrupt loss of access to content when contracts are terminated. From an academic perspective, the supply of literature in Germany is therefore still failing to live up to the possibilities of the technology or attain the standards expected around the world for academic communication. The publishers of academic media have put up considerable resistance against any extension of the exceptions from copyright. This resistance can be questioned in some respects, for instance where an academic author is refused the option to make essays and short papers accessible on their own or a university website. The narrow restrictions on the exceptions for making accessible content in research networks are felt to make them inadequate for academic cooperation. The wording of Section 52a UrhG, which will also expire on 31 December 2012 unless it is extended (once again), is too narrowly formulated in its current version from the perspective of the education, academic and research communities. Furthermore, other demands have been made for it to be examined how the exception laid down in Section 52 UrhG, which was already in place in the analogue age, can be revised for the operation of modern lecture theatres. At the Public Hearing of the Study Commission on the Development of Copyright in the Digital Society, it was emphasised that no remuneration has as yet been paid since the exception was introduced in 2002.[69]

Since the extant exceptions – which relate to education, academic work and research – were also viewed as inadequate during the

[69] Cf. on this topic the Written Statement by Ronald Schild for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)011-D, p. 4, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_011_-_Stellungnahme_Dt__B__rsenverein.pdf.

deliberations on the second basket of the revision of copyright law, the Committee on Education, Research and Technology Assessment of the German Bundestag demanded a third basket to deal with the concerns of education, academia and research when the legislation came to be adopted.[70] In line with the ideas put forward by academic organisations such as the Coalition for Action Copyright for Education and Research and the Alliance of German Science Organisations, copyright law should contain a comprehensive exception for academic purposes. The Committee on Education, Research and Technology Assessment is of the opinion that, apart from steps to make the existing exceptions more flexible, it should be examined, in particular, how the third basket could be used to anchor in German law the principle that users' should have free and free-of-charge access to knowledge produced with public resources (open access) as standard – something that is now being called for ever more insistently at the international level. Furthermore – as also demanded by the Bundesrat[71] – it should be examined whether a right of second exploitation could be granted to authors of academic papers that have mainly been written in the course of teaching and research activities financed with public resources.

In addition to this, it is being discussed whether a general right of second exploitation for authors of academic papers should be introduced by formulating the current provisions laid down in Section 38 UrhG as inalienable. Non-compliant contractual agreements would therefore be null and void. The problem is that the standard case under the current legislation, in which the author retains their right of second exploitation, is a special case in practice. On the whole, publishing houses only publish works if they are granted exclusive rights of use. Since academic reputations frequently depend on publications in particular periodicals, authors find themselves in a weak negotiating position in their contractual negotiations. Academic publishers exploit this competitive advantage. In the fields of science, technology and medicine, in particular, it is apparent that certain publishing houses market their periodicals at inappropriately high prices. The Alliance of German Science Organisations is therefore demanding a binding right of second exploitation, partly so that when public funding has been provided the public sector does not have to finance the use of the research results all over again by purchasing the articles for libraries.[72] At the same time, instead of an inalienable right of second exploitation, a solution could also be found in cartel law, or even realised by placing conditions on funding or providing libraries with better financial resources.

1.5.4 The system of exceptions/fair use

There is discussion of the possibility that the above-mentioned problems with exceptions could be resolved by blanket-style provisions that correspond to the US fair use clause. The fair use doctrine finds application in cases where users' rights and copyrights are weighed up against each other. While the German system of exceptions, which has been developed with the objective of an equitable balance of interests, is sometimes viewed as inflexible and rigid, the examination of fair use principles in court decisions should take more account of actual circumstances.

The fair use doctrine, which is regulated in Section 107 of the US Copyright Act,[73] is concerned with 'fair' uses, in particular in the non-commercial field, and creative (transformative) uses of works. In this respect, the most important criterion is whether the author of a work used under the fair use clause finds this use detracts from the economic exploitation of their work. As a rule, satirical, parodic and other free adaptations are also covered by fair use.

It should be borne in mind in this connection that the case law on fair use

[70] Cf. on this topic the Recommendation for a Decision and Report of the Committee on Legal Affairs of the German Bundestag of 4 July 2007, Bundestag Printed Paper 16/5939, pp. 26f.

[71] Cf. Bundesrat: Recommendations of the Committee on Legal Affairs (R) as the lead committee and the Committee on Cultural Affairs (K) on the Second Act Governing Copyright in the Information Society of 21 September 2007, Bundesrat Printed Paper 582/1/07, p. 4.

[72] Alliance of German Science Organisations: *Neuregelungen des Urheberrechts*, online: http://www.allianz-initiative.de/fileadmin/user_upload/Allianz_Desiderate_UrhG.pdf.

[73] US Copyright Office: 'Copyright Law of the United States of America', online: http://www.copyright.gov/title17/.

does not contain an exhaustive catalogue of criteria that has been developed by judgements on individual cases, as is usually typical of legal precedents. The fair use system was recently picked out as a best practice model in a study by the non-profit organisation Consumers International.[74]

From a theoretical legal perspective, this approach could only be applied to the dogma of German copyright law to a limited extent:[75]

1. For instance, the replacement of the whole catalogue of exceptions with a single blanket clause, as required by the fair use doctrine, would probably be impermissible in European law.
2. The addition of more flexible fair use elements to individual exceptions (the redrafting of Section 51 UrhG, for example) might fail to achieve its aim as well if completely novel methods of exploitation also continued not to be covered by the catalogue of exceptions. Examples of new forms of exploitation are mass digitisation and the renewed exploitation of out-of-print works.
3. After all, fair use principles could still be integrated into the existing catalogue of exceptions in legal practice by means of a blanket clause, as a result of which fair use would function as a default rule alongside the concrete exceptions.

At first glance, the US regime appears more liberal than the European system. For instance, most remixes and mash-ups published by Internet users on YouTube are legal in the USA while they are not covered by an exception in Germany. An essential area of the Web 2.0, non-commercial participation in creative activities by amateurs, is therefore criminalised far less in the USA than in Germany.

Nonetheless, there is agreement that blanket clauses always pose a danger of legal uncertainty: Where there is doubt, it would have to be contested in court where fair use begins and ends. The judicial clarification of the scope of fair use not only incurs high costs that, under certain circumstances, may be incalculable for the parties involved, it can also drag on for several years. However, the exceptions' scope of application is not immune to disputes in the courts either. Usually, however, exceptions enshrined in writing deliver greater legal certainty than open blanket clauses.

For instance, the argument about the Google Books search engine has shown that even just processing scanned texts for full text searches is anything but uncontroversial. US writers and publishers' organisations took legal action against the search machine company Google in response to the industrial-scale scanning of works for this full text searching facility, which was not supposed to display anything more than small 'snippets'. Google argued against this that scanning texts just so they could be searched had to be recognised as fair use: As long as merely a few lines of protected texts were displayed in the form of snippets, this would not amount to competition with the market for printed books.

It is therefore uncertain which areas can be 'reliably categorised as falling under the fair use exception'. 'Fair use will remain a blunt sword if no one knows how much such a right of access conveys in the individual case.'[76]

Quite regardless of whether fair use can resolve these problems, it remains to be noted that the current system of exceptions from copyright is coming under pressure due to the pace of development, especially on the Internet.

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[74] This system earned the USA a particularly positive assessment of its copyright regime because its soft exceptions initially permit the issues to be weighed up before a decision is taken about whether a more generous interpretation should be preferred in the individual case. The system is described as innovation-friendly because no new method of use or technology is prohibited just because it is not included in the catalogue of exceptions. Rather, it is only not permitted if it cannot be categorised as 'fair'. Cf. on this topic Consumers International: *IP Watchlist 2010*, p. 5, online: http://a2knetwork.org/consumers-international-ip-watchlist-report-2010.

[75] Examples from: Förster, Achim: *Fair Use*, 2008, pp. 213ff.

[76] Cf. on this topic the Written Statement by Prof. Dr Karl-Nikolaus Peifer for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-D, p. 20, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_D-_Stellungnahme_Prof__Peifer.pdf.

1.5.5 Technology-proofing of exceptions

The playing field is not level when it comes to the deployment of digital protection measures, which can also raise questions about the perception of the exceptions from copyright. The impacts of this legal situation are somewhat mitigated by the fact that an excessively constrictive system of technical protection would destroy acceptance among users. In turn, this is not in the interests of those who wish to deploy technical protection systems, so they choose not to activate them.

Should technical control of access to content become the standard in future (as part of a 'trend towards streaming'), it will have to be examined what can be done to ensure the exceptions – including exceptions that may be created in future – do not become ineffective.

Several models for DRM measures with very widely varying levels of practicality have been implemented. The current, state-of-the-art technical protective features employed by the various approaches encompass software identifiers and hardware authentication, which are combined with access management and various rights models, including associated options for use (for example, a right to communicate, a right to copy, communicate and lend, a right to modify content).

1.5.6 Private copying

Overview

When magnetic audio tapes and cassette recorders arrived on the market in the 1950s, it became possible for private individuals too to reproduce musical works for the first time. New forms of use that are not amenable to control by right holders are being developed in the private sphere.

Since a prohibition on the production of private copies could not have been enforced, the legislature decided to resort to a pragmatic solution and introduced a form of flat rate remuneration for the first time. The copyright legislation adopted in 1965 took account of the growing demand for recording devices by creating the institution of the 'authorisation-free private copy', at the same time promising authors an entitlement to remuneration. This has made reproduction for private and other personal uses (Section 53 UrhG) possible without authorisation having to be obtained in advance.

Since then, right holders have been compensated with a form of flat rate remuneration that is obtained by imposing levies on particular devices, blank media and storage devices that can be used for reproduction. They include, for instance, photocopiers, fax machines, scanners, printers, computers, and cassettes, blank CDs, memory cards and USB sticks.

The adoption of these provisions opened up a free, private space for the use of cultural goods, which has promoted the general flow of information while protecting authors' interests.

Since the exception for private copying actually recognised, and legally safeguarded, most forms in which knowledge is used as legitimate, the majority of citizens in Germany have hardly even been aware they have been coming into contact with copyright law for several decades. At the same time, the provisions on private copying have proved so flexible that it has been possible for them to be applied to all new generations of devices without problem.

The question is whether, and to what extent, the private sphere, to which the provisions on private copying relate, has changed with the passing of time. Are friends on the social network Facebook who someone has probably never seen in real life also to be regarded as private associates? By analogy to an earlier decision of the Federal Court of Justice concerning analogue copies,[77] an upper limit of seven copies per work and legal user for non-commercial communication is accepted for practical purposes. The focus on a number of copies has the advantage of clarity and tends to distance the legislation from the idea of a particular sphere in which infringements should certainly not be prosecuted. It can therefore not release anyone from the obligation to clarify what is viewed as a private purpose. The changes in the private sphere may entail the need for the private copying provisions to be adjusted. However, this would also hold the danger that the author's control of their rights and the commercial utilisation of these works might suffer. A solution will only be

[77] BGH, judgement of 14 April 1978 – I ZR 111/76, *GRUR*, 1978, p. 474 – Duplications.

possible if agreement has been reached on the precise purpose of the exception for private copying and it has been defined from the starting point of what should be privileged as private use in future.

The problem

Section 53(1) UrhG, which governs private copying, has now been amended several times. However, the stable legal situation it was hoped this would create has not come about. A fair solution will only be found in this field if the problems in relation to the enforcement of rights and remuneration models are resolved in ways that are satisfactory for authors as well.

There is no explicit right to make private copies in German copyright law. Copying 'for private and other personal uses' is tolerated because the author receives remuneration that is distributed via the collecting societies. The ability to produce private copies is not judicially enforceable.

All the provisions on private and other copying laid down in the most recent version of Section 53 UrhG have been highly controversial. They extend over one-and-a-half pages and can only be understood with difficulty, even by specialist lawyers. (For example: 'This shall apply in the cases referred to under the first sentence, numbers 3 and 4, only if in addition one of the conditions under the second sentence, numbers 1 or 2 pertains.')

Hitherto, the legislature has responded to the new possibilities of private reproduction with an exception for private copying. When copyright law was revised under the first basket,[78] the private copying provisions were restricted so that from this point on models could only be reproduced if they had not been 'obviously unlawfully produced'. Under the second basket, [79] models that had been 'made available to the public' (files published on the Internet, for instance) were also removed from the scope of private copying if the way they were made available was 'obviously unlawful'.[80]

In practice, these provisions may lead to considerable problems because in many cases laypeople are unable to judge whether a particular file has been made available to the public lawfully or unlawfully. To do this, they would have to judge legal relationships, i.e. familiarise themselves with the author's contract with the provider. In fact, many newspaper publishing companies offer texts by their writers on the Internet without having acquired the requisite rights over them. Conversely, files frequently circulate on filesharing sites that have been posted there by the authors themselves and may consequently be copied quite legally. The prevailing situation is therefore one of great legal uncertainty. There are various approaches that could be taken in order to guarantee legal certainty: expanding the scope of private copying again, restricting it further or even abolishing it.

With the introduction of Section 95a UrhG, the German Bundestag introduced a prohibition on the circumvention of technical measures and therefore limited the scope of private copying. On account of the provisions set out in Section 95a UrhG, digital works that have copy protection attached to them can no longer be copied, which is why the possibility of private copying is *de facto* of no consequence for many digital media. Article 6 Information Society Directive was transposed by Section 95a UrhG. Another approach to the restriction of private copying is the demand from rights exploiters for intelligent recording software to be banned because this technology, which was completely unknown at the time the rules on private copying were introduced, has the potential to make private copies available to circles of people larger than those found in the analogue age. 'Intelligent recording software' denotes computer programs that search the Internet automatically for pieces of music that are freely available quite legally and save copies of them on the user's hard drive. As a rule, the copy that is produced therefore falls under the private copying provisions. In the opinion of many right holders, uses of this kind are no longer compatible with the purpose of an exception that dates from the analogue age, and such uses would also be impermissible if a three-step test were to be applied. Right holders criticise that providers of such services earn a great deal of money without giving them an appropriate share in the proceeds.

In recent times, more and more voices have been seeking to restrict as far as possible the options for the use of the cultural heritage that has been made available to the

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[78] Act Governing Copyright in the Information Society, *BGBl. I*, 2003, p. 1174.

[79] Second Act Governing Copyright in the Information Society, *BGBl. I*, 2007, p. 2513.

[80] Cf. Section 53(1) UrhG.

public, for instance by the Europeana European digital library. One proposal has been put forward that would allow simple searches in databases of such works but prohibit from the outset the possibility of the works newly made available in this way being copied for private purposes or require the providers who offered this to design it as a charging service. This too would mean a further restriction of the possibility of private copying.

The technology industry argues against this standpoint that digital progress represents an enrichment for all concerned, in particular for Germany as a location for high-tech companies, and that it should be a matter of course for everyone to have a stake in these developments. According to this view, intelligent programs that merely make it more convenient for consumers to produce private copies should continue to be allowed. By contrast, bans on technology would damage Germany's reputation as a place to do business.

Another area where the scale and limits of the private copying provisions can be discussed afresh is the increasing popularity of the share hosters that are used to exchange digital media and protected content. While peer-to-peer networks made reciprocal uploading and downloading possible, share hosters today provide central storage capacities, allowing users to store content away from their own computers and download it onto mobile devices from this central storage location. Such services are also used to communicate large quantities of data. Instead of attaching massive files to an email, the sender simply forwards the Internet address (URL) for the files once they have be been uploaded, with access data if necessary, allowing the recipient to download them from this address. Thanks to cloud computing and the rising technical capabilities of mobile end devices, it may also be possible to dispense with built-in memories in stationary hardware. As in the case of intelligent recording software, it is necessary to discuss here the extent to which uses of share hosters should be covered by the privileged treatment of private copying or whether they are already too far removed from the private recording that was originally granted privileged treatment. Generally, as far as share hosters are concerned, the question arises of the point at which technological developments will require the scope of private copying to be discussed once again in a thoroughgoing fashion. Some examples of developments of this nature can be given: the increases in the speed of copying and the volumes that can be copied achieved by digitisation; the way these procedures have been made more convenient by the simplified production of copies; and the way the options for outsourcing to external storage devices/hosters/'cloud' servers have made it attractive to store multiple private copies of a work. It is accordingly argued, on the one hand, that tightening up copyright law would not be expedient because the core problem of the commercial provision of copyright-protected content cannot be resolved in this way without appropriate use licences. On the other hand, it is asserted that clearer provisions on private copying or even the abolition of this special exception would result in less content being made available illegally on such hosters.

Private copying also encompasses the production of copies for personal use by third parties. In this connection, figures in the creative industries are discussing whether an online provider that offers to produce copies for private purposes as a service should be exempted from the scope of private copying. Here, parliament therefore faces the question of whether there is any need for legislative action.

1.6 Questions about terms of protection[81]

Copyright law grants the holders of rights over works protection that is only in place for a limited period. With the reform of copyright law in 1964, the term of protection was extended to 70 years from the death of the author.

The background to the setting of the standard period of protection laid down in Section 64 UrhG at 70 years *post mortem auctoris* was the assumption that close relatives of the author are still alive and enjoy rights over extant works up until this point in time.[82]

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[81] The Left Party parliamentary group and the expert member Constanze Kurz voted against the text drafted for this section and delivered a dissenting opinion (see section 5.2). The expert member Alvar Freude endorses this dissenting opinion – in addition to the majority opinion.

[82] Cf. Lüft, Stefan, in: Wandtke, Artur-Axel/Bullinger, Winfried (eds.): *Praxiskommentar zum Urheberrecht*, 3rd edition, 2009, '§ 64', para. 1.

However, terms of copyright and related rights are now regulated EU-wide, which considerably constrains the German legislature's room for manoeuvre to extend or shorten terms of protection.[83]

It is to be borne in mind, for instance, that the current provisions on periods of protection in the Copyright Act are based on the Copyright Term Directive, the provisions of which are binding.

In their proposal for a directive, the European Commission and the European Parliament Committee on Legal Affairs argued for the full harmonisation of terms of protection for related rights at 70 years.[84]

Terms of protection provide the basis for temporary monopolies on the exploitation of works. In view of their duration, they are important instruments for the establishment of a balance between the interests of authors, rights exploiters, users and the general public. This means that two or three generations after an author's death their work still cannot be made available to the general public unless the right holders grant their consent. 'When it comes to the highly personal copyright, the legitimating connection of the right with the original creator of the work becomes ever looser after the death of the author as time passes, and this also applies with regard to rights of exploitation, which could not be detached from the relationship to the author with the aim of making them completely free-standing. [...] The more generations are entitled to protection, the more their relationship to the author weakens, the larger the number of right holders becomes and the more the continued duration of the protection loses its inherent justification.'[85] By contrast, the argument put forward by proponents of the immaterial goods doctrine is focussed on the interests of the general public: 'In this view, the interest of the general public in the use of the intellectual good that has been created outweighs the interests of the right holder or their heirs in the economic use of their intellectual property, at least once a certain period of time has passed."[86]

This situation is particularly awkward for archives and libraries, which increasingly find themselves working in grey areas when they digitise works and wish to make them available to the general public.

Archives and libraries face a major challenge when it comes to the digitisation of their archive material: In order to make their digitised materials available to the public, they require permission from the authors and often have to do genuine detective work to identify authors' legal successors for this purpose because some terms of protection stretch a long way back in time. If the terms of protection were shorter, more material could be made available in the public domain. Until then, archives and libraries may digitise their holdings in accordance with the second point of Section 53(2) UrhG, but not exhibit them without authorisation from the authors or an arrangement on orphan works (for an extensive account of this topic, see section 3.3).

Apart from this, the current copyright system is shaped by the existence of parallel copyrights and related rights, which in themselves are characterised by relatively long terms of protection and can find application cumulatively.

The periods of protection for these two protective instruments are of differing lengths and also formulated in contrasting terms. For instance, the period of protection for copyright is defined by reference to the death of the author and extends beyond it. By contrast to this, the period of protection for related rights begins as of the first performance or first appearance. Under certain circumstances,

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[83] Cf. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and related rights (*OJ L*, 372, 27 December 2006, pp. 12-18).

[84] Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM(2008) 464 final, online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT.
However, see also the Position of the European Parliament adopted at first reading on 23 April 2009 with a view to the adoption of Directive 2009/.../EC of the European Parliament and of the Council amending Directive 2006/116/EC on the term of protection of copyright and related rights, which provides for an extension of the period of protection for fixations of performances and phonograms to 70 years after the relevant event that marks the beginning of the term of protection, instead of the 95 years that had initially been proposed, online: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0282+0+DOC+XML+V0//EN.

[85] Fechner, Frank: *Geistiges Eigentum und Verfassung*, 1999, p. 399.

[86] Ibid., p. 401.

new related rights can even be established many years after the author's death and then have validity well beyond the term of copyright protection. Related rights can accordingly open up additional sources of revenue, but at the same time they can also delay the moment when works enter the public domain. Apart from the standardisation of the period of protection, more fundamental adjustments are therefore being discussed as well. For instance, there are proposals with various motivations for related rights to be expanded and terms of protection extended. There are differing views as to the potential impacts of these proposals. On the one hand, shorter terms of protection are expected to deliver more lively competition between intermediaries and broader provision of cultural goods. [87] On the other hand, shortened periods of protection could increase the risks to entrepreneurs. This might also lead to a loss of diversity and a decline in the quality of cultural goods.[88]

As a result of this, rights exploiters would not be able to rely on a period of time for which they were assured control of each work, but would find themselves in direct competition with other rights exploiters. Competition would increase the incentives for rights exploiters to constantly optimise the services they provide, satisfy demand more rapidly and comprehensively, and offer authors and customers greater service. Furthermore, the viability of the market might therefore be strengthened by shorter time limits.

1.7 New approaches to regulation in copyright law

At present, the policymaking and specialist communities are arguing at a very fundamental level about the question of whether and, where applicable, how the law of immaterial goods needs to be modified conceptionally in order to meet the challenges of the knowledge society. This debate is closely connected with the question of whether the attachment of copyright to the creator continues to be appropriate or a concept oriented more towards the balancing of different interests would appear preferable (on the concept of intellectual property, see section 1.3).

One reason for these proposals is that some have observed a loss of acceptance of copyright and even conclude from this that it is going through a crisis of legitimacy.[89] Others do not see these acceptance problems or emphasise that it has to be a matter for policymakers to restore acceptance. Against this background (but by no means always with the aims of the law of immaterial goods in mind), conceptional changes have been proposed at different levels. Some important examples are discussed below.

1.7.1 Approaches to the modification of the fundamental conception of the law of immaterial goods

Starting from the observation that, in view of the changes in the production of creative goods, a conception originally intended to apply to artistic creations is becoming ever more relevant to technical and functional forms of work as well, academic discussions have come to the conclusion that intellectual and material protection should be distinguished to a greater extent. [90] In the field of material protection, at any rate, such a conception would be associated with a tendency towards a shift in perspective from the protection of the author to the protection of the product.

In parallel to this, there are proposals for the law of immaterial goods to be amended so that the interest in the use of a work is taken into account as an independent interest – or even one equivalent to the interest in the protection of the creator.[91]

It is argued against these proposals that their advocates fail to provide evidence for the structural changes in the production of creative goods that would justify conceptual modifications. Furthermore, it is noted that a loss of acceptance is not to be observed. This means parties that infringe copyright frequently accept the legal

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[87] Höffner, Eckhard: *Geschichte und Wesen des Urheberrechts*, 2010.

[88] Cf. on this topic the statement of reasons in Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and related rights (*OJ L*, 372, 27 December 2006, Recital 11).

[89] Cf. Lehmann, Michael: *Die Krise des Urheberrechts in der digitalen Welt*, 2009, pp. 167ff., and Hansen, Gerd: *Das Urheberrecht in der Legitimationskrise*, 2010, pp. 56ff.

[90] Cf. Kreutzer, Till: *Das Modell des deutschen Urheberrechts und Regelungsalternativen*, 2008.

[91] Cf. Steffen, Till: *Nutzerorientiertes Urheberrecht – Diskussionspapier*, 12 March 2010, online: http://www.hamburg.de/contentblob/2164816/data/2010-03-12-jb-urheberrecht-diskussionspapier.pdf.

situation, but nevertheless act self-interestedly and not in line with the law.[92]

Proposals that would require copyright law to be differentiated to a greater extent for different types of work and the interests linked with them point in a similar direction. In academic terms, this is being discussed as ‘modularisation’ or ‘tailor-made copyright’.[93]

De facto, the German law of immaterial goods already contains tailor-made solutions of this kind. For instance, there are protective rights specific to particular fields defined in the form of individual related rights and a list of individual exceptions from copyright that are restricted tightly in substantive terms. The proposals that have been made, by publishers for instance, for new legislation on related rights that would apply specifically to press products, would extend this spectrum.

Furthermore, it is to be observed that the ‘public sphere’ has changed with the arrival of Internet communication – a fact that is of relevance for other areas of law as well. For example, if a user posts a photograph of their favourite star on their profile page in a social network, they are committing an infringement of copyright when they do so. Under current law, they would have to purchase the picture rights from the photographer, provided their profile is accessible to more than just a small number of personal acquaintances. In other words, the profile is regarded as public in this case, even though the individual user may well feel this to be a purely private matter. While it is also possible on the one hand to note that the Internet has created a new form of public sphere, which exists in parallel to the ‘old’ public sphere of the mass media, on the other hand this sphere has simultaneously become starkly differentiated. Similar to the process that *Jürgen Habermas* once described as the ‘structural transformation of the public sphere’,[94] new subdivisions of the public sphere have taken shape on the Internet, which are felt subjectively to be private, but are still to be assigned to the public realm in legal terms. The law has therefore failed to keep pace with this new structural transformation.

This leads to considerable problems. From the perspective of right holders, the publication of copyright-protected material in these new, semi-private public spaces represents a multiple infringement of their rights. They make the point, for instance, that hundreds of contacts in social networks are not to be assigned to the private sphere, even if they are called ‘friends’. The opponents of this view argue that such ‘private publics’ nonetheless also have to be distinguished from the old public sphere of the mass media from a copyright point of view, something the law has hitherto not yet been in a position to do. The balance between right holders’ interests in protection and users’ interests in access must be formulated differently for such new types of public sphere.

This is closely connected with suggestions that copyright legislation for the digital society that would be appropriate to contemporary circumstances would have to distinguish more sharply between commercial and non-commercial uses. While the difference between private and commercial activities is extremely relevant in other areas of law, copyright law by and large only differentiates between the private and the public. This no longer does justice to users’ actual habits. Furthermore, the notional or actual harm suffered by right holders can hardly be estimated meaningfully without such differentiation.

1.7.2 Information goods and the theory of public goods

In view of technological developments such as digitisation and the Internet, there is a need for debate about alternative interpretive frameworks and concepts, as well as the requirements of regulation in the information society. One fundamentally new approach to regulation discusses the use of information and creations against the background of the theory of public goods.

The criticisms that are articulated centre around the dilemma that exclusive rights, which are a precondition for the marketing of information goods, simultaneously lead to the systematic underuse of those goods, because a smaller number of users gain access to information goods than would be possible if the costs remained the same.

[92] Cf. OECD: *Piracy of Digital Content: Pre-Publication Version*, 2009, para. 148ff.

[93] Cf. Grosheide, Frederik Willem: *Auteursrecht op maat*, 1986.

[94] Habermas, Jürgen: *The Structural Transformation of the Public Sphere*, trans. Burger, Thomas with the assistance of Lawrence, Frederick, 1989.

The concept of public goods originally goes back to a discussion about the financing of certain types of goods out of taxation. The question was whether goods display intrinsic attributes that predestine them for either public or private provision. Goods the market will only bring forth to an insufficient extent, if at all, are accordingly public. Clean air, school education, national defence and even lighthouses are regarded as classic examples.

As a rule, public goods are defined by two attributes. Their central characteristic is what is known as non-rivalry. In contrast to physical objects such as foodstuffs, cultural works such as poems, mathematical formulas and melodies are enjoyed by infinite numbers of people without being worn out or depleted. However, any reproduction or other exploitation results in the loss of a certain amount of exclusivity and reduces the demand for these goods.

Economists express this particular aspect of non-rivalry in terms of marginal costs. Irrespective of how time-consuming and expensive it may be to build a lighthouse, write a novel or develop a mathematical formula, the costs for the subsequent dissemination of a public good, such as digital content, tend towards zero. This is evident, for example, in the manufacturing and marginal costs of medications. The development, testing and licensing of pharmaceutical products are increasingly capital-intensive and cost hundreds of millions of euros on average. In comparison to this, the reproduction costs of a medication are vanishingly small once it has been approved. On the one hand, there are therefore calls for compulsory licenses in order that as many patients as possible can profit from these products. On the other hand, the pharmaceutical industry, which conducts research into new preparations, criticises that such calls fail to take account of the need to recoup costs and ultimately create incentives for further research activities.

A second attribute of public goods that is less easy to express in concrete terms is their non-excludability. No one can be excluded from the benefits of a firework, the ozone layer or indeed the aforementioned lighthouse, regardless whether or not they have helped to meet the costs incurred in these goods' creation. Public goods are therefore suspected of generating free-rider effects: Why pay for something that is to be enjoyed for nothing?

According to the original theory, it should therefore be possible to work out from a good's attributes whether provision by the state or the private sector represents the superior solution. Unfortunately, reality has proven to be more complicated. A large number of publications on the exemplary case of the lighthouse indicate, firstly, that the attributes of public goods are not static, but are modified by legal and technical parameters. Secondly, the distinction between public and private goods is to be understood as one that is more gradual than categorical. For instance, the replacement of the beam of light by an electronic signal makes it possible to encode the relevant information and therefore exclude ships from its use. Technical change has turned a once classically public good into an 'impure public good', and it is now possible to operate lighthouses commercially.

In consequence, most goods are not public or private, but range along a spectrum between these two poles. This is explained above all by public goods' second attribute, their non-excludability. Although the legislation influences the position of a good on this spectrum, it does not determine it completely. For instance, it remains easier to prevent third parties using a bicycle than to exclude them from the benefits of national defence, as *Peter Drahos*[95] concludes. How private or public a good is and consequently whether there are prospects that it will be provided to a sufficient extent by the market therefore depend not solely on the nature of the object, but also on the political and legal parameters. However, this means it is a policy decision how private or public information goods should be.

The theory of public goods is also discussed as a new approach to the regulation of copyright, in which respect the view has been put forward that information and knowledge are public goods. For instance, it is argued knowledge is not depleted by its use, and it is practically impossible to prevent information spreading once it has been put into circulation. In consequence, it is claimed, no money should be earned from information as a matter of principle.

[95] Cf. Drahos, Peter: 'The Regulation of Public Goods', *Journal of International Economic Law*, 2007, p. 321 (p. 324).

Paul David [96] describes three possible solutions as responses to this claimed tendency towards the non-marketability of information and knowledge:

1. The state itself produces information and knowledge, making the results available free-of-charge (e.g.: German Federal Statistical Office).
2. The state acquires information goods by means of public procurement (e.g.: vaccines or commissioned research).
3. The state puts in place legal parameters that make the public good of information somewhat more private and allow profits to be generated from its commercial exploitation. It is this third solution that is pursued by copyright law. It endows public goods with property-type exclusive rights by creating (temporary) monopolies over their exploitation.

Proponents of the theory of public information goods criticise authors' monopoly over such goods' exploitation because it obstructs free use and reproduction, and enables right holders to 'price their intellectual goods above their costs of reproduction, to the detriment of consumers.'[97] *Paul David* and *Dominique Foray* describe the right holder as a monopolist who sets prices above the negligible costs of reproduction and therefore restricts the number of potential users of an information good.[98] The result is the systematic underuse of information goods: It is claimed people are excluded from access, even though this use would not cause higher costs. 'As long as it is costless to serve additional persons, it is inefficient to exclude anyone,' as *Jesse Malkin* and *Aaron Wildavsky* summarise the welfare economics perspective on the matter.[99]

From the point of view of the most efficient possible distribution of resources, it is possible to arrive at the conclusion that fewer people are supplied with a good than would be possible at given costs and describe this as a waste of resources. Exclusive rights granted by copyright law therefore result in the underuse (and frequently also the overpricing) of information goods.[100]

It is a question to be weighed up by policymakers whether the welfare effects that are ascribed to markets for information goods justify the scale of underuse or waste caused by exclusive rights, or not.[101] From the perspective of society's overall welfare, the most efficient solution would be 'for those who possess information to give it away for free – or rather, for the costs of communicating it.'[102]

In this view, the wastage of resources caused by copyright is exacerbated even more by the fact that information goods are not just objects of consumption, but at the same time factors in production, i.e. form the foundation for new knowledge. Knowledge is cumulative, and property rights hinder the collective generation of knowledge because the circulating knowledge of third parties cannot be 'freely commented upon, tested by replication, elaborated on and recombined'.[103]

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[96] Cf. David, Paul A.: 'Koyaanisquatsi in Cyberspace', 2003, p. 8, online: http://129.3.20.41/eps/dev/papers/0502/0502007.pdf.

[97] Cf. Fink, Carsten: *Enforcing Intellectual Property Rights: An Economic Perspective*, 2009, p. 5, online: http://infojustice.org/download/gcongress/globalarchitectureandthedevelopmentagenda/Finkarticle.pdf.

[98] Cf. David, Paul/Foray, Dominique: 'Economic Fundamentals of the Knowledge Society', *Policy Futures in Education*, 2003, 1 (1), p. 39, online: http://www.wwwords.co.uk/pfie/content/pdfs/1/issue1_1.asp.

[99] Cf. Malkin, Jesse/Wildavsky, Aaron: 'Why the Traditional Distinction between Public and Private Goods Should be Abandoned', *Journal of Theoretical Politics*, 3 (1991), p. 355 (p. 365).

[100] The classic text on this problem is by the economist Kenneth Arrow: 'In a free enterprise economy, inventive activity is supported by using the invention to create property rights; precisely to the extent that it is successful, there is an underutilization of the information. [...] The first problem, then, is that in a free enterprise economy the profitability of invention requires a nonoptimal allocation of resources.' Cf. Arrow, Kenneth: *Economic Welfare and the Allocation of Resources for Invention*, 1962, p. 617, online: http://www.nber.org/chapters/c2144.

[101] By contrast, the Nobel Economics laureate Douglass C. North demonstrates that clear property rights are a precondition for economic growth. Without property rights, private costs or benefits and social costs or benefits would diverge, and creative activity would cease to be incentivised (tragedy of the commons). Cf. on this topic North, Douglass C./Thomas, Robert Paul: *The Rise of the Western World: A New Economic History*, 1976.

[102] Cf. Benkler, Yochai: *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, 2006, p. 37.

[103] Cf. David, Paul/Foray, Dominique: 'Economic Fundamentals of the Knowledge Society', *Policy Futures in Education*, 2003, 1 (1), p. 41, online: http://www.wwwords.co.uk/pfie/content/pdfs/1/issue1_1.asp.

It is argued the theory of public goods could shift the implications of copyright law for the welfare state to the centre of attention. The starting point for such a shift would be the belief that exclusive rights of the kind granted by copyright law are not without alternative. Information goods do not inevitably have to be produced by markets. Nor do they also have to automatically entail property rights. Other forms of compensation are conceivable (on this topic, see also chapter 2). In pursuing this line, the theory of public goods is said to emancipate itself from the intellectual and moral narrowness of copyright law discourse. In this view of the matter, the regulation of knowledge as a form of property is described as an ongoing waste.[104]

It is argued in opposition to this that information and knowledge, especially, are not public goods. By contrast to a lighthouse, clean air or education, information and knowledge are not always financed from the public budget as a result of policy decisions with the function of providing essential community services. The claim is made that marginal costs in fact only reflect the distribution of such goods, not their production costs.

In addition to this, it is argued copyright-relevant content is available to the general public despite or even particularly thanks to the existence of exclusive rights. People are not excluded from access, in principle. Consequently, the theory of public goods is said to demand not free access, but free-of-charge access to information and knowledge. However, this would also signify a kind of collectivisation instead of the individual assignment of rights of disposal.

The theory of public goods is described as mistaken to the extent that this is the case because it fails to recognise the problems of public property. Its critics claim that resources are often not used and distributed responsibly if there is no clear assignment of property rights.[105] The treatment of nature, especially if clean air is taken as an example, is also claimed to show that society accords a public good less respect than private property. Ultimately, the property system is a more efficient way of managing the distribution and use of resources because allocation by the property system is also a driving force for the responsible treatment of both scarce and non-rivalrous goods.

Apart from this, it is argued that the assumption of the non-excludability of information and knowledge is incorrect as well. Yet the discussion about free access to copyright-protected content, in particular, shows that excludability is possible. In contrast to clean air or other examples, it is certainly possible to manage information and knowledge resources.

Rather than the flood of information hoped for by proponents of the theory of public goods, its critics fear it will be associated with a loss of quality. Were merely intrinsic motives to be assumed and the monetary incentive for creative activities therefore ceased to apply, no private investments would be made in the arts sector. This would increase creative professionals' financial dependence and possibly even result in the cultural landscape being controlled by the state.

Apart from this, they argue it has not been sufficiently clarified what kinds of information can be public goods. In practice, the question also arises of which copyright works are information in the sense of the theory of public goods. After all, the information value of a piece of light fiction, a pop song or indeed a porn film is questionable. In other words, apart from all its systemic and policy problems, the new regulatory approach represented by the theory of public goods faces major practical challenges.

1.7.3 Exceptions from copyright and third-party interests

According to the current conception of copyrights and related rights in Germany, the exceptions constitute a suitable locus within the system where the interests of third parties or the general public have validity.

[104] The comments above in this chapter are based to a large extent on a publication by Dr Jeanette Hofmann, expert member of the Study Commission on the Internet and Digital Society. Cf. Hofmann, Jeanette: *Wider die Verschwendung: Für neue Denkfiguren in der Wissensregulierung*, 2010, pp. 18ff., online: http://www.boell.de/downloads/2010-04-copy_right_now_zukunft_urheberecht.pdf.

[105] Cf. Demsetz, Harold: 'Toward a Theory of Property Rights', *American Economic Review*, 1967, pp. 347ff., online: http://mason.gmu.edu/~kfandl/Demsetz_Property_Rights.pdf.

They open up the possibility that the balance of interests required by the constitution will be achieved, for example if constitutionally protected rights held by the users of works, such as freedom of opinion or the media freedoms laid down in Article 5(1) GG, militate in favour of free accessibility.

Here, the German legislature is bound not least by the law of the European Union. For instance, the exceptions from copyright for the right to reproduce and right of public communication are regulated definitively in the Information Society Directive. However, it has frequently been asked at the European level whether this directive does not need to be ‘reopened’ and revised.

According to what is probably the dominant opinion among academic lawyers, the provisions that limit copyright are to be interpreted narrowly as a matter of principle, although this does not mean that the most friendly possible interpretation for authors is to be taken as the basis in each case.

Additions to the catalogue of exceptions are being discussed at both the policy and technical levels. For instance, the Coalition for Action Copyright for Education and Research, an alliance of almost all the leading German academic organisations and many renowned researchers, has proposed that a general exception for educational and academic uses be introduced into copyright law. This could replace the intricate and extremely complicated exceptions in place at the moment, for example in Sections 52a, 52b, 53 and 53a UrhG. For a long time, there has been talk at the European level of an exception for the creation of derivative works that would cover user-generated content, which could decriminalise remixes and mash-ups. Ultimately, the comments made above on the increasingly problematic separation of the public and private spheres suggest exceptions should be introduced for specific, non-commercial types of use.

In particular, the exception for private copying, which has been amended several times, is relevant to the Internet. It continues to be highly controversial whether the current version delivers an appropriate balance of interests. This discussion is examined more closely in section 1.5.6.

In addition to this, there is discussion of the extent to which the European system of an exhaustive catalogue of exceptions might be inferior to a system designed more around blanket clauses, in view of the rapid changes in forms of use that are being seen. Blanket provisions are found in the Anglo-American copyright system in the shape of the fair use clause, although this in turn involves piecemeal arrangements that have an exception-like character based on different ‘tests’. It is evident that the US courts, for instance, are therefore left with greater scope to adjust how the law is applied. This raises the overarching question of the level at which questions about the balance of interests can actually be dealt with appropriately.

However, blanket clauses of this kind necessarily involve a certain degree of legal uncertainty. A middle way would be, for example, a blanket clause with non-exhaustively enumerated standard examples that lay down a certain direction of travel. A start was made to pursue this in the most recent reformulation of the exemption for quotations laid down in Section 51 UrhG, thanks to which it is now open to any new forms of quotation that may arise.

Overall, this throws up the question of whether a deliberately broad framework of (copyright) legislation is to be preferred to provisions for individual cases. Legislation with longer-term aims is currently being obstructed by very short-term changes in technical and social realities. For instance, the German Bundestag is constantly hurrying to keep up with innovations in its attempts to regulate narrow individual cases instead of covering them by drafting the legislative provisions more broadly and prescribing guiding principles.

Apart from the fundamental question of whether the law should be formulated more flexibly or more on a case-by-case basis, the question of its enforceability always arises in connection with the exceptions in the digital sector: firstly with regard to licence provisions in general terms and conditions (see on this topic section 1.8), secondly with regard to the primacy of technical protection measures. For instance, copy protection it is impossible to circumvent may, in practice, result in the private copying legitimated by copyright law being undermined. The relationship between related rights and the exceptions from copyright is also problematic. For

instance, if a work in the public domain is digitised by a private enterprise, there is in principle nothing to stop that enterprise from acquiring new rights over the digitised version. Some critics see a danger this will lead to the remonopolisation of common goods in the private sector.

1.7.4 Enforcement of rights

Improvement of rights enforcement mechanisms

The different options for the development of the law of immaterial goods become very clear when the discussion focuses on the enforcement of rights following contraventions of the legal provisions on immaterial goods. For some, such contraventions manifest the lack of acceptance, and therefore lack of justification, for the law of immaterial goods when it comes to the point in question. Logically, positions of this kind would require the protection of rights to be cut back or the exceptions to be extended.[106] At the same time, loud calls are being made for rights to be enforced more effectively, which could in turn be done at quite different levels:

– One level would involve strengthening the acceptance for copyright and consequently aligning the social norms that shape how people act on the Internet once again with the legal norms of the law of immaterial goods. Proposals for action to promote media competence, particularly in this area, and 'warnings' sent out to Internet users may point in this direction. Studies by the Institute for Information Law at the University of Amsterdam have demonstrated that the structure and pricing of legal services also have impacts on the norms for action by which users are guided.[107] Approval for forms of use may be accompanied by provisions on the remuneration of authors (e.g. the culture flat rate).

– Another option for improving the enforcement of rights is to be seen in the field of technical measures, for example the implementation of technologies that can recognise content on the Internet and accordingly form the basis for filtering measures. These include hashing, fingerprinting and watermarking technologies that are already available and make protected works identifiable. One option that takes the prevention of rights infringements as its starting point consists in the filtering of content on this technical basis. However, it would necessarily involve encroachments on the privacy of telecommunications. Furthermore, an approach that is based not on legal relationships, but on technical features holds the danger of errors and abuse. The recently publicised case of the (video) journalist Mario Sixtus, whose videos were deleted from various video portals against his will at the instigation of the German Federation against Copyright Theft (GVU), illustrated this danger in impressive fashion.[108/109]

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[106] Cf. the survey in Schulz, Wolfgang/Büchner, Thomas: *Kreativität und Urheberrecht in der Netzökonomie*, Working Papers of the Hans Bredow Institute, 21, December 2010, p. 5, online: http://www.hans-bredow-institut.de/webfm_send/540.

[107] University of Amsterdam Institute for Information Law: *The Recasting of Copyright & Related Rights for the Knowledge Economy*, pp. 197ff., online: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.
See also, recently, Eijk, Nico van/Poort, Joost/Rutten, Paul: 'Legal, Economic and Cultural Aspects of File Sharing', *Communications & Strategies*, 77, 2010 p. 35ff., online: http://findarticles.com/p/articles/mi_hb5864/is_77/ai_n54883828/.

[108] See on this topic the joint statement by the German Federation against Copyright Theft (GVU) and OpSec Security GmbH of 10 August 2010: 'As part of the sector-wide anti-piracy project Portal Closures, the video host Vimeo was asked to delete four videos by Mario Sixtus and 'You Are a Terrorist' by Christian Lehmann. These requests were made erroneously, and the deletion of the videos was neither desired nor intended by the GVU. For these reasons, another email was sent to the host Vimeo at 22:59 hrs yesterday asking it to reactivate the links to the videos in question.
The Portal Closures project is not directed against individual hosts and therefore not against Vimeo. Rather, selected portal sites are targeted that have been identified as central platforms for the distribution of copyright-protected films that have been illegally placed on the Internet. The current campaign is directed against the Monsterstream portal site. Apart from numerous links to recent cinema films and TV series, links to the above-mentioned videos were also posted on Monsterstream. These were unintentionally included in the deletion request as well. The reasons for this are currently being analysed.
The most heavily frequented portal sites with links to copyrighted material are scanned continuously by OpSec Security. Subsequently, requests for material to be deleted are issued (notice and take down procedure). Since 2008, the German film industry's Portal Closures project has seen more than five million requests for the deletion of links sent out to hosters of all kinds around the world. The German Federation against Copyright Theft (GVU)

– Finally, measures to make prosecutions easier, increased pressure of prosecution and deterrent sanctions can also be responses to deficiencies in enforcement.

– In France[110] and the UK,[111] there is a statutory basis on which to suspend or slow down Internet access for Internet users who contravene provisions of the law of immaterial goods ('three strikes and you're out'). The fact that the French Constitutional Council criticised the first version of the relevant legislation[112] in view of its failure to offer options for legal protection and the constitutionally protected interest in access to the Internet[113] clearly exemplifies the problems involved in such arrangements.

Enforcement of rights and intermediaries

It is characteristic of the Internet as a technical medium that different types of service providers act as intermediaries between communicative content and the end user.

These include, firstly, access providers and, secondly, service providers. Access providers that stand between users and the Internet have found themselves being looked at with a view to numerous regulatory purposes because they are able to intervene effectively in data traffic. It is controversial whether they have only come into the focus of attention on account of their ability to intervene as 'neutral third parties' or whether they also profit from illegal data traffic. Whether and how they should be integrated into a rights enforcement system is a central question.

In this respect, answers are to be found not least in data protection and telecommunications law. At present, German access providers are, for good reasons, protected by the Telemedia Act (TMG)[114] from being held responsible for the content they transmit (privileged liability). Moving away from this arrangement in the interests of improved copyright enforcement would threaten access providers' neutrality. In order to ensure they do not have to take responsibility for infringements of copyright, they would be forced to control data traffic and judge it from legal points of view. This would pave the way to prior censorship. Not only that, an arrangement of this kind would *de facto* signify a privatisation of rule of law powers. For while the deletion or blocking of illegal content currently have to be initiated through legal channels, providers would then be obliged to act independently. The enforcement of rights would therefore be placed at their discretion. This would not be desirable in the interests of democratic access to the Internet.

As far as service providers are concerned, i.e. platforms that – like YouTube, for instance – enable third parties to publish content without themselves taking decisions about what should be published comparable with those taken in the traditional media, the question of a form of liability under copyright law is being discussed. It is difficult to deny that platforms' attractiveness increases as the amount of content – some of it illegitimate – they offer grows, so that (intentionally or unintentionally) providers benefit economically from illegitimate content. Hamburg Regional Court ruled in 2010 that providers bore a liability for the

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is involved in this project as a film industry anti-piracy organisation. According to GVU's information, the number of illegal film files listed on such streaming portal sites rose by 217% last year.
The GVU and OpSec Security regret this error and are making joint efforts to clarify the reasons for it in order that errors of this kind can be ruled out in future.' Online: http://www.gvu.de/media/pdf/634.pdf.

[109] Dissenting opinion of the Left Party parliamentary group on the preceding footnote: 'According to the account given by the GVU, these requests were sent out erroneously, and the deletion of the videos was neither desired nor intended by the GVU.'

[110] Act No. 2009-1311 of 28 October 2009 on the Penal Protection of Literary and Artistic Property – Hadopi II Act, entered into force on 1 January 2011, online: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208046&categorieLien=id.

[111] Digital Economy Act, adopted on 7 April 2010, parts of which entered into force on 8 April 2010 and 8 June 2010. Other parts of the Act are currently being reviewed by the High Court of Justice, online: http://www.legislation.gov.uk/ukpga/2010/24/contents.

[112] Act on Creative Works and the Internet – Hadopi I Act (Act No. 2009-669 of 12 June 2009, online: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432&categorieLien=id.

[113] Decision No. 2009-580 DC of 10 June 2009, English translation online: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/case-law.25743.html.

[114] German Telemedia Act of 26 February 2007, *BGBl. I*, p. 179, most recently amended by the Act of 31 May 2010, *BGBl. I*, p. 692.

commission of offences. However, this decision has also been criticised in the academic literature.[115] In parallel to this, negotiations are being conducted between right holders and platform operators about remuneration models.

Service providers are increasingly finding themselves accused of passing on the responsibility for contraventions of copyright law to their users. For example, video platforms can, in fact, only be held liable for publications that infringe copyright if they have taken no action after demonstrably having been informed about such infringements. It certainly appears logical that, as in the case of access providers, enterprises that merely offer a service should not be held directly liable for acts committed by their users that infringe authors' rights. However, there is a high degree of legal uncertainty in practice because without legal scrutiny providers ultimately cannot actually judge whether notices requesting the deletion of publications that infringe copyrights are justified. Here too, there is therefore a threat of ultimately arbitrary private sector regulation.

Over the long term, it should therefore be considered how questions of liability connected with user-generated content can be resolved in such a way that neither the enterprises nor the users bear inappropriate legal responsibilities. It is quite possible this question will end up turning on whether it is still possible to assign content published online to particular right holders with any legal certainty over the long term without tying full copyright protection to some form of registration. The fact that this does not appear possible in the short term on account of the Revised Berne Convention[116] certainly does not render further consideration of this topic superfluous (see also section 2.4).

1.8 Private licence agreements for digital information goods

Licence agreements for digital goods are increasingly supplementing or replacing contracts of sale. Licence agreements govern the relationships between authors and users within the meaning of copyright law. Users may be distributors or end consumers. While the pure consumption of analogue media can be 'copyright-neutral', it is usually necessary for digital works to be duplicated for technical reasons. Licence agreements have developed into an important private-sector instrument for the regulation of digital information markets. Consumers therefore no longer acquire information goods, but rights of use defined by the supplier. These licences regulate both the user's access to the information good and the conditions under which the good is used. In comparison to the rights that arise from the purchase of a good, rights of use can be formulated more restrictively. The limitations on the use of electronic books are one example of such restrictions. Unlike physical books, they can only be lent out or passed on to a limited extent, if at all. In addition to this, proprietary file formats allow the use of digital works to be tied to specific reading devices.

Many use licenses are highly complex and difficult for consumers to understand. There is much to suggest that users do not read electronic use licenses, but accept them without looking at them.[117]

Their content is frequently incomprehensible for anyone without legal training. Alternative products are not always available either and may come with similarly restrictive conditions of use.[118] The lawfulness of such services can be reviewed by scrutinising their general terms and conditions.[119]

However, restrictions apply when the core of the contract is the transfer of rights of use (the 'principle obligation to be

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[115] Cf. Christiansen, Per, 'Anmerkung zu LG Hamburg, Urteil vom 3. September 2010 – 308 O 27/09 (nicht rechtskräftig)', *MultiMedia und Recht*, 2010, pp. 835ff.

[116] Berne Convention for the Protection of Literary and Artistic Works, revised at Paris, 24 July 1971 (as at: 1 April 2009), online: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

[117] Cf. on this topic the Written Statement by Prof. Dr Gerald Spindler for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-E, p. 7, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_E-_Stellungnahme_Prof__Spindler.pdf.

[118] Cf. Kreutzer, Till: *Verbraucherschutz bei digitalen Medien*, 2007, pp. 12-13.

[119] BGH, judgement of 24 October 2002 – I ZR 3/00, *ZUM Rechtsprechungsdienst* (*ZUM-RD*), 2003, p. 235 – CPU Clause; BGH, judgement of 11 February 2010 – I ZR 178/08, *NJW*, 2010, p. 2661 – Half-Life 2.

performed').[120] In such cases, a differentiated examination of the individual clauses is to be carried out by the courts to review the contract's conformity with the guiding principles prescribed by copyright law. In some respects, there is sometimes doubt as to whether these guiding principles do not actually disadvantage the user because they are tailored to the author as the person with whom the exploitation process starts. This can lead to value judgements that are not shared by consumer rights campaigners.

Right holders are able to prescribe in detail the ways in which digital works may be used. They are also able to observe and enforce compliance with these provisions by deploying digital rights management (DRM). The Act Governing Copyright in the Information Society[121] adopted in 2003 by the German Bundestag introduced an additional safeguard for the deployment of DRM technologies with the prohibition on their circumvention. The statutory prohibition on the circumvention of DRM has strengthened the enforceability of copyrights and licence conditions. Distributors' market power has risen as a result of this.

In so far as information goods are non-substitutable[122] (this may be the case with films and literary works, for instance), the changed balance of power between the providers and users of information also causes problems under competition law and antitrust law: Rights exploiters who hold an exclusive right of exploitation for particular information goods can abuse their technically and legally safeguarded position of power in various ways. One example of this are academic periodicals because the prices for these publications regularly rise by large amounts, particularly the prices charged for prestigious international journals.[123]

This may also represent a problem under competition law because it is a situation in which a specific piece of information is only available from a single source. As *Karl-Nikolaus Peifer* explains, antitrust law has 'forced openings at these points with regard to the exercise of protective rights so that new and secondary markets may certainly not be obstructed by the exercise of protective rights even if they are not served by the dominant market player that holds these rights. This tendency may also affect the activities of publishers.'[124]

The pre-eminence (alienability) of copyright and license agreements has not been clarified. As *Martin Kretschmer et al.* state, the 2001 Information Society Directive leaves it open whether the principle of freedom of contract can override copyright or not.[125] This unclear legal situation causes significant uncertainties not only for users, but for creative professionals as well. This is true above all of cases in which licence agreements rule out actions that fall under the exceptions from copyright. For instance, the British Library concluded in 2008 on the basis of an analysis of 100 contracts it had been offered for digital works that more than 90% of these contracts infringed exceptions from copyright.[126] The same is true of licence conditions' relationship to the principle of the exhaustion of copyright. According to the European legislation (Article 4(2) Information Society Directive), the principle of exhaustion does not apply for the right to reproduce, but only for the right to distribute. The case

[120] BGH, judgement of 11 February 2010 – I ZR 178/08, *NJW*, 2010, p. 2661 – Half-Life 2; BGH, judgement of 24 October 2002 – I ZR 3/00, *ZUM-RD*, 2003, p. 235 – CPU Clause; BGH, judgement of 27 September 1995 – I ZR 215/93, excerpts printed in *NJW*, 1995, pp. 3252ff.; BGH, judgement of 22 September 1983 – I ZR 40/81, excerpts printed in *NJW*, 1984, pp. 1112ff.; BGH, judgement of 18 February 1982, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (*BGHZ*), 85, p. 61.

[121] *BGBl. I*, 2003, p. 1774.

[122] 'Non-substitutable goods' are goods that cannot be replaced by alternative products. If a lecturer wishes to read a recent article in an academic periodical that can only be obtained in exchange for the payment of an overpriced download fee, it is of little use to them that they are able to purchase a glossy magazine with all the latest celebrity gossip and fashion tips cheaply at a railway station kiosk. To the extent that knowledge goods are distinguished by their singularity, they are only substitutable to a limited degree, if at all.

[123] Cf. OECD: *Digital Broadband Content: Scientific Publishing*, pp. 34f., online: http://www.oecd.org/dataoecd/42/12/35393145.pdf.

[124] Peifer, Karl-Nikolaus: 'Wissenschaftsmarkt und Urheberrecht: Schranken, Vertragsrecht, Wettbewerbsrecht', *GRUR*, 2009, p. 22 (p. 27).

[125] Cf. Kretschmer, Martin *et al.*: *The Relationship between Copyright and Contract Law*, 2010, p. 92: 'In conclusion, the EU case law so far leaves open the question of the contractual overridability of copyright limits (except those clearly made imperative in the Software and Database Directives),' online: http://www.ipo.gov.uk/ipresearch-relation-201007.pdf.

[126] Cf. British Library: *Analysis of 100 Contracts Offered to the British Library*, online: http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=691.

law on this complex of issues grants the right holder a right to be consulted on the further distribution of software or music files, since these inevitably have to be duplicated before they can be used (caching, installation on hard disk, etc.). This right is not held by the right holder when physical pendants are resold. It was in this context that the German Federal Court of Justice referred the relevant legal issues to the European Court of Justice for a preliminary ruling. Here, an indicative decision is therefore to be expected at the European level.

The widespread substitution of contracts of sale with restrictive use licenses can make access to information goods more difficult and more expensive. At the same time, it may obstruct the development of innovations and greater competition across the information economy. In view of how licensing arrangements have been evolving, the WIPO has looked at the interface between copyright law and competition law, partly in order to help Member States take action against anticompetitive practices.[127]

Private licence agreements reflect the – frequently asymmetric – negotiating power of the parties to these contracts. Against this background, the reform of copyright contract law in 2002 was aimed at strengthening authors' weak negotiating position in their dealings with rights exploiters. The extension of licence agreements to the relationship between information providers and users has led academic observers [128] to conclude that citizens have now become the weakest group. Consumer rights organisations therefore advocate statutory measures to strengthen users' bargaining position.[129]

From the point of view of rights exploiters, however, the distribution of millions of copies of copyright-protected works requires conditions of use to be set unilaterally since bilateral licence negotiations are only possible when works are licensed individually on account of the transaction costs of such negotiations. Furthermore, there are numerous alternatives, from free-of-charge and free variants to proprietary solutions, particularly when it comes to standard software. In this field, for example, the consumer has the choice whether they accept a specific product differentiated by its licence agreement or one of the alternatives. The extremely far-reaching rejection of DRM in music files shows that consumer behaviour can also bring about changes in provision.[130]

1.9 The Creative Commons concept[131]

Creative Commons (CC) was founded by a group of lawyers critical of copyright law and has drawn up a set of copyright licences of the same name. These licences have now been adapted to more than 70 local legal systems around the world and are used by, for example, the free online encyclopaedia *Wikipedia*. CC is a non-profit-making organisation that offers assistance for the publication and dissemination of digital media content in the form of its ready-made licence agreements. These are modelled on the licences applied in the world of free/open source software.

In quite concrete terms, CC offers six different standard licence contracts that can be used to stipulate legal conditions when creative content is disseminated. In this

[127] Facilitating Access to Culture in the Digital Age – WIPO Global Meeting on Emerging Copyright Licensing Modalities, 4/5 November 2010. Recordings from the conference are available online: http://www.wipo.int/meetings/en/2010/wipo_cr_lic_ge_10/program.html.
Cf. Kretschmer, Martin *et al.*: *The Relationship between Copyright and Contract Law*, 2010, p. 115, online: http://www.ipo.gov.uk/ipresearch-relation-201007.pdf.

[128] Cf. ibid.

[129] For example, Wolfgang Schimmel proposes that consumer transactions be regulated 'by a clearly defined type of contract in the German Civil Code (BGB)'. Cf. on this topic the Written Statement by Wolfgang Schimmel for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-B, p. 14, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_B_-_Stellungnahme_W__Schimmel.pdf.

[130] The Left Party parliamentary group and the expert member Constanze Kurz voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.3). The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl, Alvar Freude and Dr Jeanette Hofmann endorse this dissenting opinion.

[131] The text of this section is an abridged, slightly modified version of Dobusch, Dr Leonard: 'Creative Commons – Privates Urheberrecht: (k)eine Lösung?', 2010, online: http://www.dobusch.net/pub/uni/Dobusch(2010)CC-Privates-Urheberrecht-(k)eine-Loesung-kursw.pdf. The Study Commission on the Internet and Digital Society would like to thank the author for his permission to use this text.

respect, CC is neither a rights exploiter nor a party to the contracts with the persons that wish to distribute content under CC licences. These licenses are merely accepted by users and applied on their own responsibility in order to make it clear what may be done with the content placed under them.[132]

Individual agreements between the right holder and a particular user are possible to grant additional freedoms.

Like open source software licences, CC too is based on copyright. Authors who place their works under a CC license therefore grant third parties rights in a standardised fashion in the hope that, if possible, a 'commons' [133] of alternatively licensed works will accumulate. Works in this pool may be used in new ways without the right holder being consulted, provided these new uses are permissible within the CC rules (for example, distribution in social networks, derivative use in remixes, distribution via file-sharing sites). In this way, CC licences make works compatible with the cultural technologies of the digital revolution. They are laying the foundations for a 'hybrid economy', in which free sharing and exchange in online communities is no longer antagonistic, but complementary, to 'commerce', as represented by new business models.

The attractiveness of CC licences is dependent on how widespread they become, for the more works that are published under CC licences, the more opportunities there will be for their creative recombination.

Commercial exploitation is not a priority for many people who are active on the Internet. In principle, they are therefore quite happy to make their content available to the general public for non-commercial purposes without ruling out more extensive kinds of use.

Here, CC licences are used to state clearly what can be done with released content, which is represented by simple pictograms that are also understood internationally. In this context, it is not just relevant how widely the licences are disseminated, but how they are understood.

The solution propagated by CC, the establishment of a 'hybrid economy' based on private licensing standards, is by no means unproblematic.

The copyright licences developed and administered by CC are examples of private regulation through standardisation. On the one hand, the titles and symbols of the licences communicate straightforwardly what concrete rights third parties are granted over the work in question. On the other hand, the standardised form of the licences allows the aggregation of works in licence-compatible pools, each of which is suitable for different forms of derivative use. This fact alone demonstrates that it is not only or not even primarily the quality of the licence provisions, but rather the dissemination of the licences that is decisive to the attractiveness of CC licences in general and their commercial use in particular.

The more people use CC licences, the better their significance will be understood, which may in turn lead to greater use. It is this dissemination, however, that is in turn decisive to the potential works licensed in this fashion have for (in some cases commercial) use. As usual when standards are set privately, network effects – the benefits of a standard for the individual user are partly dependent on the total number of users – play a major role in the case of CC. This can be elucidated particularly well by looking at the example of the download platform Jamendo.[134] The CC-licensed music hosted by Jamendo can be downloaded, communicated and used freely for private, non-commercial purposes. Jamendo's business model now involves charging for commercial forms of use, such as background music in restaurants, and sharing the turnover generated in this way with its right holders. In other words, Jamendo is in this respect in direct competition with collecting societies such as the German

[132] These components are combined to form the selection of six different CC licences discussed above. The following Version 3.0 licences are currently available to right holders in the territory subject to German law:

BY	Attribution
BY-ND	Attribution-NoDerivs
BY-NC	Attribution-NonCommercial
BY-NC-ND	Attribution-NonCommercial-NoDerivs
BY-NC-SA	Attribution-NonCommercial-ShareAlike
BY-SA	Attribution-ShareAlike

[133] 'Commons' are resources in shared, communal use. In the context of copyright issues, the term relates to the free use and dissemination of information and knowledge.

[134] The download platform Jamendo can be found at: http://www.jamendo.com/en/.

Society for Musical Performing and Mechanical Reproduction Rights (GEMA), which collects flat rate fees unless the music played at a venue is explicitly and exclusively 'non-GEMA' music.

The attractiveness of services like Jamendo depends quite crucially on the number and quality of the works available under CC licence. In mid-2010, it stocked more than 38,000 albums, although only a small minority of them were by previously established artists. The fundamentally voluntary nature of the acceptance of standards, which contrasts with their regulation in legislation, leads new business models straight into the kind of vicious circle that often afflicts business start-ups:[135] the absence of established CC artists reduces the chances of success for CC-based business models, which in turn diminishes the attractiveness of CC licences for established artists. However, breaking out of this catch-22 situation will demand not just the mobilisation of individual artists, but also a transformation of the bodies that represent their interests collectively, the collecting societies.

The vast majority of people who work more or less professionally in the cultural and arts sectors in Europe are members of one or more collecting societies, which manage the exploitation of copyrights and related rights in a fiduciary capacity for their members. As a rule, the collecting society is granted the exclusive right of exploitation for all works the author has created in the past and will create in future. 'This absoluteness of the transfer of rights is,' according to *Florian Philapitsch*,[136] 'what makes individual rights management under the Creative Commons model incompatible with collective rights management by collecting societies – an author who is entitled to receive royalties from a collecting society, i.e. has concluded an (exclusive) deed of assignment with that society, cannot attach a CC licence to their work.' This means creative and arts professionals in Germany have to decide between membership of a collecting society and CC publication. This is a situation that, in particular, makes the use of CC licences more difficult for established artists, the large majority of whom are already members of a collecting society. Up until now, only smaller European collecting societies have allowed their members to use individual CC licences in isolated cases. For example, German Version 3.0 CC licences expressly limit the authors' entitlements to remuneration to those granted by statute, but it is evident that, as a matter of principle, incompatibility with membership of a collecting society can cause problems when it comes to the use of CC licences.

Apart from this, a series of technological and legal problems impede the wider dissemination and use of CC licences. From a technical point of view, the fact that machine readability has only been implemented at a rudimentary level for CC licence information is problematic. This is the precondition for effective search engine technologies and commercial applications: The various licence versions mean it is necessary to establish what works' licences allow before they are used.

From a legal point of view, it is above all the adaptation of the licences to different legal systems ('porting') that causes difficulties. At the same time, licence porting and administration are also associated with mobilising effects, since they allow local affiliates to be established and integrated into the organisation, and language barriers overcome.[137] Whether licence porting has more advantages or disadvantages is accordingly a matter of opinion as well.

Above all, it is not possible to identify any simple solutions to the problems inherent in alternative copyright regulation based on private licensing standards. CC shares the problem of licence diversity and compatibility not just with its model, free/open source software licences, but also quite generally with private standardisation: In principle, anyone is free to propose and implement their own, differing standards,[138] but the enforcement of these standards is heavily dependent on the number of users in each case, and the problem of the (in)compatibility of different licence standards could accordingly be grasped as a (contingent) mobilisation problem. This is also the case in the field of free software, where the GNU General

[135] Ortmann, Günter: 'Das Kleist-Theorem', 1997, pp. 23ff.

[136] Philapitsch, Florian: 'Die Creative Commons Lizenzen', *Medien und Recht*, 2008, pp. 82ff.

[137] Cf. Dobusch, Leonhard/Quack, Sigrid: *Epistemic Communities and Social Movements*, 2010, pp. 226ff.

[138] Cf. Abbott, Kenneth W./Snidal, Duncan: 'International "standards" and international governance', *Journal of European Public Policy*, 2001, pp. 345ff.

Public License (GPL) has established itself as by far the most important licence – not least thanks to GPL-licensed Linux operating systems –,[139] which is why other licences too generally attempt to achieve GPL-compatibility.[140] In the case of CC, the implementation of combinable licence modules actually leads to a large number of mutually incompatible licences. In contrast to GPL in the software sector, there is no clear, 'definitive core'.

Although the fundamental idea of CC licence agreements was intended to be critical of the copyright regime, they are based on existing copyright law. As a result, they contribute in some respects to its legitimation and do not promote fundamental change.[141]

Ironically, CC's success could consequently also relieve the burden (of pain) on the extant copyright regime and so make reforms to copyright of the kind sought by CC more difficult to achieve. In addition to this, there is the question of whether the CC system might therefore even be detrimental to the idea of the 'commons' from which it takes its name.

However, this criticism oversimplifies the matter when the focus on the author is seen as evidence of the implicit reinforcement of an individualistic copyright regime. It is true, for instance, that CC takes the individual creator as its starting point and therefore recognises their copyrights. Nevertheless, CC paradoxically propagates the creation of a public good using a digital community built on individual self-interest. In this sense, it not only turns copyright against itself in some ways, but turns the individualising tendencies that are inherent in copyright against themselves as well.

It is feared that CC will encourage the commodification of digital goods, as well as applying the product-centric logic of digital goods in non-commercial fields such as amateur art and education – the very areas in which CC licences are particularly successful. By contrast, some feel CC has done a great service in having fostered awareness of the problems thrown up by the handling of copyright outside the specialist communities.

To creative professionals who are critical of the prevailing copyright regime, CC offers a concrete alternative. At the same time, the attractiveness of these licences depends heavily on the degree of their dissemination. A high degree of dissemination is indispensable if they are to be applied successfully in the commercial sphere. The barriers that hinder the penetration of CC into the commercial mainstream where established artists are positioned include, in particular, the large number of incompatible licence versions, conflicts with the collecting societies and technical inadequacies.

Digitisation has created new, open markets on which 'old' business and licence models are being supplanted by 'new' models – whether with or without the intention of earning profits. Ultimately, it will be the actions of market participants that decide which models gain acceptance. In this respect, CC is in certain ways an alternative to charging download portals. While iTunes, for example, has developed a new business model on the basis of current copyright law, CC licences drawn up on the same basis allow new forms of dissemination for works that may be used either commercially or non-commercially. The existing models can be supplemented with both profit-oriented and non-profit models. Both types of model could deliver services for which there is demand on the basis of current copyright law.

1.10 Access to academic information via 'open access' rights management models[142]

Open access initiatives have the aim of improving access to quality assured results from publicly funded research by making them available free of charge on the Internet. This can be done through 'gold access', i.e. first publication under open access conditions, or 'green access', i.e. second publication under open access conditions.

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[139] Cf. Benkler, Yochai: *The Wealth of Networks*, 2006, p. 63, online: http://cyber.law.harvard.edu/wealth_of_networks/Download_PDFs_of_the_book.

[140] Cf., for example, the Apache licence: http://www.apache.org/licenses/GPL-compatibility.html.

[141] Cf. Elkin-Koren, Niva: 'What Contracts Can't Do', *Fordham Law Review*, 2005, p. 375 (p. 393): 'At its current stage, it does not seek to change the law at all. In fact, its strategy relies upon strong copyrights. It advocates what is believed to be the "original meaning" of the current copyright regime. In this sense, the ideology of Creative Commons is reactionary.'

[142] Open access publication is being examined by the Education and Research project group of the Study Commission on the Internet and Digital Society.

Free, worldwide access to academic publications is expected to enhance the efficiency of many academic disciplines. This will develop new forms of discourse and new dimensions for the generation of knowledge. The most rapid and most comprehensive opportunities for access are offered by 'gold' open access publication.

'Green' open access publication is already possible today, provided authors only grant rights exploiters basic rights of use over their work. In practice, the granting of exclusive rights (for instance by means of buy-out contracts) plays a major role. This has the consequence that green second publication is generally no longer possible without the permission of the publishing house.

Against this background, attention is currently centred on the question of whether academic authors should be merely requested, or required, to publish their results in open access forms when their research has been publicly funded.

There are various ways of funding open access publications:[143]

– link the award of public funds to the condition of open access publication (solution in budgetary law);

– grant authors an inalienable right of second exploitation for non-commercial purposes (extension of Section 38 UrhG);

– oblige authors to initially offer their research results to their own institutions (compulsory licensing);

– stipulate in statute that only basic rights of use can be assigned.

[143] According to Hilty, Reto M.: 'Renaissance der Zwangslizenzen im Urheberrecht?', *GRUR*, 2009, pp. 633ff.

2 New forms of distribution/remuneration and business models on the Internet

Digitisation has made it easier to produce and distribute creative content. Digital content can be reproduced and distributed with almost no loss of quality. At the same time, both are still difficult to control, which is why the prosecution of rights infringements encounters practical difficulties. Unlike the analogue world, the dissemination of a work is no longer tied to the physical copy of the work on the Internet. Although non-physical goods can in principle be sold as well, the rights holder generally has no idea of the extent to which they are distributed. Quite particularly, the principle of refinancing creative activities with the proceeds from sales has therefore started to come under pressure. Apart from the classic forms of economic utilisation, new options for monetisation are increasingly coming on to the market, for example models based on access to content.

It has been shown by many developments since attractive, legal services began to be made available that users are prepared to pay for digital content as well. The turnover on downloads – the online equivalent of permanent embodiments on CD or DVD – is continuing to increase. According to surveys carried out by Gesellschaft für Konsumforschung (GfK), the turnover generated with paid downloads in Germany rose by almost 50% again in 2010 to hit €390m.[144] Other sectors of the economy are following the music, software and computer/video games industries, and developing digital distribution channels, as has been demonstrated by the growing number of video-on-demand services and the general interest in digital books or 'e-books'. Apart from this entertainment content, it is possible to monetise technical and business information, in particular. As far as books are concerned, however, e-books actually contribute less than 1% of the industry's total turnover.[145]

[144] Cf. BITKOM: 'Download-Boom: Markt wächst auf 390 Millionen Euro', online: http://www.bitkom.org/de/markt_statistik/64038_66156.aspx.

[145] Cf. the study conducted jointly by the German Publishers and Booksellers Association and GfK Panel Services Deutschland: *Umbruch auf dem Buchmarkt? Das E-Book in Deutschland*, March 2011, presentation online: http://www.boersenverein.de/sixcms/media.php/976/E-Book-Studie_2011.pdf.

Furthermore, advertising revenues have proven to be another essential pillar for services on the Internet and enable the user to consume creative content gratis, just as when they listen to or watch freely receivable radio and television services. Non-professional providers too can earn revenues in these ways – for instance by integrating advertising into their blogs, websites or forums. Internet advertising makes it possible to target advertising on users who might potentially be interested in products or services and, in so far as this is the case, is particularly exciting for the advertising industry because it is so effective. It is possible to target users on the basis of their surfing behaviour.

Apart from services users have to pay for, various services have become established that offer a basic level of content and functionality free of charge. These services require users to pay for extended content, additional features or freedom from advertising (premium/freemium services). For instance, content written by journalists may achieve the necessary reach if it is offered free of charge, allowing it to be paid for by advertising revenues or separately marketed access to premium or archive content. There are also highly popular online games that can be played completely free of charge – except for the costs of access to the Internet –, but require payment for additional virtual objects that help the player to be more successful in the game. It is possible to operate a model of this kind, recoup its costs and even make a profit if just a small proportion of the users actually pay to play the game.

Overall, the Internet and digital technologies offer a large number of opportunities for target group-appropriate services tailored to consumers' habits and preferences of use. This is illustrated by the diversity of goods on offer: The introduction and successful marketing of ring tones have shown that new digital technologies (in this case, mobile telephones) can generate fresh demand among users. For instance, consumers are prepared to pay several times the price of a complete piece of music for short excerpts from individual musical works that can be used as individualised ring tones for incoming calls. Furthermore, mobile end devices in particular have created demand for applications that give them new uses known as 'apps'. These include small programs, games, pieces of multimedia content and customised user interfaces for Internet services. Finally, the increasing use of digital end devices for text content, what are known as e-readers or tablet computers, is prompting the establishment of services that supplement classic book content with multimedia add-ons such as audio or video pieces with background information. Digital technologies have enlarged the market for digital goods with diversified services.

The options for payment have also been affected by this diversification. Apart from classic, sale-type remuneration for making works available for unlimited periods with no restrictions on their use (downloads) and rental-type remuneration for making available for limited periods and mostly one-off uses only (streaming), ad-funded alternatives have developed as well. One alternative to mainly advertising-funded private broadcasting is what is known as the streaming of audiovisual content. This involves content being saved temporarily on the user's device while they are enjoying the work, but the copy is ephemeral and therefore unobjectionable under copyright law. The user therefore does not retain a permanent copy, which is why the individual use has considerably less intrinsic value than downloading. These services only deliver their full value when they apply remuneration models similar to those in the broadcasting industry – i.e. ad-funding or flat rate subscriptions similar to those charged by pay TV or the licence fees that finance public broadcasting organisations.

Like every technology, however, streaming too can be used by both legitimate and illegitimate providers. In particular, there are numerous providers on the Internet who offer cinema films without having legally acquired the right to make them available to the public. The lawfulness of their use by consumers has not been clarified as yet by the courts and is legally controversial.[146]

In addition to this, what are known as flat rate services have now become established as alternatives. They allow unlimited access to the content they offer in return for the payment of a subscription fee. After

[146] Arguments against the lawfulness of these uses are set out in Radmann, Friedrich: 'Kino.ko – Filmegucken kann Sünde sein', *Zeitschrift für Urheber- und Medienrecht* (*ZUM*), 2010, p. 387; arguments for their lawfulness are laid out in Fangerow, Kathleen/Schulz, Daniela: 'Die Nutzung von Angeboten auf www.kino.to – Eine urheberrechtliche Analyse des Film-Streamings im Internet', *GRUR*, 2010, pp. 677-682.

the subscription has expired, there is no access to any of the repertoire. This form of use allows customers to discover music and films, which may prompt them to purchase a permanent copy or, for example, attend a concert or visit the cinema. In some cases, these subscription revenues generate calculable yields for the creative industries. Digital rights management is deployed to ensure that the copies made available to the user can no longer be played after the contractual period allowed for their use. At present, the video industry uses digital rights management to organise its lending business. Here, there are signs of a development towards 'cloud computing', which suggests users could do without permanent copies on their devices in future and nonetheless enjoy constant, nomadic access to music, films and even software (what is known as 'software as a service' (SaaS)).

Subscription models based on licence agreements that only allow access to purely digitally published works represent a particular challenge for libraries and academic research institutions with public functions. Over the last few years, libraries and research institutions that are reliant on being able to offer access of this kind to their users if they are to perform their functions have been confronted with painful increases in costs for such subscriptions, which many are no longer able to afford at a time when budgets are tight. Often, however, in particular in the case of specialist periodicals, the information published is no longer available except in digital form. In this connection, remuneration models such as open access publication offer new methods that will allow rising costs to be managed.

Revenues can also be earned independently of the creative product that is provided. When open source software is made available free of charge, value is added by the provision of linked services that have to be paid for – for instance the adaptation of software to specific needs, support services or expanded functionality. In the audiovisual media, revenues can sometimes be earned even though content is offered free of charge by selling higher-quality products (for instance, high definition versions, mobile access or permanent availability) or as a result of positive impacts on the sales of concert tickets, merchandising items, etc.

In the audiovisual media, commercial studio products are usually only supplied legitimately free of charge as advertising for a larger product of which they are part, for example a single track or additional material on a film. The situation is rather different when it comes to the public broadcasters' 'media libraries'. They sometimes provide programmes for limited periods, but otherwise in full and at no cost. However, a different financing concept forms the basis for these products.[147]

Although ever more content is being produced originally for publication online today, the Internet is still being used intensively for multiple exploitation as well, i.e. as an additional distribution channel for content that is also available in other media. Some newspaper publishing houses are now making texts from their print editions accessible on the Internet as soon as they are written.

When this happens, according to the royalty principle, journalists have an entitlement to equitable remuneration under copyright law for the multiple exploitation of their works.[148] As a rule, this entitlement is satisfied for employees by their employment contracts. Furthermore, when it comes to freelance journalists these entitlements are frequently declared to be satisfied under what are known as 'framework contracts' that make reference to the publishing houses' general terms and conditions. However, these general terms and conditions do not always withstand judicial examination.[149]

Archive material is generally made available for download in databases operated as pay services. Newspaper articles can be acquired in this way for private reading, but the publishing houses also syndicate content through digital channels. There are cases in which they do not possess the rights to the content they are

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[147] Dissenting opinion of the Left Party parliamentary group on this paragraph: 'In particular, however, revenues from the latter sources often do not benefit rights exploiters, who bear the falls in turnover on sales of audio media.'

[148] This principle accords with the established case law (see for example BGH, judgement of 2 October 2008 – I ZR 18/06, *GRUR*, 2009, p. 53 (p. 55, para. 22), or BGH, judgement of 17. July 2008 – I ZR 206/05, *GRUR*, 2008, p. 993 (p. 995, para. 25)).

[149] Cf. on this issue the very recent judgement by Rostock Regional Court of 14 May 2011, press release online: http://www.mediafon.net/mediafon2004/upload/Nordkurier-Urteil.doc.

selling. The online magazine *Perlentaucher* demonstrated this recently when it purchased what were supposed to be publication rights for Günter Grass's Nobel Prize acceptance speech from the *Frankfurter Allgemeine Zeitung* (*FAZ*).[150] Other newspapers too have repeatedly lost copyright trials against their authors or declared their willingness to pay out-of-court damages in disputes about archive rights. Very recently, however, publishing houses have gone over to having themselves granted the corresponding rights by means of buy-out contracts.

The second exploitation of content produced by public broadcasting corporations on the Internet is particularly controversial. In Germany, under the 12th Interstate Broadcasting Treaty Amendment, particular pieces of content may be provided for a maximum of seven days on the Internet.[151] This restriction was inserted into broadcasting law for reasons of copyright law, but nevertheless raises significant copyright issues. For instance, authors complain that they often receive no, or only insufficient, remuneration for online uses of their material. Furthermore, many programmes cannot be made available on account of copyright problems because clearing the rights to all the excerpts they contain would overwhelm the broadcasters.[152]

The indispensable precondition for any creation of value on the Internet is the existence of secure payment systems that are accepted by the customer. While payments for permanent subscriptions to services are mostly processed unproblematically using standard standing orders, direct debits or credit card payments, the increasingly common option of micropayments is being met with a wait-and-see attitude among users.[153] Even when there is a readiness to pay, the transaction often fails because it takes so long to input card data and there are problems with the cards' security features.

2.1 Creation of an innovative environment for new business models and distribution channels

Some critics feel authors' economic interests are insufficiently protected by the current law.[154]

Against this background, the question arises of whether it could be expedient, in view of the technical and cultural developments that have taken place, to reduce exclusive rights to entitlements to royalties in particular fields. The influence of copyrights on earning opportunities and the ways new remuneration and business models could change these opportunities positively should also be investigated in an expert opinion.

As a matter of principle, however, it is necessary to observe that the successful creation of value with creative content in digital forms demands an appropriate legal framework. Exclusive property rights are needed if intellectual creations are to be economically useable and legally marketable.[155] The exclusivity associated

[150] Cf. Chervel, Thierry: 'Fast wie bei Amazon – Rechteeinkauf bei der FAZ', online: http://www.perlentaucher.de/artikel/4187.html.

[151] Supplementary dissenting opinion of the Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude: 'This is seen critically on the user side. The recipients whose broadcasting licence fees finance the production of these programmes have no understanding for any such artificial restriction of availability.'

[152] According to ZDF's Director of Legal Affairs, Peter Weber, at the German Federal Ministry of Justice Hearing on Collective Rights Remuneration, Berlin, 27 September 2010.

[153] A wait-and-see attitude on the part of users is evident from the examples of the micropayment system Flattr, which was launched in 2010 (see the discussion of Flattr's record in Burbidge, Eileen: 'Many small streams form a big ass river', online: http://blog.flattr.net/2010/11/many-small-streams-form-a-big-ass-river/) and the Berlin-based daily newspaper *taz* (cf. Urbach, Matthias: 'taz.de-Texte 29 000 Mal geflattert', online: http://blogs.taz.de/hausblog/2010/11/02/flattr-einnahmen_pendeln_sich_ein/).
A study by the hi-media group came to the conclusion that, although micropayment was only used by less than half of the Internet users surveyed, it is a market with a great deal of potential for growth. Cf. on this topic hi-media: *Micropayment: ein dynamischer, viel versprechender Markt*, online: http://www.hi-media.de/news_attachments/hi-media_pm_micropayment-observatory_14122010.pdf.

[154] Cf. on this topic the Written Statement by Prof. Thomas Dreier for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-A, para. 156, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_A_-_Stellungnahme_Prof__Dreier.pdf.

[155] Cf. on this topic the Written Statement by Prof. Thomas Dreier for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-A, para. 156, online: http://www.bundestag.de/internetenquete/dokumentat

with property rights is a decisive factor in the economic value of created works. Customers are prepared to pay for digital content that is otherwise not accessible to them because a third party has the right to exercise control over it.[156]

In order to prevent feared losses of revenues due to unauthorised reproduction, media providers are increasingly offering pure licence agreements instead of selling physical media (see on this issue section 1.8).

Even when works are made available free of charge, the author or rights exploiter may have an interest in receiving some consideration and draw economic benefits from their exclusive rights. For, instead of payment, consumers – knowingly or unknowingly – reveal personal data that can be used for marketing purposes, particularly on the Internet, accept advertisements or pay for additional services.

When it comes to the exploitation of existing copyrights, a major role is played by the organisational arrangements made for the acquisition of rights, which demand flexible solutions because the transaction costs associated with the clearance of rights can certainly be considerable. Right holders must be prevented from merely deploying their exclusive rights to obstruct other actors. New business models need enough 'air to breath'[157] and have to establish themselves on the basis of market mechanisms, in particular.

ion/Sitzungen/20101129/A-Drs__17_24_009_A_-_Stellungnahme_Prof__Dreier.pdf.

[156] Supplementary dissenting opinion of the Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Markus Beckedahl: 'However, it may be doubted that this right to protection has really led to creative professionals being put in a better social position over the last few decades. The same is true with regard to the question of whether exclusive property rights really have stimulated and promoted new distribution and business models, or whether there are grounds to complain of an innovation backlog here because these rights have been used to block competing forms of exploitation.'

[157] Cf. on this topic the Written Statement by Prof. Thomas Dreier for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-A, para. 164, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_A_-_Stellungnahme_Prof__Dreier.pdf.

The development of many business models is dependent on a large number of rights having previously been cleared. If certain licence partners (collecting societies, for instance) did not bundle their repertoires, content platforms that provide sometimes tens of millions of titles would be confronted with enormous numbers of individual rights clearance procedures. This would massively affect the platforms' transaction costs. At the same time, it is in customers' interest to have the most comprehensive possible repertoire made available to them.

An increasing fragmentation of rights and a lack of transparency with regard to the ownership of copyrights is particularly threatening to the market for music and films in digital forms just at a time when it is starting to take off. In the past, the copyrights necessary for the physical distribution of the whole world repertoire could be cleared through Germany's collecting societies, which acted as 'one-stop shops'.

A one-stop shop is a central point of contact for the licensing of online uses (a collecting society, for example) that is able to issue licences bundled for a complete repertoire. This has been implemented for offline uses, partly by means of a comprehensive system of 'reciprocal agreements'[158] between the national collecting societies. Consequently, apart from its own repertoire, each collecting society has been able to license the repertoires of foreign collecting societies and therefore the world repertoire. For online uses, music providers have to deal with an increasing number of licensors, whose consent has to be obtained in order to license a comprehensive range of products (for example foreign collecting societies, Centralized European Licensing and Administration Service (CELAS), Pan-European Central Online Licensing (PAECOL)).

Right holders too are being forced to deal with problems caused by the complicated nature of the procedure for obtaining

[158] 'Reciprocal agreements' are contracts between collecting societies that enable them to grant each other rights. A contract of this kind permits a collecting society to assign performance, broadcasting and reproduction rights over its whole repertoire to a foreign collecting society, which is then able to administer their exploitation in its own country. Each collecting society then administers its counterpart's rights in a fiduciary capacity.

rights. Authors run the risk that their works will be used without payment or nothing will be done to exploit them at all because acquiring the rights to these works is a difficult, transaction cost-intensive business. Neither result is in authors' interests because they then receive no remuneration at all.

The 2005 Music Online Recommendation[159] elaborates a Community-wide licensing system for online music rights. According to the Recommendation, authors should be given the opportunity to choose between the various collecting societies within the European Union. The Commission hoped that, as a result of this, competition between licensors would galvanise the Europe-wide digital music market. The basic idea of this Recommendation was to improve authors' position relative to the collecting societies, the intention being for this to be guaranteed by appropriate competition and the promotion of efficient, transparent structures within the collecting societies. The Recommendation called for the practice of reciprocal agreements, which enable a collecting society to dispose of foreign rights as well, to be discontinued.

However, one consequence of this Recommendation has been a renewed fragmentation of the repertoire, which has brought about further increases in complexity with regard to the clearance of rights. Community-wide licensing would also have immediate impacts on the collecting societies. Since the collecting societies would compete on the basis of their repertoires, threats to efficient collective rights management could not be ruled out if collecting societies were not in a position to build up appropriate in-house repertoires. Another danger posed by the Commission Recommendation would be an oligopolisation of the collecting societies. Firstly, competition would be distorted if the obligation to administer that is part of national legal systems were dispensed with. Secondly, right holders would gravitate to the collecting societies with the biggest repertoires.

This development is illustrated by CELAS, a subsidiary of GEMA that, unlike GEMA itself, is not classified as a collecting society by the German Patent and Trademark Office (DPMA) and in so far as this is the case is not subject to the provisions of the Copyright Administration Act (UrhWahrnG)[160] that apply to such societies. This construct was previously criticised in the Final Report of the Study Commission on Culture in Germany.[161]

The fragmentation of the repertoire means the copyrights required for one and the same type of online use have to be obtained from several rights administrators, i.e. the right to reproduce from CELAS (Section 16 UrhG) and the rights to make publicly available from GEMA (Section 19a UrhG). The duplication of administrative procedures to deal with copyrights for a single use has been described as incomprehensible by Munich Higher Regional Court (OLG).[162]

In the radio and television sectors, the Internet has created new options for the dissemination of content and consequently new business models as well. At the same time, this is increasingly throwing up problems with the copyright law treatment of cable retransmission in Germany: at present, it is mandatory for the retransmission of radio and television signals by cable to be administered by the collecting societies, while the retransmission of programmes via other communication networks is not subject to central licensing by collecting societies.

Streaming services for digital content, IPTV and hybrid TV also raise questions about how the obligation to pay remuneration could be regulated consistently.

It appears necessary for the legislation to be formulated in a technology-neutral

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[159] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:276:0054:0057:EN:PDF.
Cf. on this issue also the Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, pp. 278ff., online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[160] Act on the Administration of Copyright and Neighbouring Rights of 9 September 1965, *BGBl. I*, p. 1294, most recently amended by the Act of 26 October 2007, *BGBl. I*, p. 2513.

[161] Cf. the recommendations in the Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, p. 285, online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[162] OLG Munich, judgement of 29 April 2010 – 29 U 3698/09, non-final, *MMR*, 2010, pp. 704-706.

form. However, the possible uses of these services differ from those of conventional radio and television on account of the end user's ability to interact with the content. It will therefore be a problematic task to formulate the law in a technology-neutral fashion.

It is not always easy to distinguish the right to broadcast (Section 20 UrhG) from the right to make available to the public (Section 19a UrhG) in copyright law. However, this distinction must reflect the interactive options enjoyed by the end user, who can interact purposefully with the content delivered in ways not allowed by conventional radio and television.

Where rights that are required are not bundled by a one-stop shop, it seems obvious to create a central database so that users can research who holds the rights they wish to acquire. Such a central database could also offer advantages from another point of view: new forms of distribution that would lead to the wider dissemination of cultural works and therefore have benefits for the whole of society are, of course, blocked by a legal system that has the individual author's exclusive rights at its core. At the European level, consideration is now being given to an amendment of the Revised Berne Convention. [163] At present, the Convention prohibits making copyright protection dependent on formal preconditions. An amendment on this point would permit the introduction of an option to register works in order to obtain full protection. Subject to this precondition, European rights registers could be created, something that is urgently required if new forms of distribution are to be placed on a legally secure foundation. Such registers could form the basis for different licensing models – not least models that focus on the collective management of exclusive rights.

2.2 The role of intermediaries (publishing houses, music companies, film producers, broadcasters, etc.) in the digital world

Description and delimitation of the situation

In order to convey a precise idea of the role played by publishing houses, music companies, film producers, broadcasters, etc. in the digital world, it is helpful and important to look at their role and function in the traditional physical business because a work first has to be created before it can be consumed offline and online. This would allow the discrepancies that are arising due to the rapid developments in the digital field to be categorised more accurately. It is these discrepancies that, on the one hand, are indicative of the tremendously rich environment that is developing thanks to the evolution of numerous new opportunities and forms and, on the other hand, the difficulties both enterprises and consumers are clearly having as they adapt to the new conditions.

The very term 'intermediary' is misleading in this connection. After all, it suggests there is a creative product on one side and a purchaser of this product, the consumer/user on the other. Although the intermediary merely seems to stand in the middle between creative professionals and consumers, many of these enterprises are professional, creative businesses that are characterised by a division of labour and whose work is certainly not restricted, and cannot be reduced, to purely intermediary services. Rather, they have a sometimes essential role in the production of creative end products, and their efforts and support play a large part in the success of these creative end products as far as their marketing and distribution are concerned.

A few examples: The production of a feature film is based on the work of numerous individuals and enterprises that are not necessarily all co-authors. However, the production company not only has to shoulder the economic risk of the whole film, it also supervises and coordinates the entire production process, beginning with the choice of the script and ending with the selection of the distributor and cooperation partners. The actors, the director, the cameras, the lighting are chosen – all of which undoubtedly help to form the basis for the work that is ultimately created. However, the concerted organisation of all these activities and factors represents an essential (contributory) creative effort. The 'film distributor', which then ensures that the end product can be shown in cinemas, also provides significant creative services: For instance, it will discuss acceptable scripts with the producers at an early stage,

[163] Cf. the report by the Comité Des Sages: *The New Renaissance*, online: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf.

assessing their creative value as well as their commercial potential.

The aims of professional creative activities are, firstly, to realise artistic ideas and, secondly, to be able to market them and so recoup the investment that has been made. The marketing services provided by intermediaries that are intended to promote the dissemination of these products can play an essential role in their success. Of course, there are exceptions when end consumers discover a product that has not been advertised and consequently help it to become more popular. Nevertheless, it is apparent that no one has as yet succeeded in replacing the classic methods of advertising reliably with other techniques. Incidentally, despite some differences, a similar structure is evident in the production and marketing of computer games.

The division of labour found within music companies differs somewhat in that the recordings are often made by external producers. As a rule, however, the artists are always accompanied by the company's 'artist and repertoire managers', who give advice during the creative process. 'Product managers' then collaborate with the artists to draw up concepts for the presentation of the work and the artist to the public.

In problematic cases, companies purchase all rights over the jointly created product from the creative professionals. When things go wrong, this can result in completed films, albums or books not being published by the intermediaries, and the chances of the actual authors bringing out their works with another intermediary and so marketing them being limited.

Authors and rights exploiters are bound by a close relationship in which the author is, in many cases, dependent on the economic success of the rights exploiter. This does not always apply for authors who achieve big sales, but is usually the case for those who have lower earnings (on the remuneration of authors, see also section 2.3).

The development of the digital world has not changed this fundamental system. There are still creative professionals, creative industries and consumers. As a result of digitisation, however, creative professionals have new options available to them (see also on this topic section 1.2.3). The distribution channels are also different. For creative workers, on the one hand, digitisation is creating an abundance of options and opportunities to market their works autonomously and directly, and therefore to offer their labour and their works independently of intermediaries on the markets. The consumer, on the other hand, is also seeing a new diversity: They can choose whether to purchase their favourite series as a physical DVD at a high street retail outlet, order this physical product from an online distribution platform and have it posted to them, download it onto their computer or mobile device, or consume it as a stream. The possibility for various media to be combined ensures that many new ways of experiencing creative products are developing (for example, news platforms with embedded films, music and educational games), and these products can also be accessed by a wider audience. However, nothing has changed with regard to the fundamental precondition: Creative products need creative people who are also able to live from their work. The production and dissemination of these products cost money and require a high degree of organisation. As a rule, both these factors are supplied by publishing houses, music companies, film producers, broadcasters, etc.

2.3 Equitable remuneration/total buy-outs

Overview

The revision of copyright contract law in July 2002[164] was intended to strengthen authors' negotiating position in their dealings with their contractual partners, i.e. enterprises in the cultural and media industries. As the explanatory memorandum to the bill puts it: 'Above all, freelance authors and performing artists frequently fail in their attempts to obtain fair conditions for the exploitation of their rights in their dealings with structurally superior rights exploiters. As in other fields of law as well, the economic imbalance between the contractual parties creates a danger of contracts that favour one side.'[165] 'This is apparent for example from cases of multiple use – for instance on the online services run by print media – without equitable

[164] Act to Strengthen the Contractual Position of Authors and Performing Artists, *BGBl. I*, 2002, p. 1155.

[165] Cf. Draft Act to Strengthen the Contractual Position of Authors and Performing Artists, Bundestag Printed Paper 14/6433, pp. 1, 11.

remuneration or the fact that outright buy-outs – i.e. the sale of all rights of exploitation in return for a one-off payment – are also spreading.'[166]

The Act contains provisions that guarantee equitable remuneration (Section 32 UrhG), joint remuneration agreements (Section 36 UrhG) and dispute resolution mechanisms (Section 36a UrhG).

These provisions are intended to address authors and performing artists' structural inferiority in their dealings with the cultural and media industries. In this respect, it should be a matter for negotiation between the organisations that represent authors and the organisations that represent users of works to flesh out the somewhat vague legal term 'equitable remuneration'.

To date, negotiations on joint remuneration agreements have taken place in just four subsectors – with results being reached for the literary writers[167] and freelance newspaper journalists.[168] At present, negotiations are still ongoing for the magazine journalists and the film sector. However, the film industry negotiations have ground to a halt. It is uncertain whether they will be continued. In addition to this, reference is to be made to the provisions in the collective agreement for freelance journalists in the public broadcasting sector, which also regulate their remuneration and whose terms may not be undercut in contracts with freelance journalists not covered by collective agreements.[169]

While the *status quo* has essentially been codified for writers, some aspects of the remuneration agreement for newspaper journalists have met with considerable criticism.[170] However, it can be observed that the provisions established in these negotiations are better than the standard market fees in the subsectors to which they relate. As this has been presented by the authors' organisations, they may result in a doubling or tripling of remuneration.[171] In addition to this, it is to be observed that increasing numbers of publishing houses are applying these remuneration agreements. However, smaller authors' organisations criticise that, nonetheless, the remuneration agreements have not been applied by a large number of publishing houses in practice to date and that not all freelance journalists are benefiting from them.

In other subsectors of the cultural and creative industries, there have either not even been any negotiations (e.g. the games industry) or the remuneration agreements demanded by the legislation have ultimately not been adopted (e.g. the film industry). Germany's literary translators have now obtained several rulings from the Federal Court of Justice (BGH) on this issue.[172]

The Study Commission on Culture in Germany previously recommended in its Final Report published in 2007 that it be examined 'once again what provisions and measures in copyright contract law could be used to arrive at equitable remuneration for all authors and performing artists adapted to take account of economic conditions, since the provisions in place hitherto in the Act to

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[166] Cf. on this topic the Recommendation for a Decision and Report of the Committee on Legal Affairs of the German Bundestag, Bundestag Printed Paper 14/8058, 23 January 2002, p. 1, online: http://www.urheberrecht.org/law/normen/urhg/2002-03-22/materialien/ds_14_8058_I.php.

[167] *Gemeinsame Vergütungsregeln für Autoren belletristischer Werke in deutscher Sprache*, online: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Gemeinsame_Verguetungsregeln.pdf?__blob=publicationFile.

[168] *Gemeinsame Vergütungsregeln aufgestellt für freie hauptberufliche Journalistinnen und Journalisten an Tageszeitungen*, online: http://www.djv.de/fileadmin/DJV/Tipps_und_Infos_fuer_Freie_NEU/Gem-Verg%C3%BCtungsregeln-endg.pdf.

[169] Cf. on this topic, for example, Implementing Collective Agreement No. 4 – Collective Agreement on the Copyrights of Individuals under Employee-Like Contracts with WDR – of 14 September 1981 as amended on 1 April 2001, para. 1.4, online: http://www.rundfunkfreiheit.de/upload/m3e521c1c0c35c_verweis1.pdf.

[170] Cf. the statement from the Free Writers Association on the joint remuneration agreements for newspapers of 6 January 2010, online: http://www.freischreiber.de/home/stellungnahme-von-freischreiber-ev-zu-den-gemeinsamen-verg%C3%BCtungsregeln-f%C3%BCr-tageszeitungen.

[171] Cf. DJV Freelance Chapter and German Journalists Union (dju) in ver.di: *Gemeinsame Vergütungsregeln*, online: http://www.faire-zeitungshonorare.de/wp-content/themes/sash_theme_01/downloads/GemVergueregeln.pdf.

[172] BGH, judgement of 7 October 2009 – I ZR 230/06, *ZUM-RD*, 2010, p. 16, and the judgement of the same date, BGH – I ZR 38/07, *BGHZ*, 182, p. 337; BGH – I ZR 39/07, *ZUM-RD*, 2010, p. 8; BGH – I ZR 40/07, *ZUM-RD*, 2010, p. 62, and BGH – I ZR 41/07, *ZUM*, 2010, p. 255. Furthermore, BGH, judgement of 20 January 2011 – I ZR 19/09, and the parallel proceedings of the same date, BGH – I ZR 20/09, *ZUM*, 2011, p. 40; BGH, – I ZR 49/09, *ZUM-RD*, 2011, p. 212, and BGH – I ZR 78-08, *ZUM-RD*, 2011, p. 208.

Strengthen the Contractual Position of Authors and Performing Artists have been insufficient.'[173]

The problem

The incomes subject to compulsory insurance earned by authors from their creative activities have been stagnating for several years at less than €1,200 a month. This is apparent from the statistics of the German Artists' Social Fund, which show an average annual income of approximately €13,288. [174] However, the artists insured with the Artists' Social Fund are not representative of the whole population of creative professionals relevant here.

Apart from this, it cannot be ignored that, as freelancers, many creative workers generally do not enjoy any protection under collective agreements[175] and therefore have to assert themselves from a structurally inferior position in individual contractual negotiations with the media and creative industries. However, this is true of a large number of professions.

The economic imbalance is evident to some extent in the practice of what are known as buy-out contracts, under which authors give away all or at least most of their rights of use in exchange for the payment of a lump sum in order to receive some remuneration. This can, however, only happen within the framework of the relevant provisions for the protection of authors, which are intended to guarantee equitable remuneration.[176]

The practice of buy-out contracts affects not just self-employed artists, but also employed academics, who even find themselves in the situation of having to sign buy-out contracts without receiving any remuneration in exchange. Organisations such as the German Federation of Journalists (DJV) and the United Services Union (ver.di) are increasingly taking legal action against general terms and conditions to oppose and roll back buy-out contracts.[177]

However, it is always necessary to differentiate between authors in the various sectors. For instance, book publishers, in particular, object that, in contrast to film or television, buy-out contracts do not play an appreciable role in the book industry.[178]

In the academic sector, the low print runs that are produced force authors to subsidise printing costs in many cases, for which purpose they regularly seek assistance from funding institutions such as the German

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[173] Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, p. 267, online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[174] Cf. the survey published by the German Artists' Social Fund: 'Durchschnittseinkommen der aktiv Versicherten auf Bundesebene nach Berufsgruppen, Geschlecht und Alter zum 01.01.2011', online: http://www.kuenstlersozialkasse.de/wDeutsch/ksk_in_zahlen/statistik/durchschnittseinkommenversicherte.php.

[175] Freelancers may enjoy protection under collective agreements, in particular self-employed journalists, camera operators, etc. under employee-like contracts. This applies in the newspaper sector as well as public broadcasting.

[176] Cf. on this topic the Recommendation for a Decision and Report of the Committee on Legal Affairs of the German Bundestag, Bundestag Printed Paper 14/8058, 23 January 2002, p. 1, online: http://www.urheberrecht.org/law/normen/urhg/2002-03-22/materialien/ds_14_8058_I.php.

[177] On 1 June 2010, for instance, Hamburg Regional Court prohibited ZEIT-Verlag from applying its 'framework agreement' for authors (Az. 312 O 224/10, *Beck-Rechtsprechung* (*BeckRS*), 2010, p. 20723). Comparable rulings had previously been obtained against Bauer Verlag's general terms and conditions at Hamburg Regional Court (judgement of 4 May 2010, AZ 312 O 703/09, *BeckRS*, 2010, p. 25096), and Axel Springer Verlag's terms and conditions at Berlin Higher Regional Court (judgement of 26 March 2010, Az. 5 U 90/07, online: http://www.gerichtsentscheidungen.berlinbrandenburg.de/jportal/?quelle=jlink&docid=KORE212972010&psml=sammlung.psml&max=true&bs=10).
On 14 May 2011, the trade unions won a similar legal action against the *Neubrandenburger Nordkurier* (Nordost-Mediahouse GmbH & Co. KG) at Rostock Regional Court, press release online: http://www.mediafon.net/mediafon2004/upload/Nordkurier-Urteil.doc.

[178] According to a representative study conducted in 2003, 98% of the books published by general publishing houses were paid for on the basis of ongoing royalties for the author or (more rarely) a combination of the payment of an up-front advance with royalties once a particular level of sales had been reached. In the audiobook sector, by contrast, where audio versions of plays involve large numbers of contributors, the majority of the individuals who hold related rights tend to prefer buy-out payments, and these are customary in this field. Here, as a rule, it is only the writer of the recorded book and a few significant co-authors or contributors (the director, under certain circumstance also important readers) who receive ongoing royalties. Cf. Homburg, Christian: *Gutachten: Betriebswirtschaftliche Auswirkungen möglicher Veränderungen der Honorarsituation in Verlagen als Folge der Urheberrechtsnovellierung*, 15 October 2003, online: http://www.boersenverein.de/sixcms/media.php/976/Gutachten_Prof_Homburg_Honorarsituation_in_Verlagen_als_Folge_der_Urheberrechtsnovellierung.pdf.

Research Foundation (DFG), the VG WORT's academic fund and various foundations. Furthermore, academic authors receive no fees for periodical articles in most academic fields – one exception is the law, economics and tax segment – because, as the publishing houses argue, they are making use of the publishers' services to publish their papers in good time with good-quality editing and proof-reading and, above all, to promote their own reputations in recognised specialist periodicals.

The legal precedents set to date[179] have created a situation in which it has been made markedly more difficult for publishing houses to be assigned a comprehensive right of use in exchange for no more than a lump-sum fee. According to the case law delivered by Germany's highest court, exacting requirements are placed on such buy-out contracts. For instance, the royalty from sales must be 'determined depending on the duration, scale and intensity of the use.' After all, the payment of a fixed sum involves 'the danger that the portion of the fixed amount attributable to the transfer of the rights merely provides for the author to be compensated for the first phase of a work's ongoing use.' In order to counter this danger, a lump-sum fee would have to guarantee an 'appropriate share in the foreseeable overall yield from the work's use' as assessed 'objectively at the point in time when the contract is concluded.'

However, if a rights exploiter has 'all rights of use for the entire duration of the copyright granted' to them, it cannot be predicted at the point in time when the contract is concluded whether the work will only be used to such an extent up until the end of the term of protection, i.e. 70 years after the author's death, that 'the agreed lump-sum fee is appropriate.'[180]

In the opinion of the Federal Court of Justice, the only circumstance in which buy-out contracts therefore do not contravene the entitlement to equitable remuneration arises when the one-off payment is so high that it constitutes equitable compensation for all possible future uses of a work up to 70 years after the death of its author. As a rule, the buy-out contracts customary in the culture and creative industries fail to fulfil this precondition in certain sectors.[181]

For these reasons, it is still necessary to ask why inequitable buy-out contracts are nevertheless concluded. The reason for this is that authors and creative professionals are sometimes the weaker party to the contract: Freelance authors and performing artists (journalists, visual artists, directors, camera operators, set and production designers, photographers, designers, actors) are treated legally as entrepreneurs. In fact, however, they are often comparable to wage-earning employees. Unlike other liberal professions such as lawyers, doctors, structural engineers and architects, they have no statutory remuneration agreement or statutory fee schedule that can be consulted by the public, ensures them remuneration rates for their work and is adjusted regularly to take account of economic conditions. However, it must not be forgotten that freelance authors and performing artists are protected by legislation and the legal precedents on this issue discussed above. This is clear, for example, from the case of the translators, although they are still not receiving equitable remuneration despite a ruling of the Federal Court of Justice.[182] By contrast, if they are members of GEMA, composers are able to receive remuneration additional to their earnings on the rights the society administers if they transfer their advertising rights to a client, for instance.

It has proven to be a problem in this respect, in particular, that current German copyright law is limited to the

[179] See for example KG Berlin, judgement of 26 March 2010 – 5 U 66/09, online: http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=KORE212972010&psml=sammlung.psml&max=true&bs=10; LG Hamburg, judgement of 4 May 2010, – 312 O 703/09, *ZUM*, 2010, p. 818; judgement of 1 June 2010 – 312 O 224/10, *BeckRS*, 2010, p. 20723.

[180] BGH, judgement of 7 October 2009 – I ZR 38/07, *BGHZ*, 182, p. 337 – Talking to Addison.

[181] Supplementary dissenting opinion of the Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude: 'On 1 June 2011, the Hanseatic Higher Regional Court ruled that buy-out contracts are also unlawful, irrespective of the level of remuneration agreed, because they are not compatible with the royalty principle in copyright law. Where a rights exploiter has rights granted to them in such a way that this "ultimately excludes the author from all future uses or further assignments of rights of use," clauses of this kind are to be regarded as ineffective (Az. 5 U 113/09, *BeckRS*, 2011, p. 16995).'

[182] BGH, judgement of 7 October 2009 – I ZR 38/07, *BGHZ*, 182, p. 337 – Talking to Addison; BGH, judgement of 20 January 2011 – I ZR 19/09 – Destructive Emotions.

standardisation of the provisions on the procedure for the creation of these joint remuneration agreements, including the arbitration board, but contains no provisions concerning the binding nature of the arbitration board's decisions.

2.4 New remuneration models

One exception from the protection of exclusive rights has been formed in the last few decades by private copying under Section 53 UrhG and the associated system of flat rate levies under Sections 54ff. UrhG. This exception was introduced in the 1960s because as a rule it was not possible to control and therefore also prevent the copying of copyright-protected works in the analogue world. The introduction of cassette recorders enabled consumers to record radio programmes without a great deal of effort. Thanks to photocopying, newspaper articles or individual passages in books could be reproduced with the greatest of ease. The legislature therefore decided at that time not to introduce complex, ineffective enforcement mechanisms, and instead added provisions on private copying to the legislation. Under this arrangement, reproductions made by consumers are tolerated to a certain degree without the author having to give their permission for the use, a situation that also pertains in the digital sector despite what are fundamentally different copying processes. For purely practical and administrative reasons, this limitation of rights is not compensated for immediately by the user themselves, but by the manufacturers of copying devices and storage media, who are obliged by statute to pay what is known as a flat rate levy to the authors. In the opinion of the German Bundestag,[183] the cost of this mandatory payment is intended to be passed on directly to the consumer, with the manufacturer including the levy in the prices for devices and storage media when they are sold. Since this levy was brought in, the device and storage media industries have paid hundreds of millions of euros each year to the collecting societies, who have distributed the funds to their authors. The volume of money raised from the levies is rising proportionally to the ever increasing diversity of the end device market, both in Germany and elsewhere.

However, the legislative foundation for this system of exceptions and remuneration has been in place since the 1960s without major change. The only alterations came in 2008, during a major reform of copyright law, the 'second basket', when the Bundestag decided in conformity with the European legislation to firstly link the level of the levies even more clearly to the standard of the actual use of the devices and the 'harm' to authors [184] caused by the toleration of private copies for which they were to be compensated. Secondly, the parties concerned – i.e. authors, collecting societies, and the device and storage media industries – were supposed to reach consensus on what would be an appropriate level for the levies. Since the 1960s, however, it is not just hardware and software-based technologies that have developed rapidly, but authors marketing techniques and users' behaviour as well: Authors can decide individually the conditions under which they make their works available, and therefore exert a significant influence on whether and in what form remuneration is paid by the user. If an author makes their content available free of charge on the Internet – for marketing purposes, for example –, flat rate levies are inappropriate. Furthermore, users' behaviour has changed drastically over the last few years. Whereas consumers once purchased individual devices especially for the purpose of making private copies, today they use a large number of devices, whose main function of is not that of producing private copies. Even if they wanted to, the same user would never have enough time to make and consume the numbers of private copies their devices could theoretically produce. Despite this, consumers today generally have to pay the copyright levy several times over just because they could use their various devices for private copying. For these reasons, it is necessary to address once again the question of whether the current system of flat rate levies, which was introduced solely in the absence of options for control on the part of the right holders, is still practical, efficient and necessary at the present time, provided all interests – i.e. those of authors, the hardware industry

[183] Cf. on this topic also the ECJ judgement of 21 October 2010, Case C467/08, *Europäische Zeitschrift für Wirtschaftsrecht* (*EuZW*), 2010, p. 951, para. 50 – Padawan.

[184] Cf. on the English term 'harm' in this context Recitals 35 and 38 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L*, 167/10, 22 June 2001).

and consumers – are taken into consideration.[185]

Flat rate levies and individual forms of remuneration are not alternatives, but cumulate. Flat rate levies are collected in addition to the charges for individual licences and pay services on the Internet. Consumers therefore pay twice below the line: firstly the flat rate levies, secondly the prices for access to individual pieces of content, flat rate charges, online subscriptions, etc. in all cases where a provider supplies pay services of this kind. German consumers are not freed from the obligation to pay for charging Internet services – for example by micropayment – because they have already paid a flat rate levy on their devices. Other states such as the UK do not administer levies of this kind, without their creative scene and the development of the Internet economy having been harmed. Of the flat rate levies paid by German consumers, large proportions flow abroad, so do not benefit the creative industries in Germany. For instance, GEMA transfers approximately 30% of the total revenues from the levies it collects abroad, which means the current net transfer to other countries amounts to about €150m a year.

In the digital world, each user consumes and produces content, i.e. places texts, images, films or music on the Internet. In theory, flat rate levies could be collected from all users and subsequently distributed to all users again. This would give birth to a bureaucratic monster without having any positive effects on creative professionals or enterprises.

Under the provisions on the treatment of private copies, right holders are granted an entitlement to remuneration to compensate them for the loss of their right to prohibit these reproductions. Sometimes the opinion is put forward that in theory and practice this compensation is not based on any damage to the right holder, but solely on the fact that their works and efforts are used. The entitlements to remuneration are satisfied by the collecting societies, which operate in a fiduciary capacity, in accordance with the allocation of revenues set in their distribution plans. The proponents of this system emphasise its proportionate and simple enforcement of the entitlements to remuneration.

While the advocates of digital rights management and micropayment systems are of the opinion that there is no longer any justification for systems of flat rate levies at a time of effective access controls, it is possible to argue against this that flat rate remuneration systems are very much better suited to take account of the public's interest in access to information goods. Formulated in general terms, flat rate forms of remuneration favour the extensive use of information goods, whereas individual charging systems encourage user behaviour that limits the costs incurred, above all among lower income groups.

A further argument for flat rate remuneration systems can be derived from the fact that, as a rule, information goods are experiential goods, whose subjective value can only be judged after their consumption. In comparison to individual charging procedures, flat rate remuneration systems impose considerably lower transaction costs for exploring or listening to and watching new works. In addition to this, authors usually benefit more from flat rate remuneration systems than proportional forms of remuneration.[186]

It is being discussed whether such a system of exceptions and flat rate levies is still practical, efficient and necessary at the present time, provided all interests – i.e. those of authors, the hardware industry and consumers – are taken into consideration.[187]

There are types of work for which the unambiguous assignment of one copy to

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[185] Cf. on this topic the Written Statement by Prof. Dr Gerald Spindler for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-E, pp. 9ff., online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_E-_Stellungnahme_Prof__Spindler.pdf.

[186] Cf. on this topic the comments by Dr Christophe Geiger at the Hearing on The Future of Copyright in the Digital Era, European Parliament, 1 June 2011. Recordings of the Hearing are available online: http://www.greenmediabox.eu/archive/2011/06/01/copyright/.

[187] Cf. on this topic also the Written Statement by Prof. Dr Gerald Spindler for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-E, pp. 9ff., online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_E-_Stellungnahme_Prof__Spindler.pdf.

one user has advantages. For example, cutting-edge games often require the user to be linked constantly to the manufacturer's server while they are playing. This is also accepted by consumers because it gives them advantages when they play the game (for example, playing as part of a worldwide community, updated new features, constant updates and extra levels). This means the player is restricted to using this one copy of the game.

At the same time, a technical environment is arising in the video and e-book sectors, as previously for pieces of music, that no longer restricts the enjoyment of the work to one device. While some providers (Apple in the film sector, for example) particularly advertise with the fact that the enjoyment of the work is no longer tied to one device, others (for example, Amazon with its Kindle e-reader and Barnes&Noble with the NOOK e-reader)[188] deploy technical measures such as hard DRM to tie files to individual devices and ensure it is only possible to 'lend' them to friends for limited periods. In these cases, the technology prevents a copy from existing on more than one device at any time. This restriction of private copying is currently allowed by Section 95a UrhG (see section 1.5.6).

DRM is criticised, above all, by data protection and consumer rights experts. Their criticisms include:

– the unequal treatment of digital and analogue works with regard to their communication to third parties;[189]

– the danger it will not be possible for lawfully acquired files to be consumed on all (current and future) players;

– the restriction of the diversity of services and consumers' freedom by the tying of content to particular devices or providers;

– upon the expiry or discontinuation of a particular DRM system, the files restricted by it could become useless;[190]

– it has not been ensured that DRM measures are programmed in such a way that they become ineffective when the statutory terms of protection for the work in question expire;

– it is not easy to back up lawfully acquired data under DRM;

– DRM systems that regularly check whether the user also holds rights of use allow detailed user profiles to be compiled.

The debate about the flat rate levy is concerned with the question of compensation for legal reproduction. The culture or content flat rate is proposed by a few commentators for a quite distinct purpose, as a response to contraventions of copyright law, i.e. illegal reproductions, on the Internet:

Under these systems, the provisions on private copying would be applied to the Internet for the flat rate remuneration of downloads of copyright-protected works. All users would pay a uniform, monthly sum for each Internet connection in addition to the levy that is already collected on storage devices and blank media. These revenues would flow to the right holders via a collecting society in accordance with a distribution formula that would need to be drawn up. The starting point for the obligation to pay this levy and its enforcement would accordingly be the question of whether a user had an Internet connection.

Different arguments are brought forward for and against a culture flat rate. Its proponents argue it could replace an inequitable, unfair, out-of-date system that is not capable of protecting authors' rights, accommodating users of cultural content or benefiting rights exploiters.

Its opponents believe such a system would be unfair because it would not take account of the principle of supply and demand, and would also represent the monetary value of culture in a crude manner. In addition to this, people who did not use works as provided

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[188] Cf. *buchreport*: 'Kindle kopiert NOOK', online: http://www.buchreport.de/nachrichten/online/online_nachricht/datum/2010/10/25/kindle-kopiert-nook.htm.

[189] Cf. on this topic also the demands made by the Federation of German Consumer Organisations: *Verbraucherschutz im Urheberrecht – Positionspapier des Verbraucherzentrale Bundesverbandes zur Reform des Urheberrechts*, 13 May 2011, p. 2, online: http://www.vzbv.de/mediapics/urheberrecht_positionspapier_vzbv_2011.pdf.

[190] Cf. Lischka, Konrad: 'Bürgerrechtler wüten gegen Microsoft-Musik mit Verfallsdatum', *Spiegel Online*, 30 April 2008, online: http://www.spiegel.de/netzwelt/web/0,1518,550686,00.html.
Furthermore: Knoke, Felix: 'Yahoo dreht Kunden die Musik ab', *Spiegel Online*, 25 July 2008, online: http://www.spiegel.de/netzwelt/web/0,1518,568086,00.html.

for under such a scheme would still have to pay in as well. Against this, it is argued that the music industry, in particular, has brought about a failure of the market with its business practices. It is claimed the sharing of files is a consequence, not the cause, of this situation. Where the market fails, the state is called upon to act. The culture flat rate is presented as an instrument with which to remedy the market, as well as making commercial, content-based activities profitable again. This is disputed by its critics, who argue it would mean abolishing market mechanisms. They fear the creation of an authority distanced from the market that would be responsible for distributing revenues and setting their level, and might exert considerable influence over the arts. Apart from this, the revenues generated would be capped. People who had connections to the Internet would pay the same set price each month, regardless of the diversity and quality of provision.

Supporters of flat rate remuneration emphasise the argument that authors would be placed in a better position financially because flat rate remuneration would be easier to enforce than individual remuneration. It is argued against this that it is still unclear how much money would actually reach authors, among other things due to the costs of collection and administration. It is felt there is a need for concrete provisions to be put forward first before any conclusions can be reached. However, proponents of the idea argue that the distribution of the revenues from a culture flat rate would potentially be fairer than the distribution of music revenues to date by GEMA. For it would also cover the sales of independent artists who receive nothing from the GEMA distributions at the moment. Its critics believe distribution managed according to a formula would relegate commutative justice in favour of distributive justice.

It is claimed that a culture flat rate would make it possible to lower the barriers to market entry for artists because they could benefit from distributions as soon as someone downloaded their work. Against this, it is argued by critics that unknown artists already have the option of publishing their works on the Internet today – the costs of online distribution would still have to be met in future.

Opponents of the culture flat rate fear that the payouts from the culture flat rate would require data about the use of works and would therefore involve the monitoring of Internet traffic that would run up against considerable reservations under data protection law. Nevertheless, the system of flat rate remuneration under the private copying provisions is not based on the measurement of use, but the fact that works can in principle be copied. Accordingly – as the supporters of a culture flat rate argue – there would be no need for use to be measured if a culture flat rate were to be implemented. Rather, it would be enough to prove that a user possessed an Internet connection in order to establish an entitlement to remuneration.

As a further counterargument, mention is made of the threat that the system could be manipulated or distorted by the mass production of trivial works. Its proponents respond that such dangers of manipulation are not a phenomenon that would only affect a culture flat rate, but would also exist if other remuneration procedures were implemented.

Apart from this, its proponents see the culture flat rate as an opportunity to reduce the burden on the justice system because it would no longer be necessary to enforce authors rights, something that is done with limited effectiveness today. However, the enforcement of rights would continue to be necessary with regard to commercially used content. Furthermore, a series of problems would remain because private copies could also be used unlimitedly by parties who were not entitled to do so, in particular in other countries. This is why the system's critics expect that a culture flat rate could only be put in place within the framework of the provisions laid down by European law, in addition to which it would require an international approach.

Finally, the critics believe a culture flat rate would constitute a disproportionate encroachment on authors' fundamental rights because they would not be able to determine either the level of remuneration or the scale on which their works were used. In the absence of immediate options to negotiate about the exploitation of the fruits of their work, it could be said that creative professionals would be deprived of the power to take their own decisions. In this connection, its proponents emphasise that flat rate remuneration could create legal security for providers, rights exploiters, and users. This would offer a foundation for

business in the creative industries that, in comparison to the current legal situation, would be tailored to the age of digitisation and the Internet.

Another new payment model concept, the ‘culture token’, is based on the idea of a flat rate levy and would constitute an alternative form of remuneration for authors of digital works that would be directly determined by the users of those works:

Users who wished to take part in this remuneration system would pay the same sum of money in each month, which would be set in advance and would be equally high for all participants. Participants could join the system voluntarily. However, it would also be imaginable for all Internet users to pay this sum. Alternatively, provision could also be made for a general levy on all taxpayers. Each participant would receive points equivalent to the sum they paid in that they could distribute directly to authors and their digital works online. It is objected to this by the critics that although, in contrast to the culture flat rate, the remuneration would not be capped and could be topped up with voluntary contributions, certain configurations of the system would make authors dependent on their users’ favour.

Authors who wished to take part in the system would register their digital works. Users should be able to transfer their points for a work to the author simply and anonymously. After a predetermined period of time or once a previously fixed number of points had been accumulated, the rights of exploitation could lapse automatically and the work become a digital commons, i.e. enter the public domain. This would shorten the long terms of protection for exclusive rights that are customary today. However, an option to pay voluntary remuneration would also exist after the work’s transition to the commons. If the level of the monthly flat rate remuneration were too low, not all right holders would take part in this model. This would increase not just the legal uncertainty as to which works had passed into the digital commons, but also the *de facto* pressure from users for right holders to have their works remunerated with flat rate payments.

The author would receive remuneration for their work paid out in accordance with the number of points allocated to them. The number of points to be paid for using a work could be set by the author or left to users to decide. It should be free for every user to pay in more money than the set sum each month and so purchase more points for distribution. This could be supported by the tax system as an incentive to spend more money on art and culture.

The culture token could open up a completely new market for digital works that would provide for direct payments to authors. At the same time, it would create a growing body of digital commons. Here, the question arises of the cross-border use of these digital commons because their use in other countries would go unremunerated.

The funds would be administered on the authors’ behalf by an independent, foundation whose executive body would be composed of equal numbers of artist and user representatives. All the foundation’s staff would be appointed for fixed terms. The software required for technical purposes should be open source and developed with open standards. Each work registered with the foundation would receive a unique identifier for the eventual accounting process. Despite this, a large number of challenges under data protection law are being discussed.

DRM systems would not be allowed under this regime because all works that subsequently passed into the commons would have to be freely accessible. Apart from this, it would limit authors and distributors’ freedom to exploit works.

In future, creative digital works would be remunerated directly and autonomously by users with the points they distributed. Furthermore, the concept should be designed so as to be open to foreign authors. Like the culture flat rate, such a system would bring in foreseeable sums of money for creative works (for example, a monthly contribution of five euros from each of the approximately 25 million Internet connections in Germany would raise about €1.5bn a year). However, the distribution to the authors would be based on actual patterns of use without Internet users’ behaviour having to be monitored. Certain versions of the model are criticised because there could be discrepancies between users’ buying behaviour and sympathies when it came to the awarding of points. The points system would then fail to reflect the works’ true prices and the real demand for them.

In order not to reproduce the distortions seen in the distribution of revenues on the current market, the monetary equivalent of unallocated points could be distributed to all the authors registered with the system in rotation. Caps on possible revenues that would benefit authors with low sales would also be conceivable. However, it is objected to this that such rules might possibly deter the attractive services that would be able to survive on the market from taking part, so causing the failure of the voluntary culture token.

At present, isolated successes with 'crowd-funding' and 'social payment' are being talked about as alternative forms of remuneration for creative activities. The idea of crowdfunding is for capital to be raised for as yet unrealised projects from a large number of voluntary payments. Financial foundations are laid for projects that otherwise might not be translated into reality. As a result of the possibilities offered by the Internet, investors, donors and creative professionals are networked effectively, there is a very great deal of transparency about how funds are spent and, under certain circumstances, investors or donors can join in the creation of content.

A few media outlets, some of them professional, use what is known as social payment, which is facilitated by services such as Flattr and Kachingle, as an additional source of revenue. Users can pay in a credit to a service provider and allocate it to organisations that join the system over the course of a month, if they particularly like an article, for instance. It therefore reflects their appreciation of works in a financial form.

However, both financing systems are still not mass phenomena and will only be able to support classic, transaction-based funding mechanisms to a minor degree for the time being. Furthermore, it is evident from the evaluation of the individual revenues earned from Flattr that for the most part funds are channelled to particularly polemical or polarising pieces. At the moment, it is not possible to tell whether a cultural landscape with a broad range of content could be financed in this way.

With his long tail theory, which is based on *Malcolm Gladwell*,[191] *Chris Anderson*[192] has drawn attention to the fact that the Internet is better suited for the marketing of niche products than traditional forms of distribution. Thanks to global demand and advanced search technology, services and products that would not be provided by traditional outlets find interested customers on the Internet. *Anderson* illustrates this by looking at the online music service Rhapsody, which earned more money with many titles for which there was low demand than its few top titles. However, *Anderson's* theory is not uncontested. *Anita Elberse* came to contrary conclusions both in her evaluation of the sales figures for the iTunes Store and in her analysis of video lending data from Netflix (both 2007).[193]

When they analysed data on the use of legitimate online music retailers and peer-to-peer file-sharing sites, *Eric Garland* and *Will Page* too came to the conclusion that the long-tail curve is significantly steeper than is assumed by *Anderson*, both for users of peer-to-peer filesharing sites and for download purchasers. Furthermore, it was found that only a very small fraction of the revenues generated was attributable to products that sold in small numbers.[194]

[191] Cf. Gladwell, Malcolm: *The Tipping Point: How Little Things Can Make a Big Difference*, 2000.

[192] Cf. Anderson, Chris: *The Long Tail: Why the Future of Business is Selling Less of More*, 2006.

[193] Cf. Elberse, Anita: 'Should You Invest in the Long Tail?', 2008, online: http://hbr.org/2008/07/should-you-invest-in-the-long-tail/ar/1.

[194] Cf. Page, Will/Garland, Eric: *The long tail of P2P*, 2009, p. 3, online: http://www.prsformusic.com/creators/news/research/Documents/The%20long%20tail%20of%20P2P%20v9.pdf.

3 Copyrights and users' rights

3.1 Enforcement of rights on the Internet – a challenge for copyright law

For the creators of copyright-protected works and rights exploiters, digital technology represents an opportunity and a challenge at the same time. Modern information technology – most of all the Internet – not only opens up undreamed-of new possibilities for the creation and utilisation of creative products. At the same time, it also creates a completely new environment for the use of copyright relevant works. As soon as a work has been digitised, it can be reproduced in large numbers without any loss of quality. Once it has been made available on the Internet, the work can be further distributed in the digital world practically without the right holder's authorisation.

It remains to be observed that the need for copyright protection is not being called into question. For Germany is not only obliged by international agreements to guarantee such protection. In addition to this, the efficient enforcement of copyrights is an important precondition for the exploitation of copyright-protected works.

Substantive copyright law: protection at a high level

The provisions of the German Copyright Act have been strengthened continually over the past few years with a view to the requirements of the digital society. This has been done overwhelmingly on the basis of the provisions of European law. Even if the further development of copyright in the digital world remains an ongoing task and the gaps in regulation that have been identified need to be closed, it can still be noted that the system of copyright norms already guarantees comprehensive protection at a high level today in the digital media as well (see on this topic also chapter 1).

The enforcement of copyright law: improvements remain necessary

What is true of all law is true of copyright law: It is only strong if it enjoys broad acceptance and is legally enforceable. Copyright law contains extensive provisions concerning the enforcement of rights, and gives authors and rights exploiters wide-ranging entitlements when their rights are infringed – in particular to obtain the cessation of rights infringements, compensation for damages and information. Furthermore, copyright law makes infringements of rights punishable, as well as formulating unambiguous legal consequences when they are committed. However, the proportionality of the provisions concerning the enforcement of copyright also has to be examined again and again in the digital world, not least on account of the rapidity of technical change.

Rights to immaterial goods can be infringed without this resulting in any physical damage. Anyone who takes away or consumes another person's physical property depletes its material substance. By contrast, an infringement of intellectual property is often less evident. What is characteristic of copyright is therefore that intellectual property does not obviously appear to be property.

The interests of the groups concerned – authors, rights exploiters and users of creative products, in particular – stand in a relationship to one another that has to be balanced. The justified concerns of all participants need to be brought into a balanced relationship to one another more today than in the past. In particular, the justified need for a high level of data protection, guarantees for the privacy people require and freedom of information must not be called into question on the Internet. This is why it is important that different legal goods are not played off against each other. The requisite balance of interests must guarantee authors exclusive rights in an equitable fashion.

New business models: repression is no solution

Experience has shown that rights infringements decline when legitimate services and new business models are put in place that meet Internet users' particular needs. Many consumers are prepared to use legal content and also pay remuneration for it. If no such services are on offer, this is – of course – no justification for contraventions of copyright law, but can *de facto* increase the incidence of illegal uses. However it is only possible to strengthen the population's respect for other people's creative output if copyright is perceived as something necessary and positive. New services on the Internet may help to encourage this perception. Anyone who relies solely on repressive measures will

not be able to foster the acceptance that copyright law so urgently needs. A loss of acceptance will make it more difficult to enforce rights.

In this connection, particular significance also attaches to the legal framework for simple, efficient licensing. The existing licensing systems have to be examined to ascertain whether they do justice to the requirements of media content providers and possess the flexibility necessary to cope with new technologies.

The use and abuse of cease and desist notifications

Cease and desist notifications sent out in response to infringements of copyright have become a mass phenomenon in Germany.[195] Notifications are issued in such large quantities by some parts of the cultural and media industries that these notifications are perceived by many to be simply abusive *per se*. However, this perception does not tell the whole story. In principle, the cease and desist notification is neither a new instrument for prosecution nor in any way dishonest: The notification is a notice issued by a right holder to a rights infringer in which the rights infringement is brought to the infringer's attention and a demand made that they commit themselves not to infringe rights in future. This is a proper, appropriate tool with which to deal with cases of this kind and reach agreement rapidly without court proceedings. Such notifications have therefore been recognised for decades as a legitimate measure in the field of copyright law. Since 2008, the Copyright Act has provided expressly for the party whose rights have been infringed to initially issue a notification before they take the matter to court in order to give the party that has infringed the right the opportunity to reach an out-of-court settlement.

In the public discussion, it is viewed critically that the fundamentally tried-and-tested instrument of the cease and desist notification is used in a particular way in the Internet sector. Issuing notifications on a mass scale has become a business model for many legal firms and, in isolated cases, right holders as well. Under this model, companies specialised in the issue of notifications are granted rights of use solely for the purpose of searching the Internet for rights infringements and sending out notifications about them on a mass scale. When they issue cease and desist notifications, some companies also approach users with offers for out-of-court settlements without having previously billed the right holders for these activities. This means damages are being demanded from users in the form of costs that the right holders have not even incurred. Such abusive use of the instrument of the cease and desist notification as a part of business models that are intended merely to generate revenues for legal firms and in which the actual interests of the author recede into the background has brought notifications of this kind into widespread disrepute. In the public debate about the use of notifications, this has resulted in those who wish to assert their rights often having to vindicate themselves morally, even when the notification has been justified, and not those who have infringed others' rights.

Section 97a(2) UrhG introduced the privileged treatment of first-time and straightforward rights infringements. In such cases, the notification costs are restricted to €100. However, this *de minimis* clause includes many limitations and imprecise legal terms. In consequence, it only rarely takes effect to the benefit of users.

The German Bundestag has left the definition of 'straightforward cases' and 'merely insignificant infringements' to the courts. They therefore sometimes treat infringements of the law of a private nature as if they were on a commercial scale when determining the level of harm that has been caused. The norm is usually regarded as inapplicable when works have been made available to the public on online filesharing sites.

The introduction of a civil law entitlement to obtain information from intermediaries into Section 101(2) UrhG in 2008 considerably moderated the expense and

[195] According to Deutsche Telekom's *Report Data Privacy and Data Security 2010*, the company received temporary orders for the storage of an average of 200,000 IP addresses each month in 2010 due to suspected infringements of copyright, online: http://www.telekom.com/static/-/15426/2/report-datasecurity-2010-si.
The German Association against Cease and Desist Madness believes that in 2010 more than 500,000 notifications were issued in Germany with demands worth a total of more than €400m, while over 50% of the notifications were issued by just five legal firms, online: http://verein-gegen-den-abmahnwahn.de/zentrale/download/statistiken/2010/jahresbilanz_2010.html.

effort that notifications cause right holders.[196] According to information from the Association of the German Internet Industry (eco), right holders now receive user data on 300,000 Internet connections each month from German Internet providers thanks to the application of this norm.[197] Nevertheless, notification procedures are still associated with effort, expense and inconvenience for all concerned. Above all, users who have infringed third party rights because they are unaware of the legal situation feel unjustly treated as they are subjected to demands for what are often high costs without any prior warning. This point applies all the more in cases where the individual called on in the notification to cease and desist from infringing rights has not infringed the third-party right themselves, but is merely held liable in accordance with the principles of 'accessory liability'.

The provisions laid down in Section 97a(2) UrhG would have the potential to ensure a stable legal situation in the field of copyright infringement notifications if their imprecise legal terms were formulated more clearly. To date, however, these provisions have only found application to a lesser degree on account of their need for interpretation, which is why there is a gap in consumer protection in this respect.

Three strikes model

In order to simplify the prosecution and punishment of contraventions of copyright law, models are being discussed in some states or – as in France, for example – have already been implemented in practice that are referred to as 'three strikes' or 'graduated response' systems. Under these models, an Internet connection subscriber who has contravened copyright law on the Internet is initially sent warnings, and their personal data and surfing behaviour are recorded. If these measures have no impact and another copyright infringement via this Internet connection is observed, sanctions enter into force. In France, for example, it is possible for the Internet connection to be suspended for a particular period of time. However, there can be technical difficulties with these models.

Blocking someone's Internet connection is a profound encroachment on their freedom of communication and would be a disproportionate measure in view of the often vital significance of the Internet in daily life, the world of work and political participation. Apart from this, it is questionable whether this sanction would actually have the desired effects because the users affected would easily be able to turn to other Internet connections.

Furthermore, the three strikes solutions known to date are only able to deal with infringements of copyright that occur on classic online filesharing sites, but not those committed via other channels of communication, such as one-click share hosters or streaming services, which are of constantly growing significance at the moment.

3.1.1 Combatting copyright infringements

Infringements of copyright on the Internet can be combatted by quite diverse means. Technical tools, educational measures and Net-based measures are being discussed to address copyright infringements. The various possibilities are discussed at the following points in the present report:

- technical mechanisms (on the advantages and disadvantages of DRM measures and three strikes models, see sections 1.5.5, 1.8, 2.4, 3.1),
- flat rate remuneration (see section 2.4),
- alternative services (see chapter 2 and section 3.2).

The discussion about the most effective options for combatting infringements of copyright has seen a highly diverse range of instruments suggested.

1. As a response to the ability to copy content facilitated by digitisation and the Internet, proposals have been made for the establishment of access controls, copy protection and the monitoring of relevant platforms. In particular, media companies are bringing the deployment

[196] Dissenting opinion of the SPD and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude on this sentence: 'The introduction of the entitlement to obtain information from intermediaries as well under civil law in Section 101(2) UrhG in 2008 has reduced the expense and effort involved in notifications for right holders. This is ultimately the result of an attempt to weigh up the legitimate interest in the protection of the private sphere against the interest asserted in the notification at the expense of the private sphere of the persons affected.'

[197] Cf. Association of the German Internet Industry (eco): '300 000 Adressen pro Monat: erfolgreicher Kampf gegen illegale Downloads', 31 May 2011, online: http://www.eco.de/verband/202_9137.htm.

of technical tools such as digital rights management into play in this connection. DRM systems of this kind tie files to individual devices so that a work can only be lent out with the device. As a result of this, it may be stated that the copy acquired only exists on one device. The proponents of these DRM systems see them as a way of ensuring the number of copies made does not exceed a figure that can be determined in advance. Opponents believe they pose a danger that the opportunities to use content will be restricted in impermissible ways. For instance, some commentators point out that it is impossible to lend works, use them on multiple devices or use them on devices of later generations. In consequence, while those who implement DRM place the simplified enforcement of rights in the foreground, its opponents emphasise the danger of abuse, which may involve consumers being monitored in ways that allow the compilation of user profiles.

2. Another form of rights enforcement has been made possible by the system of flat rate levies applied in Germany since the first reform of copyright law in 1965. Under this approach, a use that cannot be controlled in conformity with data protection law is remunerated by a levy that is already included in the prices for products in advance. Rights are enforced in accordance with the legal relationships between right holders and those obliged to pay remuneration, and such enforcement does not require any measurement of use, but is merely based on the device's functions, i.e. whether it is capable of producing copies. The experience since 1965 has shown that sound and video recordings still continue to be provided and there is demand for them, in other words that, despite its relatively easy enforceability, the introduction of flat rate remuneration has not destroyed the market for these products.

3. Finally, the enforcement of rights will be made quite considerably easier if alternative, user-friendly commercial business models are developed that are based on subscription fees. With the large-scale networking of business models of this kind, filesharing platforms may be crowded out of the market and become unattractive. Although these will primarily have to be commercial services provided by private enterprises, the legislature has options for action in this field to promote a subscription culture of this kind on the Internet.

The following overview concentrates on repressive legal instruments.

Survey of the legal situation[198]

Right holders' entitlements under civil law

When copyrights or related rights are infringed, the author or holder of the exclusive rights of use is entitled, in particular, to obtain the cessation of the infringement, its rectification and damages in accordance with Section 97 UrhG. In order to actually be able to assert these entitlements, they need to ascertain the identity of the person who has infringed their rights. Since the entry into force of the Act on the Improved Enforcement of Intellectual Property Rights on 1 September 2008, they have therefore had recourse to an entitlement to obtain information from Internet providers as well under Section 101(2) UrhG. According to this provision, subject to particular preconditions, the provider is obliged *inter alia* to supply information about the names and addresses of users of their services, and the numbers of copies they have received.

In accordance with the provisions of Section 97a(1) UrhG, which have also applied since 1 September 2008, if a right holder has found out who has infringed their rights, they should notify the infringer prior to the initiation of court proceedings and give them the opportunity to deliver a declaration that commits them to desist from the infringement subject to an equitable contractual penalty, so settling the dispute out of court. In straightforward cases of merely insignificant rights infringements outside the sphere of commercial dealings, the costs to be borne by the infringer for the use of lawyers' services to bring the first notification are capped at €100 under Section 97a(2) UrhG.

[198] The following discussion in this section is partly based on a publication by Dr Wolfgang Schulz, expert member of the Study Commission on the Internet and Digital Society. Cf. Schulz, Wolfgang/Büchner, Thomas: *Kreativität und Urheberrecht in der Netzökonomie*, Working Papers of the Hans Bredow Institute, 21 December 2010, pp. 45ff., online: http://www.hans-bredow-institut.de/webfm_send/540.

The precondition for these entitlements is, of course, that the use is not an expression of the exceptions to which copyright is subject. Here, it is the still controversial exception for private copying laid down in Section 53(1) UrhG, according to which single reproductions of a work are permitted for private use, that is relevant above all. The second basket has modified this restriction. It is now necessary to ensure that no use is made of a model that has been obviously unlawfully produced or made available to the public. This is intended to cover downloading from file-sharing sites with greater clarity than the previous provisions. It remains to be seen whether it will prove possible to deal with all relevant kinds of activity more clearly by applying these provisions.

Providers' liability

Since right holders are frequently not in a position to take action against infringers, they are increasingly holding providers liable in order to achieve effective enforcement of their rights.

The privileged treatment of liability laid down in Section 10 TMG only touches on responsibility under criminal law and liability for the compensation of damages. By contrast, entitlements to obtain cessation remain unaffected by this provision.

Host providers' liability for infringements of copyright committed using the platforms they operate is assessed according to the principles of accessory liability. A party can accordingly be held liable who – without themselves being the infringer – contributes in any way willingly and with sufficient causation to the infringement of an absolute right where it is legally and actually possible, and reasonably to be expected for them to prohibit or prevent the immediate rights infringement.

However, the Hanseatic Higher Regional Court (OLG Hamburg) ruled in its RapidShare judgements [199] that the restrictions on the obligations to inspect content are ineffective if the operator deliberately and systematically omits to make use of opportunities that are reasonable for them and obvious to determine the identity of the user and substantiate any repeated act. In order to fulfil their obligation to prevent infringements of copyright, for instance, the operator of a share hosting service will also be obliged in future to carry out thorough, effective checks on users who have previously uploaded content in contravention of copyright law.

A fundamentally different view was taken very recently by Düsseldorf Higher Regional Court (OLG Düsseldorf).[200] The court ruled RapidShare did not itself make the uploaded files available to the public or arrange for them to be made available to the public. RapidShare could not be forbidden from merely permitting behaviour engaged in by third parties. Furthermore, RapidShare was not liable as an accessory for infringements of copyright by its users. It would not be reasonable to expect RapidShare to carry out manual inspections of the files that were uploaded, and automated checks on the files would be unsuitable for the most part.

In view of the inconsistent case law delivered by Germany's higher courts, the legal situation is therefore unclear for providers at present.

A liability on the part of the host providers of the kind demanded by right holders would be problematic not least because this would mean the enforcement of the right would become the providers' responsibility. In order to be safe from prosecution, they would have to check and, where necessary, delete the content posted by their customers. As a general rule, however, providers are unable to judge whether copyright has in fact been infringed or not. The logical conclusion is that the introduction of provider liability would therefore be equivalent to a privatisation of rights enforcement that appears incompatible with the principles of the rule of law.

Sanctions under criminal law

In accordance with Section 106 UrhG, the unauthorised exploitation of copyright-protected works is also punishable. However, Germany's public prosecution offices often prefer not to initiate criminal

[199] OLG Hamburg, judgement of 2 July 2008 – 5 U 73/07, *ZUM-RD*, 2008, p. 527 – RapidShare; furthermore: OLG Hamburg, judgement of 30 September 2009 – 5 U 111/08, *ZUM*, 2010, p. 440 – RapidShare II.

[200] OLG Düsseldorf, judgement of 27 April 2010 – I-20 U 166/09, *ZUM*, 2010, p. 600, and – 20 U 166/09, *ZUM*, 2010, p. 600; OLG Düsseldorf, judgement of 21 December 2010 – I-20 U 59/10, *ZUM*, 2011, p. 252, and – 20 U 59/10, *ZUM*, 2011, p. 252.

proceedings. Under Section 406e Code of Criminal Procedure (StPO), the injured party has a right to inspect files and is able to ascertain the identity of the infringer in this way in order to assert their interests under civil law.

Potential gaps in protection

Evidence

Gaps in protection may result in part from the fact that the reach of the entitlement to information under Section 101(2) UrhG is controversial. For example, it is questionable at what point a rights infringement reaches a commercial scale. For instance, the case law views the one-off uploading or downloading of just one music album in its 'commercially relevant phase' as a rights infringement on a commercial scale. This criterion is dubious, in particular, because well known artists could presumably assert their rights more effectively, given that the commercially relevant phases for their works would be assumed to be longer.

As the law stands at present, the onus of presentation and the burden of proof are incumbent upon right holders. They must be able to document that they were also the holders of the relevant rights at the time of the rights infringement. If the right holder wishes to hold an infringer liable under civil law, they must *inter alia* be in a position to present and, where necessary, substantiate an unbroken chain of rights. They must therefore be able to document that, starting with the authors, there were effective licence agreements between each of the purchasers of the rights of use in the intervening period. This is particularly difficult where a large number of parties are involved and the contracts were concluded a long time before.

Notification costs

In straightforward rights infringement cases, prosecution is not associated with disproportionate costs and effort for the right holder, which is why the notification costs are capped. However, it is still unclear in which cases the cap on the reimbursement of costs takes effect. If it is a straightforward case concerning a merely insignificant rights infringement, the right holder cannot refinance their prosecution costs by issuing notifications on a mass scale. They must then bear a share of their expenses themselves and might be prevented from enforcing their rights for these reasons.

Rights infringements on streaming sites

At present, pieces of music and audiovisual media are increasingly being consumed using streaming technologies, whereas peer-to-peer filesharing systems are declining in significance. While merely watching a stream is irrelevant under copyright law, it remains disputed whether retrieving a stream could constitute a relevant use.

Unclear normative texts

As, among other things, the revised version of the provisions on private copying shows, some of the legislation can still give rise to disputes about its interpretation that might hinder the enforcement of rights. For instance, it is unclear when a model within the meaning of Section 53(1) UrhG has 'obviously' been unlawfully produced or made available to the public. Wide scope for interpretation is found with regard to the question of whether a merely 'insignificant rights infringement' has occurred and a case is 'straightforward' (Section 97a(2) UrhG). It would also have to be examined whether the definition of a 'straightforward case' has sufficient purchase or whether this needs to be clarified.

Third-party rights and abuse

Action to combat infringements of copyright on the Internet serves the enforcement of constitutionally founded positions, but encroaches on constitutional rights at the same time as well.

For instance, it is clear that a computer's IP address on the Internet, at least together with the information that a particular service was used at a particular time, represents a piece of personal information within the meaning of data protection law. The use of these data without the consent of the person in question and without a specific statutory foundation would be an unlawful encroachment on the right to informational self-determination, which is protected under Article 2(1) in conjunction with Article 1(1) GG.

Furthermore, the Federal Constitutional Court has developed a new constitutional guarantee founded on Article 2(1) in conjunction with Article 1(1) of the GG, namely the 'right to guarantees for the

integrity and confidentiality of information technology systems'. Measures by means of which a user's computer memory would be searched, for instance, would come into conflict with this constitutional guarantee.

In addition to this, some commentators mention that, apart from individual, constitutionally protected interests, controls to combat infringements of copyright also have excessive negative effects on the freedom of communication on the Internet. The mere awareness that, subject to certain preconditions, someone's communicative behaviour will be logged by other parties can change how they communicate and therefore reduce the communicative potential the Internet offers society as a whole.

Rights enforcement approaches in other countries

In other states too, efforts are being made to combat infringements of copyright on the Internet. Yet while the cease and desist notification discussed above is the only option for right holders who wish to defend their rights in Germany, different routes are increasingly being taken in other states. In this respect, the development is moving in the direction of graduated response models under which right holders collaborate with Internet service providers (ISPs) – in France, this is done under the auspices of a 'high authority' established to take action against infringers. Right holders initially report contraventions of copyright to an official body (or, in Ireland, the relevant ISP), which is then supposed to issue warnings to rights infringers. After a certain number of warnings, the subscriber faces consequences that can range from limitations on bandwidth to the complete suspension of the Internet connection. On account of these mechanisms, this approach is also known as the 'three strikes and you're out' system. It continues to be not uncontroversial in these states.

A summary of the various approaches in a number of states that have decided to tighten up their rights enforcement rules is given below:

France

France was a pioneer of graduated response with its legislation to establish a new body, the High Authority for transmission of creative works and copyright protection on the Internet (Hadopi), which obliges ISPs to issue warnings to their users. Following a variety of legal disputes about its introduction – which centred on the protection of users' data – the act entered into force in September 2010. After two unsuccessful warnings and the storage of the rights infringers' personal data, together with the facts about their possible rights infringements, they can be taken to court. They face the threat of fines and the suspension of their Internet connection for up to 12 months. A more draconian approach was previously quashed by the highest French court, the Constitutional Council.

However, the studies that have been conducted on the effects of this new approach have produced contradictory evidence, and it may still be too early to draw conclusions. At any rate, since the legislation entered into force an average of 25,000 warnings have been issued to users every day. One survey conducted recently by the Authority arrived at a number of findings concerning its work.[201] According to this study published on 18 May 2011, 93% of users who admitted to downloading illegal content from the Internet stated that the establishment of the Authority had prompted them to change their illegal behaviour. 38% had ended their illegal consumption, while 55% had reduced it.[202]

Another measure that France has taken is of interest: the Music Card, with which the state subsidises the purchase of voucher cards for legal providers of digital music by customers between the ages of 12 and 25. This shows the kinds of measures that can also be considered when the aim is to change users' behaviour.

UK

The United Kingdom too has adopted legislation that is intended to introduce a graduated response system with its Digital

[201] Hadopi: *Hadopi, biens culturels et usages d'internet: pratiques et perceptions des internautes français: 2ème vague barométrique*, online: http://hadopi.fr/sites/default/files/page/pdf/t1_etude_longue.pdf; English summary: *Hadopi, cultural property and Internet usage: French Internet users' habits and points of view: 2nd survey – Overview and key figures*, online: http://www.hadopi.fr/sites/default/files/page/pdf/t1_etude_en.pdf.

[202] The Left Party parliamentary group delivered a supplementary dissenting opinion on this passage (see section 5.4). The Alliance 90/The Greens parliamentary group and the expert member Alvar Freude endorse this dissenting opinion.

Economy Act. However, it has not yet been implemented in full. There was initially controversy about the data protection law implications of the new approach, but the ISPs affected, which believe they will have to shoulder the organisational expense and effort of the warnings, also have objections to the Act (a contrasting interpretation is set out in the judgement of the High Court of Justice of 20 April 2011).[203]

Ireland

Ireland is not seeking to introduce a graduated response scheme with statutory legislation, but to find a solution by means of voluntary agreements between the ISPs and the music industry. However, this approach has had mixed success since a ruling of the country's highest court in October 2010 found that an ISP could not be forced by a right holder to deny a repeat offender access. However, the court had ruled that the implementation of graduated response was a 'proportionate and effective' measure. Nevertheless, the conviction of one ISP, UPC, was quashed by the ruling because the EU legislation had not been implemented correctly in Ireland. Recently, though, the country's biggest ISP, Eircom, announced that it will issue warnings voluntarily in future – although it has still not permanently disconnected any users to date.

Sweden

The results of the Intellectual Property Rights Enforcement Directive (IPRED) legislation in Sweden were picked up by the press as an example of the way that legislation adopted to combat copyright infringements may lead to a decline in illegal downloading in the short term, but the figures can rise very rapidly again, i.e. if users change their behaviour and switch to other illegal channels. It is disputed whether the legislation passed in 2009 has been a success. A significant decline in Internet traffic was recorded directly after the introduction of the IPRED legislation.[204] In June 2009, GfK found that 60% of filesharers had halted or reduced their file sharing activities.[205] Of these individuals, 49% said they had migrated to the Spotify streaming service. In the subsequent period, however, Internet traffic has risen to its previous level again. The reasons for this have not been fully investigated with empirical methods.

New Zealand

The New Zealand government recently adopted the Copyright (Infringing File Sharing) Amendment Act 2011,[206] a piece of legislation that is also intended to introduce a graduated response scheme in New Zealand, the functioning of which will be similar to the systems in France and the UK.

South Korea and other Asian states

In South Korea, a graduated response model was anchored in legislation very early on. The International Federation of the Phonographic Industry (IFPI) points to South Korea as a state where this approach has had positive effects on the music market. Legislative action has also been taken to introduce similar systems by other Asian states, including Taiwan.

United States of America

A law adopted in 1998 obliges ISPs to implement a system that places them in a position to cut the connections of rights infringers who are repeat offenders. The system is still being implemented. In parallel, there are already agreements between the ISPs and the music industry on the implementation of graduated response arrangements on an individual basis. In May 2011, the US Senate introduced a new law that provides for search machine operators, ISPs and credit card companies to be held liable where they permit access to websites with illegal content.

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[203] Royal Courts of Justice, judgement of 20 April 2011, [2011] EWHC 1021 (Admin), Case No: CO/7354/2010, online: http://www.bailii.org/ew/cases/EWHC/Admin/2011/1021.html.

[204] Primary source no longer available. Cf. however BBC News: 'Piracy law cuts internet traffic', online: http://news.bbc.co.uk/2/hi/7978853.stm; see also *CNet News*: 'Swedish antipiracy law: Traffic down, ISP rebels', online: http://news.cnet.com/8301-1023_3-10220679-93.html; furthermore, Adermon, Adrian/Liang, Che-Yuan: *Piracy, Music, and Movies: A Natural Experiment*, p. 8, online: http://www.ifn.se/wfiles/wp/wp854.pdf.

[205] Cf. Adermon, Adrian/Liang, Che-Yuan: *Piracy, Music, and Movies: A Natural Experiment*, 2010, p. 20, online: http://www.ifn.se/wfiles/wp/wp854.pdf.

[206] Copyright (Infringing File Sharing) Amendment Act 2011, online: http://www.legislation.govt.nz/act/public/2011/0011/latest/DLM2764312.html.

3.1.2 Questions of liability and obligations to check content

Where copyrights or proprietary rights are infringed online, the question is whether it is only the user who infringes rights who may be held responsible or whether the platform provider that, in certain respects, actually makes this possible bears some liability as well. The German Telemedia Act sets out a balanced, coherent liability regime rooted in the provisions of the E-Commerce Directive.[207]

In practice, however, legal uncertainties arise at one or another point due to the interpretation and application of the act. The object of the statutory provisions has always been not to push the ISPs into becoming the judge and jury when it comes to the assessment of third-party content. Quite particularly, they would otherwise be affected by a risk of liability for incorrect decisions.

Service providers who transmit their own content (content providers) are responsible for it in accordance with the general legislation (Section 7(1) TMG). Under Section 8 TMG, service providers who transmit content over their communication networks (access providers) are not responsible for third-party content. Service providers who store content for their users (host providers) are only responsible when they have knowledge of the rights infringement and have not taken immediate action to remove content that infringes rights (Section 10 TMG). Section 7(2) TMG transposes the E-Commerce Directive by prescribing that access and host providers, in particular, must not have any general obligations imposed upon them to monitor the information they transmit or store, or to actively seek circumstances that indicate illegal activity. In contrast to this, Recital 59 of the Information Society Directive states that intermediaries are often best placed to bring such infringing activities to an end. However, the efficiency of the measures taken to enforce rights is always judged in the light of proportionality as well. The mere fact that providers are best able to end rights contraventions must not lead to the conclusion that, when various goods are weighed up, the rights of the private sphere will be of secondary importance. Accordingly, providers' obligations always have to be weighed up against the private interests of the parties affected.

In the mean time, the case law has further differentiated the limitations on liability provided for by statute, and in this respect it has been guided in particular by Article 8(3) Information Society Directive. Accordingly, when rights to immaterial goods are infringed the main response is to issue cease and desist orders on the basis of accessory liability. The Federal Court of Justice interprets the second sentence of Section 7(2) TMG to the effect that the liability to ensure the cessation of infringements, irrespective of culpability, is not conclusively negated by the restrictions set out in Sections 8 to 10 TMG, but precautionary, forward-looking monitoring obligations may also arise.[208]

However, the precondition for an entitlement to obtain precautionary cease and desist orders is that there have been 'clear, easily identifiable rights infringements'.[209] It is questionable whether this legal precedent can also be applied to copyright. On the one hand, the legal system privileges the host providers with whom content providers store media files online on their servers. In this situation, the host provider must respect their clients' private sphere. In consequence, they are forbidden from carrying out any checks. Consequently, there is also no obligation to carry out checks, even when material is copyright-protected. According to the decisions of the OLG Hamburg that are discussed above, however, where the host provider's server is not used as a store for private data and the content is made available to an audience wider than their customer's private associates, it may be subject to heightened obligations to carry out checks. This obligation is merely incumbent on the host provider and cannot be passed on to customers.[210]

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[207] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ L*, 178, 17 July 2000, pp. 1-16.

[208] BGH, judgement of 11 March 2004 – I ZR 304/01, *BGHZ*, 158, p. 236; BGH, judgement of 19 April 2007 – I ZR 35/04, *BGHZ*, 172, p. 119; BGH, judgement of 30 August 2008 – I ZR 73/05, *Monatsschrift für Deutsches Recht* (*MDR*), 2008, p. 1228; BGH, judgement of 27 March 2007 – VI ZR 101/06, *NJW*, 2007, p. 2558.

[209] BGH, judgement of 19 April 2007 – I ZR 35/04, *BGHZ*, 172, p. 119.

[210] Hanseatic Higher Regional Court Hamburg, judgement of 2 July 2008 – 5 U 73/07, *ZUM-RD*,

Nevertheless, the legal situation is not always easy for providers to assess, particularly when it comes to proprietary rights and copyright infringements. If they do not remove content despite uncertainty about the issues, they are liable to the right holder. If they do remove it, they are threatened with demands for damages by their contractual partners. Where there is no threat of demands for the compensation of damages because liability has been excluded under a contractual relationship, the provider might therefore tend to uncritically delete all content that has been reported and will possibly infringe rights in order to stay on what they suppose to be the safe side. In fact, experience has already shown that providers respond to notices from purported right holders without even having made the most fleeting checks on the justification of the claims.[211]

The discussion about obligations for providers to inspect content should also take account of the effort this demands and find answers to the question of what can reasonably be expected, argue the opponents of provider liability. For example, it is pointed out that, as far as the YouTube video portal is concerned, more than 35 hours of video material are uploaded onto the platform every minute.[212] The social network Facebook now has over 750 million active users.[213] Manual checks on the lawful behaviour of every user and the lawfulness of every use of a piece of content are not reasonably to be expected of the operators. Under certain circumstances, exclusively technical filter mechanisms might be unsuitable to identify the rights-infringing character of a piece of content posted by users. Irrespective of this, it is already possible today for right holders to detect rights infringements, inform providers about them, and consequently trigger the providers' obligations to carry out checks and take action.

3.1.3 Improving awareness of the significance of copyright law as a general social task

The current perception of the legal situation often suffers from a lack of mutual understanding between the creating, exploiting and consuming sides. The stigmatising media campaigns initiated by intermediaries in the past ('Copyright Pirates are Criminals') and the issuing of cease and desist notifications, which has become a business model for some legal firms, have often resulted in a negative perception of copyright as a profit-oriented end in itself. Creators' needs have been pushed out of the public awareness by inadequate communication; some rights exploiters have acquired a poor reputation. The needs of consumers, such as their need to use works that have been acquired on more than one device or back up works they have purchased by making extra copies, have also been neglected by rights exploiters, given that the emphasis has been placed one-sidedly on copy protection mechanisms. These are felt to be patronising towards consumers who purchase works legally, whereas users of unlicensed copies are not constrained by these limitations.

Furthermore, the current provisions of the Copyright Act are widely unknown and often still difficult for consumers to understand. Not only that, too little public information is provided, and people are either unaware of the provision that is available or fail to make use

2008, p. 527 – RapidShare; furthermore, Hanseatic Higher Regional Court Hamburg, judgement of 30 September 2009 – 5 U 111/08, *ZUM*, 2010, p. 440 – RapidShare II.

[211] For instance, in August 2010 several reports by a journalist were removed from a video platform against his will because the operator had received a request for their deletion. Cf. Vetter, Udo: 'GVU-Panne: "5 von 5 Millionen"', online: www.lawblog.de/index.php/archives/2010/08/10/gvu-panne-5-von-5-millionen/.
In the UK, the Music Publishers Association (MPA) recently forced the access provider GoDaddy to block the website IMSL.org, which offered copyright-free sheet music. The MPA claimed to hold the rights to 'The Bells' (Op. 35, 1920) by the Russian composer Sergei Rachmaninov, whose work is actually free from copyright in both the USA and Canada. Cf. *informationliberation*: 'Publishers Force Domain Seizure of Public Domain Music Resource', online: http://www.informationliberation.com/?id=35043.
There is particularly clear evidence of a tendency towards anticipatory obedience among providers in the USA, where fair use publications are always affected by notice and take down procedures as well. On account of the automatic technologies used by large portals to remove copyright-protected content, the legal publication of user-generated content such as remixes and mash-ups is generally made impossible on these portals. The cultural commentator Elisa Kreisinger has commented ironically on this situation. Cf. Kreisinger, Elisa: 'Improving YouTube Removals', online: http://elisakreisinger.wordpress.com/2010/01/19/improving-youtube-removals/.

[212] Cf. Walk, Hunter: 'Great Scott! Over 35 Hours of Video Uploaded Every Minute to YouTube', November 2010, online: http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html.

[213] Cf. Facebook: 'Statistics' (retrieved: September 2011), online: http://www.facebook.com/press/info.php?statistics.

of it. On the Internet, where the dividing line between creative professionals and consumers is often blurred, the legal situation is particularly difficult for ‘prosumers/produsers’. A very great deal of creativity takes place there in a space that is covered by the concept of fair use in US law, but for which there are no fitting protective exemptions in the German copyright legislation. However, fair use provisions can result in situations where it is not clearly and unambiguously evident to those concerned how far a case is still covered by the fair use exception, so that protracted and costly legal disputes can take place under this system as well.

Contraventions of copyright law are often not identifiable as such for users. On the one hand, there is a lack of knowledge about these provisions, on the other, there is often a general absence of awareness about the wrongful character of such activities because works are easy to copy and not embodied in physical materials.

3.2 Scale of copyright infringements on the Internet – consequences of rights infringements[214]

The problem can only be analysed and options for action developed if our understanding of the issues is as highly differentiated as possible, i.e. distinguishes between sectors, channels of dissemination and forms of use. To date, it has only been possible to develop a rudimentary understanding of the problem because almost the only data to hand relate to the products sold by the music industry.

There are data on the number of infringements committed, for instance in the form of downloads from illegal sources. In this respect, particularly when it comes to data from abroad, it has to be examined whether only acts that are actually illegal under German law have been counted, because not all filesharing is illegal.

As a rule, there are only records of the numbers of infringements committed. Even in this respect, the studies that have been carried out have had to contend with the problem of any research into unreported cases. Few data are available about the context, for instance

- users’ knowledge of the legal rules,
- users’ acceptance of the legal rules,
- users’ motives for action,
- and how the individuals concerned would act if the illegal source were closed down.

This not only makes it difficult to quantify the actual losses caused by illegal use. There are also no foundations for the assessment of different options for action. The following summary is therefore inevitably incomplete.

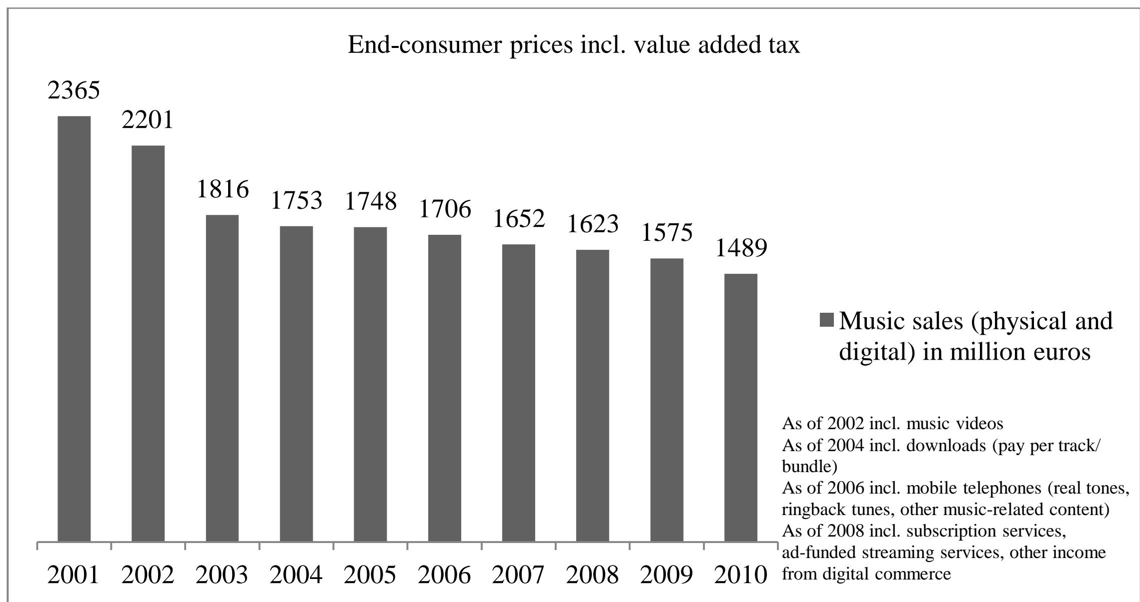
Data[215]

If we take the music industry as the ‘main victim’, it has certainly reported falls in turnover since 1999. Nor has a significant rise in revenues from downloads yet been sufficient to compensate for the losses in revenue from sales of physical audio media.

[214] The following discussion is partly based on a publication by Dr Wolfgang Schulz, expert member of the Study Commission on the Internet and Digital Society. Cf. Schulz, Wolfgang/Büchner, Thomas: *Kreativität und Urheberrecht in der Netzökonomie*, Working Papers of the Hans Bredow Institute, 21, December 2010, pp. 35ff., online: http://www.hans-bredow-institut.de/webfm_send/540.

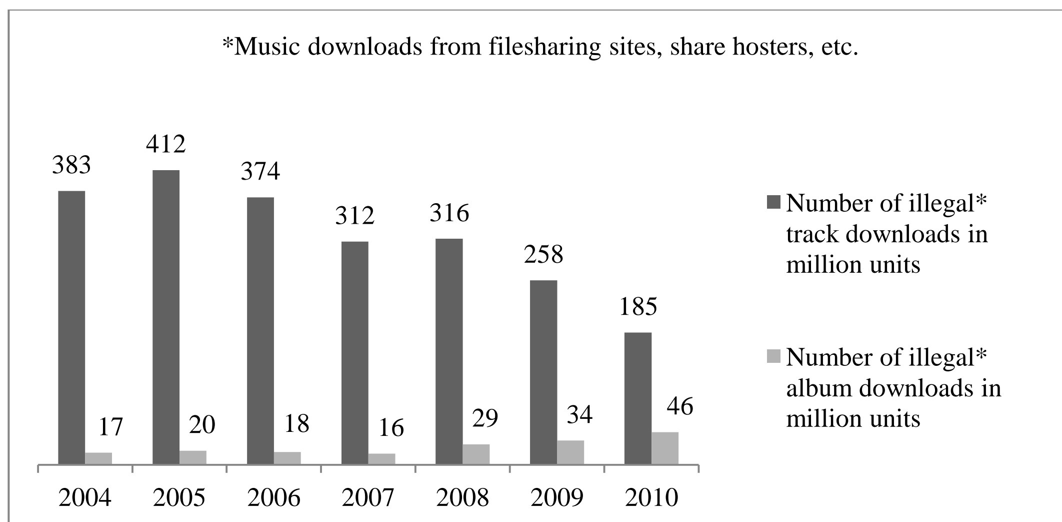
[215] The expert member Alvar Freude delivered a supplementary dissenting opinion on this passage (see section 5.5).

Figure 1: Total turnover on the music market 2001-2010



Source: German Federal Association of the Music Industry: 'Übersicht Jahreswirtschaftsbericht 2010 – Umsatz', online: http://www.musikindustrie.de/jwb-umsatz-10/.

Figure 2: Number of illegal* music downloads



Source: Cf. German Federal Association of the Music Industry: *Studie zur digitalen Content-Nutzung (DCN-Studie) 2011 – Presseversion*, p. 21, drawn up by GfK for the German Federal Association of the Music Industry (BVMI) in cooperation with the German Publishers and Booksellers Association and the German Federation against Copyright Theft (GVU), online: http://www.musikindustrie.de/uploads/media/DCN-Studie_2011_Presseversion_FINAL.pdf.

One of the best known studies is the *Survey on Digital Content Usage* (*DCN Survey*), which was conducted by GfK on behalf of the German Federal Association of the Music Industry in cooperation with the German Publishers and Booksellers Association and the German Federation against Copyright Theft.[216] According to this study, the number of illegal single downloads went down to 185 million in 2010, while the number of illegal album downloads grew to 46 million. However, the number of illegally downloaded music recordings is still many times higher than the number of pieces of music sold online – despite the boom in this field.

A study by the OECD also looked at data that were supplied by the industries, and confirms the findings that have been discussed.[217]

Users' motivation

By contrast, there is a lack of data on users' motivation. In the *Brennerstudie 2010* (*Burner Study*, the forerunner of the *DCN Survey),* 4% of respondents stated that downloading music was not theft in their view because the song or file still existed afterwards.[218] According to a study commissioned by the German Association for Information Technology, Telecommunications and New Media (BITKOM),[219] 25% of Germans believe the piracy of music, films or software to be acceptable.[220]

Against this background, it would certainly be interesting to obtain information about citizens' behaviour and their attitudes towards the unlawful use of copyright-protected content. In contrast to the simple figures on different actually or supposedly unlawful forms of use, there have only been a few surveys that have also attempted to depict acceptance in a differentiated fashion. They include a study by the Institute for Information Law at the University of Amsterdam that was published in 2006.[221] At that point in time, more than 50% of users in the Netherlands stated that they regularly engaged in illegal forms of use, although an overwhelming majority recognised copyright and its protection in principle (a finding comparable to the results of the German *Brennerstudie*). However, the results are not applicable to the whole population because only students were interviewed.

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[216] Cf. Federal Association of the Music Industry: *Studie zur digitalen Content-Nutzung (DCN-Studie) 2011 – Presseversion*, drawn up by GfK for the Federal Association of the Music Industry (BVMI) in cooperation with the German Publishers and Booksellers Association and the German Federation against Copyright Theft (GVU), online: http://www.musikindustrie.de/uploads/media/DCN-Studie_2011_Presseversion_FINAL.pdf.

[217] Stryszowski, Piotr/Scorpecci, Danny: *Piracy of Digital Content: Pre-Publication Version*, 2009.

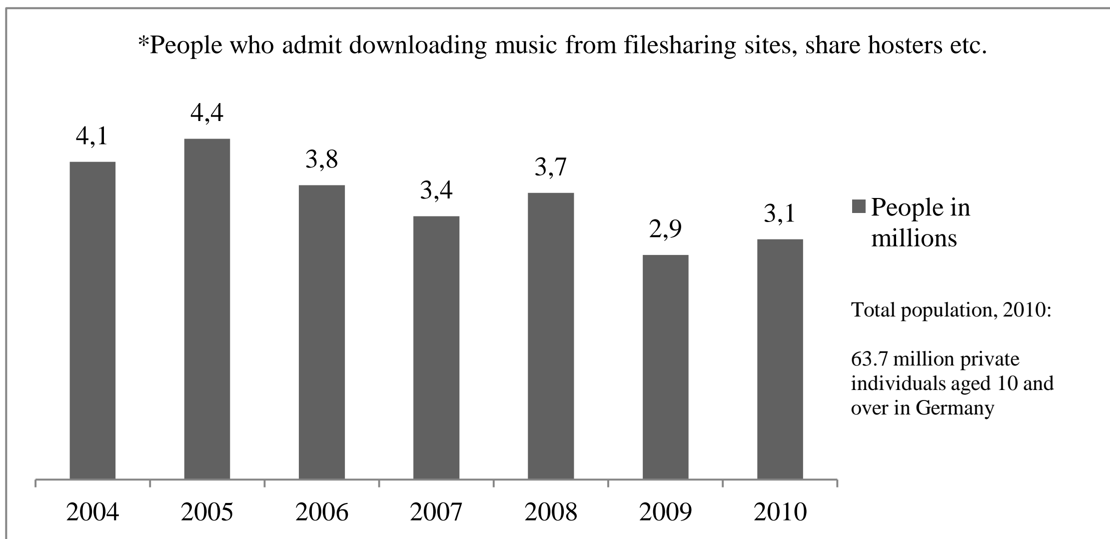
[218] Cf. Federal Association of the Music Industry: *Brennerstudie 2010 – Presseversion*, p. 48, drawn up by GfK for the Federal Association of the Music Industry (BVMI), online: http://www.musikindustrie.de/uploads/media/Brennerstudie_2010_Presseversion_FINAL.pdf.

[219] The figures on pirated copies of online content were gathered in a survey carried out by ARIS Umfrageforschung for BITKOM in which 1,000 German-speaking respondents aged 14 years and over were interviewed in private households. Cf. BITKOM's press release on the 2010 BITKOM Survey: *Raubkopien nach wie vor weit verbreitet*, online: http://www.bitkom.org/de/presse/8477_67777.aspx. Cf. also: BITKOM: 'Mehrheit für Verfolgung von Raubkopierern', online: http://www.bitkom.org/files/documents/BITKOM-Presseinfo_Geistiges_Eigentum_25_04_2010.pdf.

[220] Cf. *MMR-Aktuell*, 2010, 302564 (= *MMR*, 2010, p. 8).

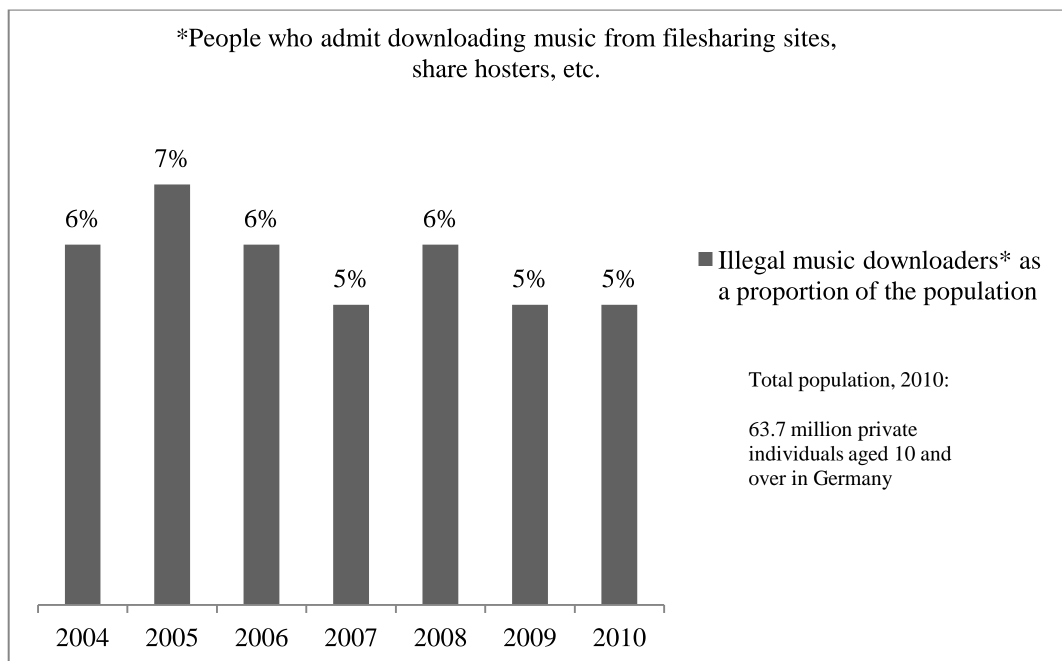
[221] University of Amsterdam Institute for Information Law (IViR): *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Amsterdam, 2006, pp. 11f., online: http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf.

Figure 3: Number of illegal* music downloaders



Source: German Federal Association of the Music Industry: *Studie zur digitalen Content-Nutzung (DCN-Studie) 2011 – Presseversion*, p. 21, drawn up by GfK for the Federal Association of the Music Industry (BVMI) in cooperation with the German Publishers and Booksellers Association and the German Federation against Copyright Theft (GVU), online: http://www.musikindustrie.de/uploads/media/DCN-Studie_2011_Presseversion_FINAL.pdf.

Figure 4: Illegal music downloaders* as a proportion of the population



Source: German Federal Association of the Music Industry: *Studie zur digitalen Content-Nutzung (DCN-Studie) 2011 – Presseversion*, p. 21, drawn up by GfK for the German Federal Association of the Music Industry (BVMI) in cooperation with the German Publishers and Booksellers Association and the German Federation against Copyright Theft (GVU), online: http://www.musikindustrie.de/uploads/media/DCN-Studie_2011_Presseversion_FINAL.pdf.

What is interesting about this is that when it came to the ‘sharing’ of copyright-protected material in peer-to-peer networks, different social norms played a role and ended up coming into conflict with one another: firstly, there was a desire to comply with the norms of copyright law but, secondly, people also exchanged what they had with other ‘peers’ as an expression of solidarity.

In the student communities, the second norm was more powerful than the norm that commanded compliance with the provisions of copyright law. Finally, it is interesting the study found a connection between the opinion that illegal forms of filesharing were ethically acceptable and attitudes towards legal commercial services. There was a greater probability that users who were convinced commercial services were too limited, too expensive or too inconvenient to use would believe illegal forms of use were ethically acceptable.

Such findings are – if only due to the constitutional protection for authors' position – not simply an argument in favour of adapting the law to social norms. However, there should be an awareness of these facts if new emphases are to be introduced into the copyright system. The implication may be that the design of commercial services has a stronger influence on social norms ('It's OK to copy from illegal sources') than can possibly be brought to bear by means of more intensive checks and tougher sanctions.

It would be interesting to conduct surveys on questions about what would stop users from downloading content illegally, what threatened sanctions would deter them or what they would be prepared to pay for downloads. The results could be used to arrive at a strategy for action to permanently change users' behaviour, in particular through information and education.

Sector-specific differentiation

The individual sectors, for example the music and film industries, the book and periodical publishing houses, and the software and games companies, are affected to differing degrees by rights infringements, so a differentiated analysis is also called for when different options are being assessed.

The more individual types of work demand interaction, the less likely it will be enough for the user to have a single copy, which they can also acquire illegally, and the more likely it will be possible to develop alternative business models like those in the games sector, for instance. They presuppose the online registration of games that have been supplied on physical data media. This evidently represents a more effective kind of protection against illegal access, although here too of course there are versions circulating from which the copy protection has been illegally removed ('cracked'). The lawfulness of this model was confirmed very recently by the German Federal Court of Justice.[222] Another business model involves offering basic versions of games free of charge, whereas (virtual) accessories or other program functions have to be paid for. This means that some users are happy with the basic version and spend nothing, while the provider finances themselves from the payments made by those users who want to enjoy better features.

Affected service, revenue and business models

Economic and management consequences

Even the study recently conducted by TERA Consultants, which was commissioned by the International Chamber of Commerce's Business Action to Stop Counterfeiting and Piracy (BASCAP) initiative, states that figures like the €1.2bn loss to the German creative industry in 2008 and the forecast of 1.2 million jobs that will be lost by 2015 due to illegal filesharing are based on worst case scenarios.[223 / 224] By contrast to this, *Felix Oberholzer-Gee* and *Koleman Strumpf*[225] have demonstrated in an empirical analysis that a direct album-to-album comparison shows no significant connection between filesharing and CD sales.

It is usually difficult to estimate the consequences for business models. Even the industry does not claim every digital copy acquired from illegal sources results in the

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[222] BGH, judgement of 11 February 2010 – I ZR 178/08, *GRUR*, 2010, p. 822 – Half-Life 2.

[223] Cf. TERA Consultants: *Building a Digital Economy – The Importance of Saving Jobs in the EU's Creative Industries*, p. 9, online: http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Building%20a%20Digital%20Economy%20-%20TERA%281%29.pdf.

[224] Supplementary dissenting opinion of the Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude: 'This study has met with considerable criticism in specialist circles. Compare for instance the analysis by SSRC: *Piracy and Jobs in Europe: Why the BASCAP/TERA Approach is Wrong*, online: http://blogs.ssrc.org/datadrip/wp-content/uploads/2010/03/Piracy-and-Jobs-in-Europe-An-SSRC-Note-on-Methods.pdf; or Sanchez, Julian: '750,000 lost jobs? The dodgy digits behind the war on piracy', http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars.'

[225] Cf. Oberholzer-Gee, Felix/Strumpf, Koleman: *The Effect of Filesharing on Record Sales: An Empirical Analysis*, p. 38, online: http://www.hss.caltech.edu/~mshum/ec106/strumpf.pdf.

right holder losing the revenue from one sold copy. The German Federal Association of the Music Industry calculates that 10-20% of illegally acquired pieces of music would have been purchased legally without this option. Such a generally low figure is also plausible against the background of the consideration that illegal acquisitions certainly do not rule out the legal purchase of the same products.

Brigitte Andersen and Marion Frenz [226] evaluated a representative study of the music and leisure behaviour of the Canadian population using econometric methods, and found that at least one more CD is sold for every two albums downloaded from peer-to-peer filesharing systems. Furthermore, they were able to identify a positive correlation between music purchases and spending on other forms of entertainment such as cinema visits, video games and concerts.

In the mean time, extensive research has been done on filesharing.[227] Some of this work has been based on surveys, some on data from filesharing networks.[228] The majority of the investigations assume a – more or less strong – negative effect on the sales market.

However, there is evidence that the analysis does not go far enough in many studies that fail to take indirect effects into consideration. For instance, it is evident in the Netherlands[229] that, although a negative effect on the turnover of physical and non-physical music purchases is to be found, the live event sector and merchandising benefit, so that there is actually a positive effect overall.

Furthermore, studies have shown that ad-funded services – which are free to the user – do not have a negative effect on the use of pay services.[230]

Consequences of rights infringements in summary

There are numerous channels through which copies of music, film and video files can be distributed. For instance, there is the classic practice of swapping within families or friendship groups, with files being sent by email. This happens rather rarely due to the restriction of data traffic volumes by providers. Peer-to-peer networks, in which computers are linked together and the files to be exchanged are transferred directly from computer to computer, were and to a certain extent still are of crucial significance. By contrast, under the client-server model a server provider offers a service that is used by their customers. An ever greater role is being played in this respect by share hosters and one-click hosters. These are Internet service providers on whose sites the user can save files directly without prior registration. For the most part, the file is uploaded directly via the provider's Internet site, and additional file transfer programs are not required.

Furthermore, the traffic on streaming sites is now greater than in peer-to-peer networks. Other channels of distribution include, for example, directory services, blogs, forums and social networks.

While filesharing originally stood in the focus of criticism, changes in users' behaviour have now made streaming and online hosting seem particularly problematic, although neither form is equally suitable for all kinds of use.

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[226] Cf. Andersen, Brigitte/Frenz, Marion: *The Impact of Music Downloads and P2P Filesharing on the Purchase of Music: A Study for Industry Canada*, online: http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/industrycanadapapermay4_2007_en.pdf/$file/industrycanadapapermay4_2007_en.pdf.

[227] Cf. Peitz, Martin/Waelbroeck, Patrick: 'The Effect of Internet Piracy on Music Sales: Cross-Section Evidence', online: http://www.serci.org/docs_1_2/waelbroeck.pdf; Zentner, Alejandro: 'File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries', abstract online: http://www.bepress.com/bejeap/topics/vol5/iss1/art21/. Chi, Wendy: *Does File Sharing Crowd Out Copyrighted Goods? Evidence from the Music Recording Industry*, November 2008, online: http://www.econ.sinica.edu.tw/upload/file/0224-3.pdf.

[228] A summary is given by Tschmuck, Peter: *The Economics of Music File Sharing – A Literature Overview*, Vienna, 2010, online: http://musikwirtschaftsforschung.files.wordpress.com/2010/06/tschmuck-the-economics-of-file-sharing-end.doc.

[229] Cf. Huygens, Annelies *et al.*: *Ups and downs: Economic and cultural effects of file sharing on music, film and games*, TNO-rapport, 34782, commissioned by the Dutch Ministries of Education, Culture and Science, Economic Affairs and Justice, February 2009, p. 4, online: http://www.governo.it/Presidenza/antipirateria/audizioni/audizione_ALTROCONSUMO_allegato2.pdf.

[230] Cf. Papies, Dominik/Eggers, Felix/Wlömert, Nils: 'Music for free? How free ad-funded downloads affect consumer choice', *Journal of the Academy of Marketing Science*, published online, 20 October 2010, online: http://www.springerlink.com/index/C08G42116H55501M.pdf.

Online hosting

In online hosting, host providers offer third parties server space where files can be stored. The users' anonymity is usually guaranteed, and they can upload their data fully automatically onto the servers. One-click hosters are regarded as particularly problematic. Right holders suspect they are backed by a business model built on the exchange of what is often illegal content. The Hanseatic Higher Regional Court has ruled the legal system cannot condone a business model that makes it possible to anonymously upload files, which are broken down into packets, compressed and given password access protection, and in consequence knowingly encourages users to commit copyright infringements on a mass scale.[231]

Streaming

It is possible to make out a trend for the relevant use of works to no longer lie in the field of reproduction, but in the field of streaming. In the *DCN Survey*, 30% of respondents stated they most frequently listened to music on streaming platforms. By contrast, the proportion who used peer-to-peer networks was just 4%. However, this says nothing about the harm potentially done to the music industry.

Users are increasingly dispensing with digital copies of their own and repeatedly accessing the content that is always available on the Internet.

Streaming is the communication and reception of audio and/or video data from computer networks, in which respect two types are to be distinguished: Content can be transmitted either in real time as 'live streaming' or subsequently as 'on-demand streaming'. The data are not saved permanently on the receiving computer during either of these streaming processes.[232]

One reason why streaming portals like YouTube are now more relevant as sources of music than file-sharing sites is, for example, that they do not transmit malicious software or files that have deliberately been given incorrect titles. Browser add-on software can be used to extract sound tracks from the videos available on these portals, which are often published by musicians or labels for marketing purposes (the sound tracks extracted can be of relatively high quality, depending on the quality of the original medium).[233] The music industry is demanding a ban on this kind of recording software. It views the companies that deploy such technologies for business purposes as 'copyright parasites' because they allow neither the distributors nor the artists or authors to take a share of the profits earned.

Copyright enforcement caught between social norms and the law

It is one of the fundamentals of the sociology of law that compliance with legal norms is founded only to a small extent on the effects of controls and sanctions. Rather, compliance is overwhelmingly dependent on there being some consistency between social norms and legal norms, and citizens' willingness to abide by what social norms prescribe.[234] In this respect, the relationship between social norms[235] and legal norms is initially completely open. Legal norms may formally support existing social norms, but contradictions between the systems of norms are also possible.[236]

Another finding from the sociology of law that is probably undisputed is that there is never 100% compliance with current law. The system of norms itself can formulate expectations as to how much tolerance of contraventions is acceptable and how high the 'compliance rate' has to be.[237] If the compliance rate is extraordinarily low in particular fields, the situation can become precarious for the law. In consequence, the

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[231] OLG Hamburg, judgement of 2 July 2008 – 5 U 73/07, *ZUM-RD*, 2008, p. 527 – RapidShare I; however, a different view was taken recently by OLG Düsseldorf, judgement of 27 April 2010 – I-20 U 166/09, *ZUM*, 2010, p. 604 – RapidShare.

[232] Cf. Koch, Frank: 'Der Content bleibt im Netz', *GRUR*, 2010, p. 574.

[233] Supplementary dissenting opinion of the Left Party and Alliance 90/The Greens parliamentary groups, and the expert member Alvar Freude: 'This is covered by the exception for private copying and to this extent is unambiguously legal as a use.'

[234] Cf. Raiser, Thomas: *Grundlagen der Rechtssoziologie*, 2007, pp. 175f.

[235] See the fundamental discussion of this concept in Opp, Karl-Dieter: *Die Entstehung sozialer Normen*, 1983. If legal norms are also viewed as social norms (as in Raiser, Thomas: *Grundlagen der Rechtssoziologie*, 2007, p. 175), it would be necessary to refer here to 'other' or non-formal social norms.

[236] For an instructive account of the interactions that take place, see: Cooter, Robert: 'Expressive law and economics', *Journal of Legal Studies*, 1998, pp. 585ff.; Parisi, Francesco/Wangenheim, Georg von: *Legislation and Countervailing Effects of Social Norms*, 2006, pp. 25ff.

[237] Cf., for instance: Raiser, Thomas: *Grundlagen der Rechtssoziologie*, 2007, pp. 240f.

norms' claim to validity is undermined.[238] This can be overcome either by measures to increase compliance (increasing the intensity of controls, tightening up sanctions) or by 'education', for instance if there is a lack of knowledge about the norms. At the same time, it is of course also conceivable for the law to be adapted to reality, in particular when the failure to comply with the norm prescribed results from a lack of acceptance. If the law is not adjusted, there is a danger that the norm's legitimacy will wither away.

3.3 Digital preservation and useability of cultural goods – treatment of orphan works

The problem of orphan works has gained in significance with the new possibilities of digitisation. The European Union too has indicated it would like to find a solution.

A work is regarded as 'orphaned' if it is protected by copyright, but the right holder cannot be found. These are not isolated cases. Conservative estimates suggest that there are approximately three million orphan books in Europe, which is equivalent to approximately 13% of all copyright-protected titles. The older the books, the greater the proportion that are orphan works.[239] Since no surveys have been carried out in Germany, figures from the British Library are discussed below. The British Library estimates the number of orphan works at a level even higher than 40%. According to *Anna Vuopala*, it is to be assumed that the figures in Germany are much the same because similar numbers of books are published in Germany as in the UK and the period of protection is equally long everywhere in Europe.[240] The Association of European Cinémathèques (ACE) *Orphan Works Survey 2009/2010* comes to the conclusion that roughly 225,000 of the films held by the 24 ACE archives that responded could be considered orphans, i.e. approximately 21%.[241] In the UK, 95% of the newspaper articles published prior to 1912 are orphan works.[242] The right holders of 17 million photographs in British museums, i.e. approximately 90% of these institutions' photographic holdings, cannot be traced.[243]

[238] I.e. certain behavioural expectations come to be stabilised even though the objective facts suggest they are incorrect. Cf. Luhmann, Niklas: *Rechtssoziologie*, vol. 1, 1972, pp. 53ff.

[239] Cf. Vuopala, Anna: *Orphan works issue and Costs for Rights Clearance*, p. 5, online: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.

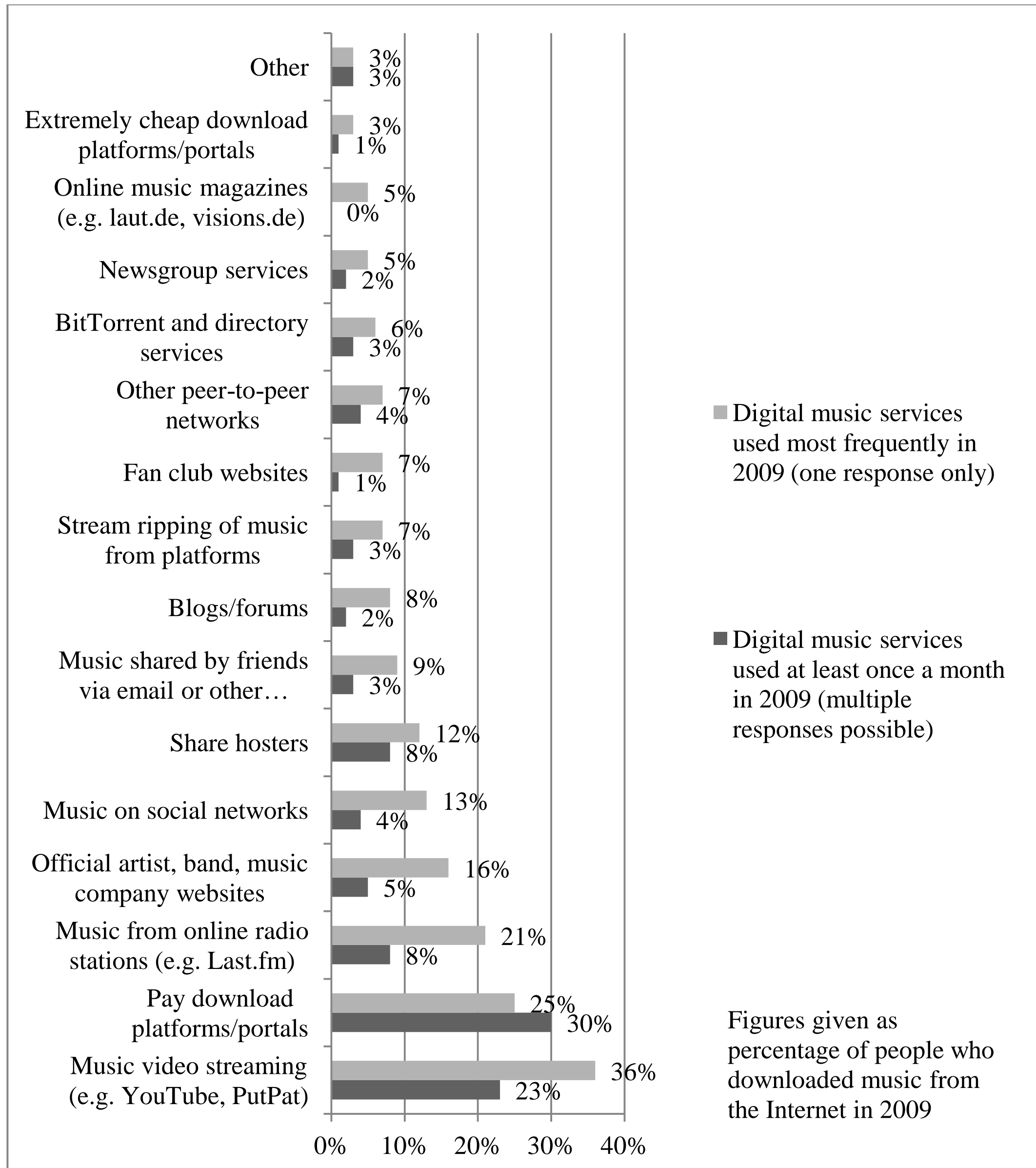
[240] Cf. ibid., p. 19, citing: Society of College, National and University Libraries (SCONUL), January 2010.

[241] Cf. Dillmann, Claudia: 'Results of the Survey on Orphan Works 2009/10', online: http://www.ace-film.eu/?page_id=246.

[242] Cf. Vuopala, Anna: *Orphan works issue and Costs for Rights Clearance*, p. 30, citing: The National Archives, UK, December 2009, online: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.

[243] Cf. ibid., p. 29, citing: *The Gowers Review*, 2006.

Figure 5: Sources for digital music



Source: Federal Association of the Music Industry: *Brennerstudie 2010*, drawn up by GfK for the Federal Association of the Music Industry (BVMI), online: http://www.musikindustrie.de/typo3temp/pics/a652fb38ef.jpg.

As one possible reason for these high figures, it is possible to mention, first of all, the terms of copyright protection that have been extended again and again over the last few decades. For instance, the Copyright Term Directive added 20 years to the period of protection, which had been restricted by the Revised Berne Convention to 50 years from the author's death. [244] At present, an extension of the term of protection for related rights over audio media from 50 to 95 years from publication is being discussed in order to harmonise international/European law.[245] Yet it is not only the absolute duration of the terms of protection that may encourage the orphaning of works, but also the fact that rights of use can be granted to third parties. It is often no longer the author themselves, but a rights exploiter, a publishing house for example, that holds the electronic rights when the work is published. Over the years there can be changes of owner, following which the fate of the accumulated rights is often unclear. Frequently, it is no longer possible to trace who holds which rights over particular works after several decades. Furthermore, heirs are not always familiar with copyright law and neglect the administration of their rights. In addition to this, the accumulation of various types of rights makes the situation more complicated: For instance, the danger of orphaning becomes greater if there are both copyrights and related rights over a work. Digitisation itself has contributed not least to the problem. Works are distributed more rapidly through digital channels than in the analogue world. They are often adapted and modified, which automatically creates new rights that are held by the adapters. This results in a barely manageable accumulation of rights over the individual work.

It has always been necessary to obtain authorisation from authors for new types of use. For instance, the exploitation of films on video in the 1980s depended on rights being obtained from all the cinematic authors who had contributed to these works. What is new, however, is the scale of mass digitisation today. For example, technology has made it possible to digitise not just individual books, but whole libraries and allow access to them online in the form of complete archives. Exhaustive rights clearance proves to be impossible in this situation. To date, projects of this kind have therefore generally remained limited to works that are in the public domain. For instance, Google has merely scanned works held by the Bavarian State Library that appeared prior to 1900.

By contrast, works that are still copyright-protected cannot easily be made available to the public. The reason for this is that the right to make available to the public ('online right') is formulated as an exclusive right in Germany, just as it is across the whole of Europe (cf. the Information Society Directive). In principle, the author must be asked if they wish their work to be published online. If an author cannot be identified and asked, the work must remain offline. The way that authors' protection has been strengthened more and more in recent decades therefore ultimately results in content being blocked. In particular with regard to the EU's Europeana project, which is intended to make the European cultural heritage available as comprehensively as possible in digital forms, it is regretted that some works' orphan status makes this more difficult or even prevents their being made accessible.

Up until now, neither the current German Copyright Act nor the German Copyright Administration Act [246] have included provisions on the treatment of orphan works. In the mean time, however, various approaches to the resolution of this issue have been put forward. In this respect, nothing should be done to either shorten the terms of copyright protection or abolish in principle right holders' exclusive rights. Instead, special provisions should be put in place for works whose right holders cannot be found that make it possible for them to be used even without authorisation.

One of these models would involve the issue of statutory licences for orphan works. Users would be able to contact a state body and pay fees to purchase licences for works whose right holders were missing. This model has already been implemented in Canada, where the Copyright Board stipulates

[244] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (*OJ L*, 290, 24 November 1993, pp. 9-13).

[245] Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM(2008) 464 final.

[246] Act on the Administration of Copyright and Neighbouring Rights of 9 September 1965, *BGBl. I*, p. 1294, most recently amended by the Act of 26 October 2007, *BGBl. I*, p. 2513.

concrete conditions for the use of such works (types of use, term of licence, etc.) and keeps the fee paid in case the right holder subsequently comes to light. Only after the expiry of a term of five years can the money be used for other purposes. However, this model is criticised for its ponderousness: The bureaucratic expense and effort are high, which is why it takes so long and is comparatively cost-intensive to issue licences.

Another model for the resolution of this issue would involve the introduction of an exception for orphan works. Privileged institutions, libraries, academic institutions and archives, for instance, could be granted the right to make orphan works available to the public for non-commercial purposes. These institutions could set aside a certain sum as equitable remuneration in case a right holder were subsequently to become known. After the expiry of a certain period, this money could be used for the archival conservation of the originals, for example. After all, the conservation of historic materials represents a considerable financial challenge, particularly in the field of audiovisual works. And without the work of museums and archives there would not be any orphan works at all, but merely lost works.

A third model is based on the system of extended collective licensing in the Scandinavian countries, which mostly takes effect where exceptions find application in Germany. Extended collective licensing is based on representative groups of authors concluding contracts with representative groups of users for particular types of use, which then also apply for ‘outsiders’, i.e. non-members. For instance, representative authors and publishers’ organisations could conclude a contract with library and archive associations about making orphan printed works available to the public on the Internet sites of the institutions in question. This contract would then also be valid for all those on both sides who were not involved in its negotiation. As a matter of principle, however, they would have a right to opt out of the scheme. This procedure is not tailored to orphan works. Nevertheless, it displays the advantage of greater flexibility than other models because contractual solutions could be found without statutory provisions first having to be put in place. For example, it would also be conceivable to make commercial uses of orphan works possible in this way or to open up access to these works for actors who were not privileged by exceptions (such as the online encyclopaedia *Wikipedia*). Even if it were applied to orphan works, however, a Nordic-style system of extended collective rights management would *de facto* amount to ‘a kind of compulsory licensing’,[247] because it would initially be assumed across the board that works had been orphaned, and the author would then only be able to exercise their right to opt out.

As a matter of principle, all collective contractual solutions face the problem that, in contrast to existing copyright law, the author is deprived of rights because they first have to take action by opting out in order to be able to exercise their copyrights individually once again.

A fourth model has become known as the ‘limitation on remedy’ solution[248] and would require changes to the Copyright Administration Act. The starting point here is an exemption from liability under civil law. Users of orphan works, libraries for example, would pay a fee for their use to a collecting society, in return for which the collecting society would indemnify the institutions in question from demands for the compensation of damages from any right holders who might subsequently come forward. In other words, orphan works would merely be conceived of as a special group within a larger corpus of works that are no longer available on the retail market. In particular, this model would provide for a ‘reasonably diligent search’ for the right holder, which would have to satisfy certain criteria. Only if such a search had proved unsuccessful would this special provision take effect. The same procedure would also allow out-of-print works whose right holders were still known to be made available again. However, right holders point out that there is no entitlement to the availability of out-of-print works. The ability to place limits on a work’s exploitation is a necessary component of the right holder’s legal position.

It is to be emphasised that at present all these proposals are problematic under European law for various reasons. At the EU level, consideration is therefore being given to the prescription of a binding framework for the

[247] Fiscor, Mihäly: *Collective Administration of Copyright and Neighboring Rights*, 1990, p. 36.

[248] Gompel, Stef van: *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, pp. 19ff., online: http://www.ivir.nl/publicaties/vangompel/IIC_2007_6_orphan_works.pdf.

national legislatures. It is still unclear what this should look like. For a long time, there was talk of opening up the Information Society Directive and adding an exception for orphan works. Of late, however, there have been efforts in various countries to pre-empt such an arrangement with solutions that draw on licence agreements. The background to this is that, as a rule, rights exploiters have not acquired online rights to those works that have to be regarded as orphaned at the present point in time. In consequence, they could not demand to receive a share of any collective remuneration to be expected under an exception.

On 24 May 2011, the European Commission presented a Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works.[249] This is intended to create a system of mutual recognition for works' orphan status. In order to establish 'orphan work' status, libraries, educational establishments, museums, archives, film heritage institutions and public service broadcasting organisations would be obliged to conduct a prior diligent search in line with the requirements specified in the proposed directive in the Member State where the work was first published. As soon as the diligent search had established the 'orphan status' of a work, it would be deemed an orphan work throughout the EU. This would obviate the need for diligent searches to be carried out over and over again. On this basis, it would be possible to make orphan works available online for cultural and educational purposes without any prior authorisation, provided a work's author had not put an end to its orphan status.

This initiative builds on the 2006 Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation.[250] The creation of a legal framework to facilitate the cross-border digitisation and distribution of orphan works on the internal market is also one of the key measures that are listed in the Digital Agenda for Europe – an initiative launched under the Europe 2020 strategy. An arrangement for out-of-print works is still being discussed. It is still necessary to conduct a stakeholder dialogue on this issue, which should identify the action that is needed and possible solutions.

On the whole, the efforts being made to regulate the problem of orphan works appear not to be hopeless. While the discussion about the US Google Books settlement frequently featured talk of authors being expropriated, there are now even voices that plead for orphan works to be equated legally with those that are in the public domain. Mediating between these two radical positions and at the same time making Europe's cultural heritage available as comprehensively as possible in digital forms is not an easy task, particularly as in principle the Revised Berne Convention guarantees copyright protection without any requirement for registration. In consequence, when the 'Comité Des Sages', an EU 'reflection group' on digitisation, drew up its final report, *The New Renaissance*, [251] it called for the Revised Berne Convention to be amended and the establishment of fully comprehensive copyright protection coupled in future with the registration of the work.

However, the idea is not uncontroversial. For it militates against this proposal that under the earlier Anglo-American copyright system, which linked protection to formal conditions such as registration, there was a danger of authors not being able to exploit their works because they had failed to register them. In this respect, it remains to be resolved what should be done with works that have found their way onto the Internet, or otherwise been published anonymously or against the will of the author. Apart from this, there are fears that all previously published and even unpublished works would have to be registered retrospectively if mandatory registration were introduced for copyright-protected works. This would cause a problem for rights management because a large number of works and cultural products, published and unpublished, would have to be registered.

[249] Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final.

[250] Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (*OJ L*, 236, 31 August 2006, pp. 28-30).

[251] Comité Des Sages: *The New Renaissance*, p. 5, online: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final-report-cdS3.pdf.

3.4 Negotiation of international agreements on copyright

In Germany, valid copyrights are not just anchored in national legislation such as the Copyright Act or the Copyright Administration Act.

At the international level, copyright protection is determined by a large number of international treaties. Apart from bilateral agreements, Germany has also signed various multilateral treaties in the past. Examples that may be mentioned here include the Revised Berne Convention (1886, revised 1971 – RBC), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS – 1994) and the WIPO Copyright Treaty (WCT – 1996). Since their ratification under international law, the large number of provisions contained in these treaties have been directly applicable in Germany. Apart from this, there are detailed provisions in European law – for example, those laid down by the Information Society Directive. In view of these international and European provisions, only relatively narrow scope still remains for national legislation, in the field of copyright contract law, for instance.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS regulates copyright, trademarks, patents, industrial designs and geographical indications. Among other things, the Agreement contains provisions on terms of protection and national exceptions from protection that are allowed as long as they pass the three-step test.

The negotiations about the TRIPS Agreement took place when the World Trade Organisation (WTO) was established by the General Agreement on Tariffs and Trade (GATT) during what was known as the Uruguay Round in 1994. The ratification of the TRIPS Agreement is an obligatory precondition for WTO membership. It is therefore binding on all WTO Member States to observe the RBC as well. This has led to a marked expansion of the group of states that are parties to the RBC. The adoption of the TRIPS Agreement therefore marked the linkage of trade rules with intellectual property rules.

The TRIPS Agreement provides for the comprehensive protection of intellectual property and stipulates a binding level of protection for all WTO Members regardless of their economic situation. These 'minimum standards' relate to provisions on the creation of copyrights, periods of protection, exceptions, the principle of national treatment and most favoured nation treatment. It continues to be open to the individual states to adopt more ambitious measures. States like Germany have made use of this, for example, in relation to periods of protection. Nevertheless, the binding level of protection is by no means low, but is largely based on the standards that prevail in the leading industrialised states.[252] In contrast to other international agreements, protective rights are enforceable under the WTO regime. It is possible to lodge a complaint with the WTO against a contravention of TRIPS using the special Dispute Settlement Understanding (DSU). Such contraventions are punished by the imposition of trade sanctions on states that infringe copyright ('cross-retaliation').

From the very beginning, TRIPS was subjected to heavy criticism, not just from developing countries[253] and non-governmental organisations,[254] but even from liberal proponents of globalisation.[255] The central points of criticism are its possible negative impacts on food security and health provision, particularly in developing countries. Another disputed point that does not relate to the developing countries is the question of whether there can be patents on software, which the USA affirms, citing Article 27(1) TRIPS, but is ruled out by current European and German law.[256] Against this background, a process of revision has been set in motion in the TRIPS Council since 1999. In the course of this process, the legitimacy of TRIPS has been called into question, and the criticisms of the provisions in question taken up. Many renowned

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[252] Cf. Sell, Susan: *Intellectual Property Rights*, 2002, p. 172: 'By extending property rights and requiring high substantive levels of protection, TRIPS represented a significant victory for US private sector activists from knowledge-based industries.'

[253] Cf. WIPO: 'Standing Committee on the Law of Patents: Fourteenth Session: Geneva, January 25 to 29 2010: Proposal from Brazil', online: http://www.wipo.int/edocs/mdocs/patent_policy/en/scp_14/scp_14_7.pdf.

[254] Cf., for instance, 'Joint statement by NGOs on TRIPS and Public Health', 3 December 2005, online: http://www.cptech.org/ip/wto/p6/ngos12032005.html. Cf. furthermore the activities of Intellectual Property Watch, online: http://www.ip-watch.org/weblog/.

[255] Cf. Bhagwati, Jagdish: *In Defense of Globalization*, 2005, p. 201: 'In short, the illegitimate third leg, TRIPs, is now threatening to grow other legs.'

[256] See Article 52(2)(c) European Patent Convention and Section 1(3)(3) German Patent Act.

economists are of the opinion that only a comprehensive reform of the international regulations on intellectual property can promote worldwide innovation and sustainable development.[257]

WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

After TRIPS had entered into force, the WIPO redoubled its efforts to reform itself and responded in 1996 with two agreements of its own, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These agreements are special agreements under the RBC and are intended to adapt it to the new technologies of digitisation and the Internet. The RBC rights have therefore been extended with the right of distribution, the right of rental and the right of making available to the public. For example, Article 8 WCT sets out for the first time a 'Right of Communication to the Public', which grants the author an exclusive right to make their work accessible to users at a place and a time of their choice. This right of use was not covered by the existing right of broadcasting, which foresaw the simultaneous consumption of the work. These provisions are primarily tailored to online uses and accordingly grant a widely defined right of communication.

Relationship between the WIPO and WTO agreements

The WIPO and WTO agreements find themselves in a relationship marked by both cooperation and competition. While the TRIPS Agreement possesses a sanctions mechanism, provisions of this kind are not to be found in the WCT or WPPT. The WIPO Patent Agenda has shifted the focus to the protection of patents and is not as politically controversial as the TRIPS Agreement at present. There is certainly a great deal of heated debate about the TRIPS revision process, in which questions concerning the Agreement's legitimacy and criticism of the existing system of intellectual property law are increasingly being articulated. Some parties are even demanding that the WIPO should correct the systematic weaknesses in policymaking under TRIPS.[258] The WIPO has at least responded to this demand with its own Development Agenda and an IP Justice Policy Paper.[259]

There is little prospect of a reform of the multilateral system of rights to immaterial goods under the WTO and WIPO agreements because the conflicting interests of the developing and industrialised countries will prevent any amendment of the current international treaties. Against this background, moves back to the conclusion of more bilateral trade agreements are again to be observed (e.g.: the 2007 U.S.-Korea Free Trade Agreement (KORUS FTA)[260]).

ACTA – Anti-Counterfeiting Trade Agreement

As it has not been possible to agree on the further development of international intellectual property rights under the auspices of the WTO and the WIPO, the USA and Japan took the initiative of drawing up an international standard based on their existing regimes without involving the developing countries: the Anti-Counterfeiting Trade Agreement (ACTA). ACTA is intended to have the character of a trade agreement, but the main points covered by its provisions relate to copyrights, trademarks and commercial protective rights. In addition to this, ACTA engages in particular with the question of the enforcement of rights under civil and criminal law, and the international cooperation of the Parties to the Agreement in these fields. The aim of the Agreement is to harmonise and globally establish the participating states' standards for the enforcement of intellectual property rights and so allow action to be taken against counterfeit products, including action at the international level. No distinction between commercial and non-commercial rights contraventions is drawn in the Agreement.

The Agreement's provisions are focussed particularly strongly on the Internet. Providers are called upon to cooperate, although this is not specified in greater detail. The obligation to cooperate could also theoretically be accompanied by an obligation to carry out detailed checks on the

[257] Cf. Henry, Claude/Stiglitz, Joseph E.: 'Intellectual Property, Dissemination of Innovation and Sustainable Development', *Global Policy*, 2010, p. 237 (p. 237).

[258] Cf. Boyle, James: 'A Manifesto on WIPO and the Future of Intellectual Property', online: http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html.

[259] WIPO: IP Justice Policy Paper for the WIPO Development Agenda, online: http://ipjustice.org/WIPO/WIPO_DA_IP_Justice_Policy_Paper.shtml.

[260] 'U.S.-Korea Free Trade Agreement: New Opportunities for U.S. Exporters Under the U.S.-Korea Free Trade Agreement', online: http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta.

data packets that are transmitted across the Internet (deep packet inspection). For enforcement purposes, ACTA provides not only for liability to be asserted under civil law, but also comprehensive sanctions under criminal law. However, it is not mandatory for these provisions to be implemented by the Member States. The premise for the negotiations was that no party to the agreement should have to alter its existing national arrangements.[261] They would merely have to be applied subject to the principle of *pacta sunt servanda* ('contracts are to be honoured').

Delegations from the following states took part in the negotiations: Australia, the EU and its Member States, Japan, Jordan, Canada, South Korea, Morocco, Mexico, New Zealand, Singapore, Switzerland, the USA and the United Arab Emirates. ACTA will enter into force once it has been ratified by six Parties to the Agreement.

Like most international treaty negotiations, the talks on the Agreement took place behind closed doors. It was merely possible to gain an idea of the texts adopted from negotiating round statements that were issued while the negotiations, which were not conducted in public, were still ongoing. It was not made possible for other states and stakeholders such as non-governmental organisations or enterprises that would be affected to participate in this process. This is an unusual arrangement for negotiations on international agreements. In a resolution passed on 10 March 2010, the European Parliament demanded that information about ACTA be disclosed.[262]

ACTA has been criticised by a broad front of academics and non-governmental organisations who highlight not just policy issues but sweeping constitutional concerns.[263] At the beginning of 2011, a group of European academics published an opinion[264] that asked whether, on account of the various ways it is interpreted, ACTA was incompatible with EU and WTO law in a number of respects. They argued ACTA, which had put the enforcement of rights in the foreground from the very beginning, showed a tendency to further tighten up the legal protection against infringements of rights over immaterial goods without stipulating binding provisions for the protection of users' interests in return. It was argued the Agreement would fail to reflect the fact that copyright law is intended above all to help guarantee a fair balance of interests between authors, rights exploiters and users. Critics accuse ACTA not only of disrupting the balance between the right holders' interest in protection and the general public's interest in information,[265] but above all of undermining data protection as well by obliging providers to collaborate on a mandatory basis.[266] Furthermore, the rules envisaged would not allow any reasonable differentiation between commercial infringements of copyright and merely private uses. Furthermore, it is said ACTA would encourage the private enforcement of rights where there had been supposed infringements of copyright without court proceedings or rule of law standards.[267] The *Opinion of European Academics* therefore makes the recommendation that the European Parliament not ratify ACTA. The European Commission commented on this opinion on 27 April 2011 and stressed that ACTA was merely a catalogue of best practice and was

[261] See Article 3(1) Anti-Counterfeiting Trade Agreement: 'This Agreement shall be without prejudice to provisions in a Party's law governing the availability, acquisition, scope, and maintenance of intellectual property rights,' online: http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf.

[262] European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, online: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN.

[263] Cf. Goldsmith, Jack/Lessig, Lawrence: 'Anti-counterfeiting agreement raises constitutional concerns', *Washington Post*, 26 March 2010, online: http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html.

[264] Cf. D'Erme, Roberto *et al.*: *Opinion of European Academics on Anti-Counterfeiting Trade Agreement*, online: http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf.

[265] Cf. Metzger, Axel: 'Perspektiven des internationalen Urheberrechts – Zwischen Territorialität und Ubiquität', *JuristenZeitung* (*JZ*), 2010, p. 929 (pp. 931, 936f.).

[266] Cf. the comprehensive survey in Geist, Michael: *ACTA watch*, online: http://acta.michaelgeist.ca/.

[267] Cf. Shaw, Aaron: 'The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)', *Knowledge Ecology Studies*, 2008, 2: 'ACTA would create unduly harsh legal standards that do not reflect contemporary principles of democratic government, free market exchange, or civil liberties. [... ACTA] would also facilitate privacy violations by trademark and copyright holders against private citizens suspected of infringement activities without any sort of legal due process,' online: http://www.kestudies.org/node/20.

not intended to tighten up the substantive rights over immaterial goods.[268]

In a resolution adopted on 24 November 2010, the European Parliament stated that ACTA would merely aid enforcement measures and itself contained no provisions that would modify the substantive law of the EU and the other Parties to the Agreement concerning intellectual property rights. It argued ACTA offered for the first time an international framework for action to combat rights infringements in the law of immaterial goods and commercial protective rights, which would support the parties in their efforts to combat intellectual property rights infringements effectively. The European Parliament was well aware that ACTA would not resolve the complex and multidimensional problem of product and trademark piracy, but regarded it as a step in the right direction. In addition to this, the Parliament also regretted there was no definition of ‘counterfeit geographical indications’ in the Agreement.[269]

Some political groups in the European Parliament are preparing to refer ACTA to the European Court of Justice. A vote on this in the European Parliament is expected at the end of 2011. The review to be conducted by the European Court of Justice would be intended to examine the following criticisms:

1. ACTA would create a duty to cooperate between Internet service providers and copyright holders that could be understood as legitimation for privately regulated ‘three strikes and you’re out’ measures. Furthermore, the clauses on the ‘commercial scale’ of copyright infringement are too imprecise and could also affect private copying protected by the legal exceptions from copyright.

2. ACTA would include new powers for customs authorities that would place restrictions on trading in generic pharmaceuticals and result in unjustified searches of private travellers’ laptops and MP3 players.

3. The Agreement would force EU Member States to extend their criminal law and, for the first time, introduce criminal law measures to enforce copyright, which would signify a massive encroachment on fundamental rights. However, such changes would have to be made with the full participation of the European Parliament and national parliaments. ACTA would demand state measures that went further than the legitimate aim of the effective enforcement of rights.[270]

4. In the long term, there is a threat agreements such as ACTA will bring about a ‘hypertrophy of protective rights’,[271] which would increasingly erode the acceptance for the law of immaterial goods and ultimately backfire on right holders.[272]

5. ACTA would have a binding character for the EU while, as an ‘executive agreement’, it would not be binding on the USA. Furthermore, the USA has not ratified the Vienna Convention on the Law of Treaties. Such asymmetry is difficult to justify because it allows the USA greater flexibility than the EU.

6. ACTA has been negotiated in strict confidentiality, largely bypassing institutions such as the European Parliament and the WIPO. These criticisms were taken on board during the negotiations, and negotiating round statements were submitted to the Parliament. ACTA will need to be ratified by the European Parliament before it enters into force.

The Agreement’s advocates object that it will ultimately be down to the national governments what options they make use of. They believe there would be hardly any likelihood of EU law or even the German legislation being modified on account of this agreement. Ultimately, they feel it is only a matter of laying down a framework and taking a step in the direction of international harmonisation.

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[268] *Commission Services Working Paper: Comments on the “Opinion of European Academics on Anti-Counterfeiting Trade Agreement”*, online: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf.

[269] European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), online: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0432+0+DOC+XML+V0//EN.

[270] Cf. Stieper, Malte: ‘Das Anti-Counterfeiting Trade Agreement (ACTA) – wo bleibt der Interessenausgleich im Urheberrecht?’, *GRUR Int*, 2011, p. 124.

[271] On this term, see: Zypries, Brigitte: ‘Hypertrophie der Schutzrechte?’, *GRUR*, 2004, p. 977.

[272] Cf. Stieper, Malte: Das Anti-Counterfeiting Trade Agreement (ACTA) – wo bleibt der Interessenausgleich im Urheberrecht?, *GRUR Int*, 2011, p. 124.

3.5 Challenges to collective rights management from new business models for licensing

Changing user habits, cross-border uses on the Internet and new business models are confronting the collecting societies with major challenges, particularly as these institutions are mostly organised as associations at the national level.

Structure and function of the collecting societies

Collecting societies license various kinds of use by rights exploiters on behalf of authors and right holders, who they represent once they have concluded a deed of assignment. Firstly, they do this where direct licensing would not be technically and administratively feasible for the individual author, right holder or user without disproportionate costs being incurred; but, secondly, also where it is to be expected the individual author would generally be at a structural disadvantage in their dealings with rights exploiters. Hence the principle of solidarity upheld by the collecting societies, their double obligation to accept contracts (which is controversial among some authors and users) and their power to set binding tariffs.

Both fundamental preconditions for collective rights management – the reduction of transaction costs for right holders and users in the exploitation and representation of their interests, and solidarity among authors – are now subject to scrutiny as a consequence of new forms of production on the Internet, the potentially simpler accounting options facilitated by digitisation, and the development and stronger establishment of new business models. In this respect, it is to be borne in mind that, as a rule, the collecting societies are organised nationally as associations, and are not profit-oriented organisations. Their internal and external actions are bound by corresponding procedural rules and, in Germany, the Copyright Administration Act. At the same time, the collecting societies enjoy the advantages offered by their well established administrative structures, their broad documentation of the market and their fundamental knowledge of the kinds of new technical institutions that might be needed to deal with new business models.

New business models

As a rule, the challenge from new business models is a result of the cross-border exploitation of content in incorporeal forms on the Internet. New business models are not easily to be equated with new kinds of use, and the transitional provisions for new types of exploitation set out in Section 137l UrhG do not necessarily find application.

New possibilities for artist-led business models

Above all, the manufacturer model and the fundraising model are becoming ever more firmly established as artist-led models, something that is also happening in other art forms such as literature and the documentary film. Often, this is being combined with steps to split products up into smaller elements and increase their scarcity by delaying their release onto the market. Alternatively, the service may be combined with CC licences that allow free-of-charge use up to a certain point and therefore create an incentive for further consumption in incorporeal forms (the merchant model, for example) or physical forms (purchase of books or CDs with expensive booklets, etc.). General licences that allow works to be adapted subject to the condition that they are communicated for non-commercial purposes have also become established as practically 'free-of-charge' marketing measure.[273] In these cases, the collecting societies' model is often less helpful or proves a hindrance on account of the restrictions it currently places on authors. The fact that the German collecting societies have still not found a pragmatic way of dealing with CC licences detracts from their competence to deal with these artist-led business models.

Challenges to the institutions of collective rights management

Technical and organisational challenges

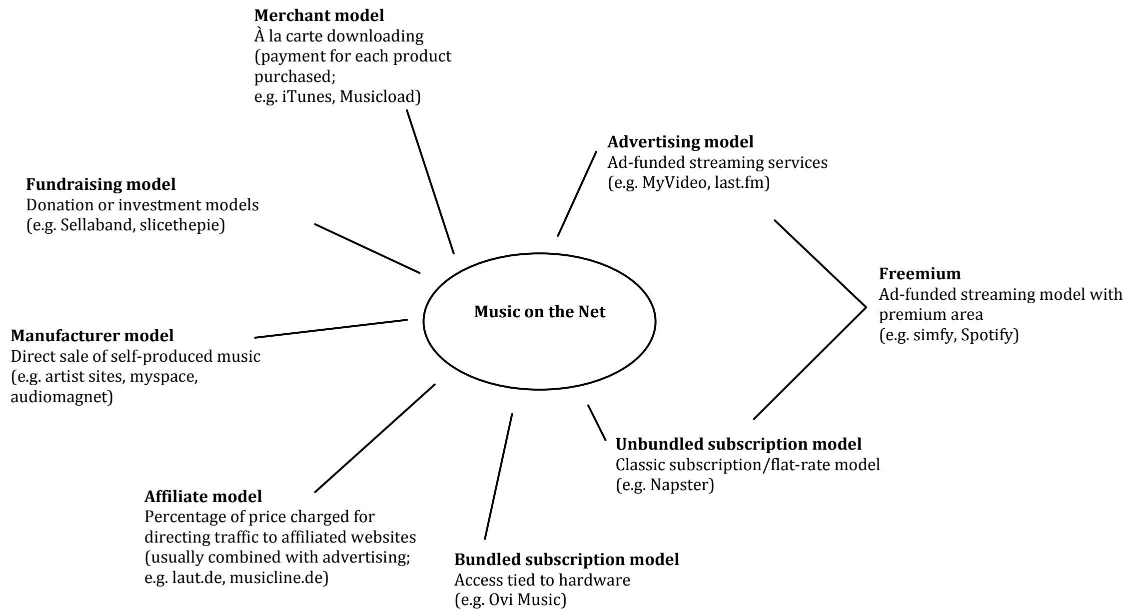
Collective rights management and the collecting societies authorised to date in Germany face challenges of, first of all, a technical and administrative nature, but there is also the potential for issues to arise in relation to the collecting societies' investment budgets. Here, it is necessary to develop and implement technically

[273] See the sales of works by the band Nine Inch Nails on Amazon's mp3 charts, 2008, online: http://www.amazon.com/b/ref=amb_link_7866952_18?ie=UTF8&node=1240544011. Cf.: Beckedahl, Markus: 'Nine Inch Nails nutzen Creative Commons Lizenzen', online: https://netzpolitik.org/2008/nine-inch-nails-nutzen-creative-commons-lizenzen/.

efficient, cost-effective, new tools for transparent accounting and the distribution of the revenues from licences (cf. VG WORT's T.O.M. (Register Texts Online) registration portal, and the still provisional GEMA distribution plan for the online sector).[274] Most of the collecting societies are structured as associations, which is forcing them to go through decision-making processes and incur investment costs very different from those of purely market-oriented enterprises as they bring in these administrative innovations. Nevertheless, the collecting societies have also had a structural advantage up until now in this field on account of their many years of experience and their statutory status.

[274] It is also necessary, for example, to negotiate equitable remuneration for authors when new business models are applied. Cf. the GEMA/YouTube negotiations.

Figure 6: Music marketing on the Internet



Source: German Federal Association of the Music Industry: 'Übersicht Jahreswirtschaftsbericht 2010 – Musikhandel', online: http://www.musikindustrie.de/jwb-musikhandel-10/.

Competition with new collective rights management structures

In view of the increase in the cross-border use of content, it can be anticipated that it will not be possible for this structural or statutory advantage to be maintained in the same form over the long-term. And the collecting societies' advantage will rapidly prove to be a disadvantage as they compete with the new collective rights management structures (for example CELAS and PAECOL) unless acceptance is gained for further external action to support the fundamental principles of collective rights management (cf. the recommendation of the Study Commission on Culture in Germany that steps be taken to prevent collective rights management degenerating into mere debt collection [275]). At present, the statutory foundation for the collecting societies' work is not unambiguous in this respect. There are expectations that, among other things, an EU framework directive on collective rights management will be proposed that could bring clarity to the situation, at least for the (music industry) actors who operate in Germany and Europe.

Assertion of the principles of collective rights management in the face of digitisation and new licensing models

However, it is also necessary to assert collective licensing quite generally in the face of new business and rights exploitation models. Some artist-led models are succeeding perfectly well without the previous advantages of collective rights management or tend to be constrained by them (cf. CC licences). Today, however, commercial right holders who hold relatively large catalogues can also build up direct licensing structures for the Internet and bypass the classic collecting societies comparatively easily if they have the technical know-how and the necessary investment budgets. The only question is how it will be possible for the small and medium-sized structures found in the culture industries to create a cost-effective supply and accounting system for users and providers without relatively strong, classic collecting societies.

3.6 Collecting societies: supervision, transparency, international cooperation, working methods

Collecting societies deliver not inconsiderable yields for their right holders. Quite particularly, they exploit copyright-protected works where the individual author would not be able to control the use of their output and enforce their entitlements. In so far as this is the case, they are indispensable as fiduciaries and collecting agents for individual authors and publishing houses in many fields. Although right holders are generally free to conclude deeds of assignment, they cannot assert their entitlements under statutory licences (the levy on private copies, for example) unless this is done through a collecting society. It also makes sense for uses such as cable retransmission to be administered by collecting societies in order to facilitate users' acquisition of rights or actually make this possible in the first place.[276]

When it comes to voluntary collective rights management, the bundling of rights by collecting societies forms an important instrument for reducing transaction costs as far as rights exploiters are concerned. Since digital platforms, especially, have to be based on a broad repertoire, they are reliant on cost-efficient rights licensing from a manageable number of licensors. Easy – not free-of-charge – access to creative content is indispensible, particularly for innovative start-ups, because immense transaction costs would otherwise prevent them from operating economically.[277] Conversely, if each author managed their rights individually, it would not be possible to keep administrative costs down to 8-12%, the kind of level the German collecting societies regularly achieve. As a result, legal uses would not occur or would be limited to a narrow repertoire that promised to be profitable.

[275] Cf. the Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, p. 285, online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[276] Cf. the 1996 government bill amending the Copyright Act, Bundestag Printed Paper 13/4796, p. 7; Dustmann, Andreas, in: Fromm, Friedrich K./Nordemann, Wilhelm (eds.): *Urheberrecht*, 10th edition, 2008, '§ 20b', para. 3.

[277] Cf. on this topic the Written Statement by Prof. Dr Karl-Nikolaus Peifer for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-D, p. 17, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_D-_Stellungnahme_Prof__Peifer.pdf.

On account of the above-mentioned advantages of collective rights management for the groups involved, and particularly in order to guarantee a balanced power dynamic between users and right holders, the German Bundestag has recognised the collecting societies’ strong position in the past. In return, the collecting societies in Germany are subject to a kind of special antitrust law. Apart from the general provisions of the Act against Restraints of Competition, the Copyright Administration Act contains provisions on the authorisation, operation and supervision of collecting societies. These limiting factors only apply immediately for collecting societies that are legally domiciled in the Federal Republic of Germany – and this will certainly continue to be the case until the legislation in this field is harmonised at the European level. These provisions do not apply to rights exploiters like CELAS or PAECOL (both subsidiaries of GEMA), whose operations are similar to those of the collecting societies.

Collecting societies are ‘required to grant exploitation rights or authorisations to any person so requesting on equitable terms’ (obligation to contract, Section 11 UrhWahrnG), and to draw up and publish generally valid tariffs (obligation to draw up tariffs, Section 12 UrhWahrnG). On account of the increasing diversification and rapid change characteristic of the digital sector, there is a particular need to respond appropriately to the development of new business models when tariffs are drawn up and adjusted. Where the collecting societies and users cannot agree on the level of equitable remuneration, the mechanism provided for in the legislation, under which disputed sums are deposited, ensures that necessary rights of use are regarded as granted. The development of innovative digital services will not be obstructed by the collecting societies withholding the rights they administer. The legal and economic uncertainties otherwise to be expected on both sides will not be experienced. At the same time, the obligation to deposit disputed sums serves to protect right holders from the risk of digital services that have already commenced their activities going insolvent before any understanding has been reached as to levels of remuneration.

In the music sector, the four largest publishing houses and some of the smaller publishing houses have withdrawn parts of their repertoires from the national collecting societies and are having them licensed separately for online use by companies such as CELAS (EMI), PAECOL (Sony ATV) and Deal (Universal). At the same time, it is to be noted that individual national collecting societies – for example, the Performing Right Society (PRS) in the UK or the Society of Authors, Composers and Music Publishers (SACEM) in France – are modifying their reciprocal agreements and directly licensing their repertoires to online service providers across Europe. The online service providers are therefore demanding greater transparency about the repertoire on the part of right holders. Apart from the publication of the relevant reciprocal agreements, this will require the disclosure of the right holders for each work listed under its correct title in an easily accessible database. The publishing houses and collecting societies are currently collaborating on a system of this kind that will ensure the various repertoires are clearly identifiable and rule out the possibility of superfluous licences being issued. To support these efforts, stakeholder talks are currently being held at the EU level on a global repertoire database [278] that would help to make the documentation of creative works transparent.

The collecting societies manage the rights of use assigned to them for administration in a fiduciary capacity on behalf of their right holders. This fiduciary relationship gives rise to certain minimum requirements with regard to transparency towards right holders and state supervision. The Copyright Administration Act accordingly lays down a number of obligations for the collecting societies to furnish and disclose information with regard to the volume of rights they administer, their annual accounts, tariffs, etc. In particular, the obligation to furnish information under Section 10 UrhWahrnG that is consequent upon the collecting societies’ strong position takes account of users’ interests to some extent. There are also demands for it to be made obligatory for the administrative costs of enforcing individual entitlements (flat rate copyright levies, for example) to be published so it is possible to calculate what proportion of the revenues are actually available for distribution to right holders. Apart from this, the publication of the total revenues from individual tariffs would allow it to be worked out which enterprises license works under a particular general agreement or pay levies, so that equal legal treatment is

[278] Online: http://globalrepertoiredatabase.com/.

guaranteed for all members. However, such a far-reaching obligation to disclose information is rejected by GEMA because it believes users have no identifiable interest worthy of protection in receiving this information. Furthermore, GEMA argues the provisions of the Copyright Administration Act ensure the supervisory authority is able to attend the relevant meetings of the bodies that govern collecting societies and, furthermore, request all relevant information that is required for the efficient scrutiny of collecting societies' obligations towards right holders and users.

The collecting societies are subject to state supervision by the German Patent and Trademark Office (DPMA). This body falls within the remit of the Federal Ministry of Justice, which is responsible for copyright law. The DPMA is the central German authority concerned with intellectual property rights, possesses the requisite staffing and can draw on more than 40 years experience of state supervision over collecting societies. Other parties have made demands for this field to be supervised by an authority analogous to the Federal Cartel Office that would report to the Federal Ministry of Economics and Technology, arguing this form of supervision would be better suited to the system that is in place.[279] The current system of collecting societies is sometimes subjected to considerable criticism, above all from the perspectives of transparency and democracy.

3.6.1 Promotion of (online) services by the administration and licensing of (online) rights

As a matter of principle, it is the case under copyright law that anything the author has not explicitly authorised is prohibited. In practice, however, this principle cannot be upheld where works are used on a mass scale. In consequence, particular rights are managed collectively by the collecting societies, with which authors and rights exploiters conclude corresponding deeds of assignment. In Germany, for instance, based on the assumption that copies of copyright-protected works are also made with printers, scanners and CD burners, VG WORT collects levies from copyshops, and the manufacturers of devices and blank media. In the music sector, authors (composers and lyricists) are represented by GEMA, while musicians and phonogram producers are represented by the Society for the Administration of Neighbouring Rights (GVL). *Inter alia*, the collecting societies conclude contracts with broadcasters so that they do not have to negotiate individually with composers and performers every time a song is played on the radio.

The system of collective rights management functions well at the national level, as far as the offline sector is concerned. However, the management of online rights by the collecting societies throws up numerous questions. Furthermore, cross-border online services are still in their infancy today at the European level. The reasons for this will be explained below.

Difficulties with collective rights management

There is no separate online law that governs the making accessible of content on the Internet. Various of the rights mentioned in Section 15(2) UrhG are relevant, including, in particular, the right to make works available to the public. Performance and broadcasting rights fall under public communication. Making available to the public covers on-demand services. At a time of increasing media convergence, the dividing line between these concepts is admittedly becoming ever more difficult to draw, which causes numerous problems. However, both rights are formulated as exclusive rights: every single right holder must be asked individually whether they wish their work to be used. In itself, this circumstance makes collective rights management more difficult. Furthermore, numerous other rights play a role. The right to reproduce, an exclusive right that relates to all copies and the storage processes that take place when works are transmitted, is usually pertinent as well. In addition to this, there are the related rights held by, for example, musicians and phonogram producers.

All these rights are individually transferable, which means it is often not possible to acquire them from a single source. The fragmentation of rights this entails makes collective rights management a difficult undertaking from the outset, and it is complicated even more by the current terms of protection. Over long periods of time, multiple rights transfers

[279] The Left Party parliamentary group and the expert member Constanze Kurz delivered a supplementary dissenting opinion on this passage (see section 5.6). The Alliance 90/The Greens parliamentary group and the expert member Alvar Freude endorse this dissenting opinion.

leave hopelessly tangled chains of rights, which make it increasingly difficult to market works due to the potential for constant rises in the costs of researching and clearing rights.

However, the main obstacle to collective rights management in Europe is the territoriality of the law. Copyright always remains confined by the borders of the nation state. As a consequence, a national collecting society cannot in principle possess a 'global repertoire', but only ever holds the rights of the artists of the country in which it has its legal domicile. At most, it can also administer the rights of foreign artists on the basis of reciprocal agreements with foreign collecting societies, but then only for its own territory. As a rule, cross-border licensing is not possible.

Measures at the European level

The idea of a one-stop shop for the acquisition of cross-border online rights has been discussed again and again against this background. After initial attempts at the EU level to agree on a directive that would have governed online services generally within the Community, the European Commission finally limited itself to online cross-border music services. In the 2005 Music Online Recommendation,[280] it made proposals to the Member States that were intended to promote competition on the rights management market. From this point on, right holders were to be able to appoint any European collecting society to administer their rights. This society would then issue EU-wide licences. However, the Recommendation did not contain any obligation to implement these measures.

The European Commission has declared its desire to facilitate cross-border licensing transactions. It remains disputed whether competition on the rights management market is the right instrument for this purpose. In the opinion of the system's critics, it will not automatically result in more diverse provision but, on the contrary, monopolistic structures will develop over the long term. Right holders will have an interest in arranging to be represented by the largest collecting societies, which will be able to pay the highest royalties on account of their lower overheads. These will be the societies that move into the marketing of the most commercial, most popular parts of the repertoire. Conversely, this means that less marketable content will tend to be ignored, and smaller providers will be crowded out of the market. For licensees, it will mean a tendency for the range of products on offer to become narrower. In consequence, the promotion of competition for licensors will not necessarily lead to greater competition as well when it comes to services for users, although this would certainly be desirable from the consumers' point of view.

However, the large national collecting societies too have a sceptical attitude towards the concept put forward by the European Commission because they are afraid of competitive disadvantages. In Germany, for example, collecting societies work in a fiduciary capacity, are subject to state supervision, and have both an obligation to administer (Section 6 UrhWahrnG) and an obligation to contract (Section 11 UrhWahrnG). The obligation to administer means they are required to conclude a contract with any right holder who requests this. The obligation to contract means the collecting society must grant all users licenses on the same conditions. These instruments were consciously created as a counterbalance to their statutory monopoly and would hinder the German collecting societies from operating purely as market-oriented organisations. From a European point of view, by contrast, any collecting agency whose business model consists in the marketing of use licenses counts as a collecting society. However, competition between state supervised collecting societies of the conventional model that act in a fiduciary capacity and the new-style organisations structured as private companies is problematic in view of the very different requirements they have to fulfil.

The founding of CELAS, a joint subsidiary of the German GEMA and the British MCPS/PRS (a consortium of two collecting societies) has accordingly met with a great deal of criticism. In contrast to the national collecting societies, CELAS is able to issue Europe-wide licences, but merely markets EMI's Anglo-American and German repertoire, i.e. only a limited portion of the material held by a single large provider. Territorial limitations have therefore been superseded by limitations on the selection of the repertoire. In the mean time, similar models have taken shape in many countries:

[280] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (*OJ L*, 276, 21 October 2005, pp. 54-57).

Alliance Digital (MCPS and peermusic), PEDL (various European collecting societies and Warner Chappell), SACEM-UMPG (SACEM and Universal) and other organisations each market different repertoires with different territorial coverage.

At present, collective rights management in Europe therefore finds itself in a dilemma, torn between territorial limitation and private sector pick and choose. It is no accident that it has been the large corporations in the music industry who have been crucial in driving ahead the second option. If it is kept in mind that the four major music labels together hold a world market share of more than 80%,[281] it is possible to conclude that the real danger to collective rights management in Europe comes less from competition between collecting societies than from competition between collective and individual forms of rights management. It appears all the more urgent to safeguard authors in contract law at the European level as well.

A consultation conducted in 2008[282] revealed controversy among the actors involved as to what action should be taken in future in the European Union. Since then, the European Commission has once again announced a forthcoming framework directive on collective rights management. This was to have been published by the end of 2010. To date, however, it would appear that no agreement has been reached.

Solutions

It would be conceivable for the instrument of the obligation to administer to be introduced at the European level as well, so that all collecting societies would in principle be obliged to conclude contracts with right holders. This could largely counter the danger of a monopoly forming as a result of a pick-and-choose approach to the rights pool. At the same time, it would be worth considering steps to orient the competition between collecting societies that is desired more towards licensees than licensors, i.e. to promote demand-responsive competition on the market for rights of use. This could mean all collecting societies would have a world repertoire on offer, the arrangements for which could be made through appropriate reciprocal agreements. There would then not be a single one-stop shop, but a large number of one-stop shops. Users would be able to purchase rights from a collecting society of their choice, regardless of their own location. Competition would develop as the collecting societies competed for the largest possible client base. From the consumer's point of view, such competition on the provider side would certainly be more advantageous than competition between providers for available rights. At the same time, the instrument of the obligation to administer would protect authors against unfair advantages being taken by collecting societies as contractual partners. This protection would have to be reinforced by further rules in contract law.[283]

A real solution to the problem of collective rights management at the European level still seems far off at the present point in time. It would involve the harmonisation of European copyright law. With regard to collective rights management, such harmonised Community legislation would probably involve, above all, a delimitation of broadcasting and on-demand rights, which would take account of the increasing convergence of the media, as well as a standardisation of the existing exploitation rights and exceptions. For instance, it would then be conceivable to continue having traditional forms of communication to the public (broadcasting rights) managed by national collecting societies, but online rights (rights to make available to the public) administered collectively by a central, European register. The national collecting societies view this idea critically.

3.6.2 The role of rights management law in Europe

While the EU has harmonised substantive copyright law ever more strongly in an

[281] Cf. *RouteNote Blog*: '2010 Quarter 1 Marketshare for Major Music Labels', online: http://routenote.com/blog/2010-quarter-1-marketshare-for-major-music-labels/.

[282] European Commission: *Monitoring of the 2005 Music Online Recommendation*, 7 February 2008, online: http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf.

[283] This conclusion is also reached by Kreutzer, Till: *Verbraucherschutz im Urheberrecht*, Federation of German Consumer Organisations, p. 34, online: http://www.vzbv.de/mediapics/urheberrecht_gutachten_2011.pdf.
The Max Planck Institute for Intellectual Property and Competition Law too thought in this direction in its statement concerning the Commission Recommendation of 18 October 2005 on the licensing of music for the Internet (2005/737/EC). Its study can be downloaded at: http://www.ip.mpg.de/shared/data/pdf/stellungnahme_mpi.pdf.

abundance of legislation (seven directives between 1991 and 2001), this has not been done for the law of rights management as yet. Since the mid-1990s, proposals from the Internal Market and Services Directorate General intended to lead to a collecting societies directive have prompted discussion at various EU conferences and a study on the status of collective rights management in Europe, but not led to concrete legislative proposals. The Internal Market and Services Directorate General, which is responsible for copyright, most recently took an initiative in 2005 with its Music Online Recommendation, [284] but this has not succeeded in clarifying and simplifying the licensing of music authors' rights as was hoped. In this respect, the European Commission, particularly the Competition Directorate General, has always kept a close eye on the practices engaged in by the collecting societies in Europe.

Back in the early 1970s, the European Commission compelled a collecting society to permit the selective revocation of rights for particular types of use and cut its notice periods for deeds of assignment. [285] In a decision adopted in 1981, it opened access to any of the national collecting societies in Europe for EU citizens in accordance with the general principle of non-discrimination within the EU. [286] With its 2003 Simulcasting Decision,[287] it paved the way for reciprocal agreements that combined a licence on country of destination conditions with free, EU-wide access to collecting societies for right holders and users. Furthermore, in its CISAC[288] Decision[289] of 2008, which is currently being reviewed by the European Court of Justice, it indicated its opposition to territorial restrictions.

This patchwork of largely isolated individual decisions contrasts with a series of provisions in the directives concerning substantive copyright law. They make it clear that, certainly when it comes to statutory entitlements to remuneration, the EU believes the existence of collecting societies to be a necessity, for instance to administer the cable retransmission of broadcasts or entitlements to remuneration for private copying.

The European Commission has announced that it will harmonise the law of collective rights management in a directive in the near future. When this is done, the central challenge will be to stipulate the reach of harmonisation: Should it only encompass the statutory entitlements to remuneration recognised by substantive copyright law in the EU or rights that have to be managed by collecting societies, or should the rules also extend to areas of rights management where administration by the collecting societies is not mandatory? This latter field has after all – particularly as a result of the Commission's 2005 Recommendation – seen the formation of a large number of innovative agencies and collective bodies that represent authors, only some of which can be subsumed under the traditional concept of collecting societies.

3.6.3 Competition between collecting societies

Digitisation and the transnational character of Internet-based services have created the preconditions for there to be large-scale consumer demand for services, which also has an international dimension. In order to be able to provide services, music rights exploiters require the rights of foreign collecting societies as well if they are to offer a comprehensive repertoire. The collecting societies deal with the necessity this imposes on them to have their rights managed abroad with a system of reciprocal agreements. Under these largely standardised, bilateral agreements, the national collecting societies entrust each other with the administration of each other's rights. In the past, this system ensured that each collecting society was able to administer the world repertoire within its own territory.

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[284] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, *OJ L*, 276, 21 October 2005, pp. 54-57.

[285] Commission Decision 71/224/EEC of 2 June 1971 relating to a proceeding under Article 86 of the EEC Treaty (IV/26.760 – GEMA), *OJ L*, 134, 20 June 1971, pp. 15-29, as modified by Commission Decision 72/268/EEC of 6 July 1972 relating to a proceeding under Article 86 of the EEC Treaty (IV/26.760 – GEMA), *OJ L*, 166, 24 July 1972, pp. 22-23.

[286] Commission Decision 82/204/EEC of 4 December 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.971 – GEMA statutes), *OJ L*, 94, 8 April 1982, pp. 12-20.

[287] Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI 'Simulcasting;), *OJ L*, 107, 30 April 2003, pp. 58-84.

[288] CISAC: International Confederation of Societies of Authors and Composers.

[289] Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC), *OJ C*, 323, 18 December 2008, pp. 12-13.

The content of these bilateral contracts consists of two clauses in particular: The ‘membership clause’ forbids the contractual partners from taking on members of the other collecting society or citizens from the other country in which it operates. The ‘exclusivity clause’ contains provisions that prescribe users can only acquire licences from the collecting society domiciled in their own country. However, they limit the reciprocal rights of use granted by the collecting societies exclusively to the territory of their contractual counterparts.

The territorial limitation fixed in the reciprocal agreements means only a limited amount of competition is possible between the collecting societies. Each society can merely license it own national repertoire across borders because it has not been exclusively incorporated into the system of reciprocal agreements. However, on account of the requirements of the market, there is hardly any market demand for a single nation’s repertoire, which is why the practice of direct cross-border licensing – in so far as can be ascertained – has hardly become established to date. As a rule, rights exploiters can therefore acquire rights of use over the world repertoire for which there is demand only from the collecting society in whose territory they are active. Competition for rights exploiters has therefore been ruled out to date. Rather, the collecting societies are subjected to an obligation to accept contracts, according to which, as a matter of principle, they must firstly manage the rights of all the artists who register with them (obligation to administer, Section 6 UrhWahrnG). Secondly, they are obliged to issue appropriate licences to all rights exploiters (obligation to contract, Section 11 UrhWahrnG).

Hitherto, special arrangements have existed merely for the licensing of phonograms. Here, the collecting societies and international phonogram producers conclude what are known as central licensing agreements effective for the whole European Economic Area. These make it possible for CDs to be manufactured in any European country and distributed throughout Europe without the rights over them having to be cleared with numerous collecting societies for their individual territories. Collecting societies therefore compete to sign up phonogram producers, to whom they offer the clearance of copyrights for the whole of Europe as a service. This is attractive for the collecting societies because these are ‘big contracts’ from which a great deal of money is to be earned, not least due to the administrative costs that are incurred. The system therefore results in rationalisation effects that, in turn, make it possible for prices to be discounted. In other words: here, the music industry is able to hold remuneration levels for authors as low as possible thanks to the competition between the collecting societies. However, this special arrangement does not apply to the online sector in particular.

Having recognised there was a great need for action, in particular with regard to online music rights, the European Commission published the Recommendation on collective cross-border management of copyright and related rights for legitimate online music services in October 2005.[290] The aim was to improve the parameters for cross-border online music services as a way of accelerating their growth. To date, however, the Recommendation has had little success, not least due to the lack of agreement from the major national collecting societies, and merely led to a fragmentation of digital rights.

Currently, the situation for online music services is therefore as follows:[291] In order to be able to offer a Europe-wide service, a provider must reach agreement with all the collecting societies in the Member States. At present, however, since each collecting society works with its own distribution plans for its music licences and the legal parameters have not been harmonised either, Internet users from other countries who are interested in making purchases are blocked technically in order to prevent legal disputes with right holders. In order to be able to deal with the problems caused by different national provisions, the service providers would like a one-stop shop – a single point of contact for all licences in Europe.[292]

While CELAS offers EMI Publishing’s Anglo-American repertoire, Sony Music’s repertoire is licensed by PAECOL. The service providers have therefore been confronted with two further negotiating

[290] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (*OJ L*, 276, 21 October 2005, pp. 54-57).

[291] Wieduwilt, Hendrik: ‘Rechte-Zank lähmt den Markt’, *FAZ.net*, 21 June 2010, online: http://www.faz.net/-014l2a.

[292] The Left Party parliamentary group delivered a supplementary dissenting opinion on this passage (see section 5.7).

partners alongside the existing European collecting societies, with whom they have always wanted, and still do want, to negotiate individually to acquire cross-border online rights to the world repertoire.

On the one hand, CELAS has made the standardised licensing of music for use in the online sector easier, on the other hand, at least in the view of the service providers as users, it has also made it more difficult. Unlike GEMA, CELAS is a private company that is not subject to any controls on tariffs or obliged to conclude contracts. The German supervisory authority, the German Patent and Trademark Office, has now responded to these concerns about GEMA's involvement in CELAS by launching an investigation.

Problems with streaming and cloud-based services

Physical media (records, CDs, etc.) are increasingly being displaced by streaming-based variants such as YouTube and Simfy.

On the digital rights licence market for such services, authors themselves can now decide which collecting society in the EU internal market they wish to entrust with the management of their digital rights of use. This freedom of choice is intended to improve the management of rights, but has thrown up new problems for all concerned: The collecting societies fear losing their national monopolies if they have to cope with international competition for authors' rights. In particular, smaller national collecting societies fear they will fail to make headway against the competition. Larger collecting societies will be able to offer better conditions on account of their lower administrative costs, and it is to be expected that authors will be more likely to sign up with them. The situation is confusing for authors as well: There are no binding data and accounting standards that apply for all collecting societies equally. Nor is there any European obligation to administer. A collecting society is therefore not obliged to conclude a deed of assignment with each author. In consequence, there is a danger that less commercially successful artists will be excluded from the cross-border dissemination of works. Quite particularly, competition for users, i.e. providers of innovative online services, in line with the EU's ideas would not be desirable because it would merely threaten to foster competition for authors' rights, but not competition for licensees as clients.

4 Recommendations for action[293]

Digitisation and the Internet have transformed the storage, the availability, and the worldwide access to and distribution of knowledge. The Internet offers the most liberal, most efficient forum for information and communication in the world. Society and the economy are increasingly dependent on it and require a clear legal system for immaterial goods. This will create incentives for authors, and therefore for innovation and progress in society, research and the economy.

In the opinion of the Study Commission, even the upheavals the Internet is bringing with it do not give cause for copyright to be construed from the user's perspective, and so to be detached from the necessary protection for the intellectual and economic interests of the author of creative goods, which is also required by the German constitution. Furthermore, there are in principle no grounds to call into question the concept of making immaterial goods marketable primarily by giving authors exclusive rights and in this way increasing the incentives for them to create works. However, the overview has shown that copyright certainly requires systematic adjustment at many points in order to arrive at an appropriate regulatory framework for immaterial goods in a digital society.

In a digital society, the copyright system is the product of a complex process of formulation in which, apart from the interests of the author of creative goods, the general interests in the promotion of creativity, innovation and advances in knowledge also have to be taken into consideration above all. Internet-based communication, especially, can contribute considerably to creativity, innovation and advances in knowledge if copyright law is also further developed with this understanding of its aims in mind. In this respect, there is a need to protect both rights of exploitation and authors' personal rights, as well as guaranteeing free access to the Internet. These are the only things that will ensure innovativeness can unfold fully.

Digitisation is changing the relationship between authors, rights exploiters and users. It is necessary to reconcile the economic

[293] The Study Commission adopted the following recommendations for action by various majorities at its meetings on 27 June 2011 and 4 July 2011.

foundations for authors' activities with the establishment of new forms of digital distribution and business models, as well as rapid and uncomplicated access for users to copyright-protected content in conformity with the law. The fair use of copyright-protected products presupposes a culture of mutual respect. This and the strengthening of acceptance for copyrights are general social challenges that do not stop at national borders. The development of digitisation and the Internet shows that the protection and efficient enforcement of copyrights increasingly have to be viewed internationally.

The acceptance of copyright law also depends on how the legislature deals with the technologically determined difference between *de facto* being able and legally being permitted to access digital content on the Internet. In this respect, it is necessary to strengthen acceptance with more education, at the same time as constantly working to further develop the legal framework for attractive services that provide copyright-protected content.

The reality of copyright law is becoming increasingly distanced from the holistic ideal of the solitary creative artist, whose personality 'flows' into the work, and creative groups and collective creations are developing. Copyright law has responded to these developments. The Internet and its manifestations are now bringing forth further developments and have, for instance, shaped new forms of pure production to order and networked production in which large numbers of people collaborate to assemble works on Internet platforms. The copyright system should take account of this, which will mean examining whether the recognition of personal rights should be tied to the recognition of rights of exploitation on a compulsory basis for all types of work or forms of creative production.

Copyright is founded on the assignment of exclusive rights to authors. Business models that allocate the author the economic value of their creation build on these rights. A differentiated analysis should ask in which cases an exclusive right and its associated access restrictions are necessary, and where it is enough to secure authors a share in the economic success of their works by means of legislation.

The Study Commission has taken account of technical, social and economic changes and challenges in its analysis of the prospects for copyright in the digital world. Particular attention has been paid to digital distribution and business models, new approaches to remuneration, collective rights management, and the situations of authors and users.

Against this background, the following recommendations for action are made:

On chapter 1: Copyright in the digital society: overview, and technical, social and economic challenges

On 1.1: The Internet and digital technologies as tools for creative activities, self-marketing and distribution/transformed constellation of actors

Simplify copyright provisions

On the Internet, digital content can be used all over the world, at any time and with numerous different end devices. The Study Commission recommends that the German Bundestag take the changes seen in user behaviour as the occasion to review the provisions relevant to copyright law in greater depth in order to ascertain whether they are clearly and comprehensibly formulated for right holders, providers and users, and as simply applicable as possible.

On 1.2: Value and status of creativity in the digital world

Foster awareness of the value of intellectual property

A clear awareness of the value of intellectual property and the protection of copyright are right at the heart of a digital society. The Study Commission sees this as a general social task. It therefore recommends that the Federal Government further intensify its education work on these issues. Existing initiatives to strengthen media competence run by the Federation and the Länder, and relevant activities in business and society should take up this aspect as an additional priority. Steps to foster a consciousness of the need to protect intellectual property and its value will be all the more successful the more users' understanding of the issues is promoted, incentives to use legal services are enhanced and breaches of the law are met with effective sanctions.[294]

The Study Commission recommends stronger public funding for original digital

[294] The Left Party parliamentary group voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.2).

publications. Arts funding must not remain restricted to the offline world.

The Study Commission notes that a blossoming culture of remixes and mash-ups has grown up on the Internet. Creative content and modern technology are boosting each other's ability to generate turnover. As a result of this, it may be possible to make out changes in many creative professionals' understanding of how their original creative output is used.

The Study Commission therefore recommends funding be provided for platforms that offer information and education about rights under specific exceptions from copyright. Arts funding should be extended to digital publications. In addition to this, the Study Commission recommends the training of schoolchildren in the skills to use the media be focussed on the monetary and intrinsic values of creative content.[295]

On 1.2.4: Fundamental requirements for a reorganisation of copyright

The Study Commission recommends that the regulatory structure of the system of exceptions and special provisions in Europe be reviewed. Apart from this, it should be examined what system of exceptions would meet the requirements of an information society.

On 1.5: Exceptions

Adapt the provisions on private copying to the challenges of the Internet

Exceptions from copyright must take account of the actual circumstances and requirements of the digital world. In view of the ongoing technical developments on the Internet, the Study Commission recommends a renewed examination of the provisions on private copying by the German Bundestag and the Federal Government. These provisions were not originally developed for a digital society. In the opinion of the Study Commission, they are at least in need of clarification and should therefore be drafted with greater precision.[296/297/298]

The Study Commission recommends the decriminalisation of remixes and mash-ups by means of the introduction of a European-level exception for the creation of derivative works and the transformative use of works, as proposed in the *Green Paper: Copyright in the Knowledge Economy*.[299/300]

On 1.6: Questions about terms of protection

An extension of the terms of protection is being discussed at the European level. A further extension of the terms of protection does not appear expedient. The Study Commission recommends that the German Bundestag distance itself from any further lengthening of the terms of protection and calls upon the Federal Government to argue at the European level against any extension of the terms of protection.[301]

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[295] Dissenting opinion of the Christian Democratic Union/Christian Social Union (CDU/CSU) and Free Democratic Party (FDP) parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'State arts funding for digital publications is rejected as an exclusive source of finance because this would mean abolishing competition in the creative industries and potentially exerting influence over our free, independent cultural and media landscape.'

[296] The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.3).

[297] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.1).

[298] The Left Party parliamentary group voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.2).

[299] European Commission: *Green Paper: Copyright in the Knowledge Economy*, COM(2008) 466 final, online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF.

[300] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that the *Green Paper: Copyright in the Knowledge Economy* (COM(2008) 466 final) does not contain any proposals for the introduction of an exception for the creation of derivative works. Instead, it states that Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society does not permit such provisions.'

[301] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring and Dr Bernhard Rohleder: 'With reference to the cross-party Bundestag decision to welcome the extension of the terms of protection (Recommendation for a Decision and Report of the Committee on Legal Affairs, Bundestag Printed Paper 16/13674), it is pointed out that the object of the extension of the terms of protection at the European level is not just to extend phonogram producers' rights to 70 years, but that one aim of the proposal is to improve performing artists' social situation.'

On 1.7: New approaches to regulation in copyright law

Restrained approach to regulatory interventions

Today, existing copyright law already leaves room for different approaches and business models on the Internet. Apart from proprietary solutions, there are also solutions developing that are based on, for example, the free-of-charge communication of authors' original output. In principle, it is competition that will decide whether these approaches succeed or fail. The Study Commission therefore recommends that regulatory interventions in copyright be made dependent on an appraisal of the market and its legal framework.[302]

On 1.8: Private licence agreements for digital information goods

Strengthen individual licensing models rather than flat rate remuneration

Technological development, in particular on the Internet, is increasingly making it possible for individual licensing to be linked with demand-responsive remuneration. The Study Commission recommends that, when copyright law is formulated, the German Bundestag prefer individual forms of remuneration and forms of remuneration developed through competition to flat rate forms of remuneration, where this is possible. Existing flat rate systems should be examined to ascertain whether they could be converted.[303/304/305]

The Study Commission recommends the creation of an option for the resale of legally acquired, immaterial copies of works (music, film and other media files, and computer programs).[306]

On 1.9: The Creative Commons concept

Promotion of modern general licence models

Models for voluntary licensing to all-comers under self-selected standardised conditions of the kind proposed by the Creative Commons (CC) organisation in its model licence agreements are worthy of promotion in some areas of application because they represent a user-friendly option for the unbureaucratic granting of rights. The easy access to content made possible for the general public by CC licences is understood by the Study Commission as an expedient addition to the existing legal framework. The Federal Government should examine pragmatic solutions for the incompatibilities faced by authors who otherwise arrange to be represented by collecting societies. This should enable authors to place individual works under CC licence even after they have concluded a deed of assignment with a collecting society.

Authors who use free (Creative Commons) licences for publicly funded works should be rewarded with a funding bonus or recognition of their eligibility for enhanced funding.[307]

The use of free licences in public fields should be driven ahead proactively.

Around the world, efforts are being made to deploy the Internet to broaden access to, and improve the quality of, learning and teaching materials at all levels of education with 'open educational resources' (OERs). As with the 'open access' publication of research

[302] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.1).

[303] The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.3).

[304] The Left Party parliamentary group voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.2).

[305] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.1). In addition to this, the SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch wish to make reference to the statements delivered in the majority opinion on section 3.6.

[306] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that, as the law stands at present, the relicensing ("resale") of digital content is already possible. The rights to reproduce required to use a work can only be granted by the right holder (Section 31 UrhG). In so far as this is the case, there is no need for legislative action.'

[307] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Dr Wolf Osthaus, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that models for voluntary licensing to all-comers under self-chosen standardised conditions based on current copyright law of the kind proposed by the Creative Commons organisation in its ready-made licence agreements deserve to be promoted in some areas of application, since they represent a user-friendly option for the unbureaucratic granting of rights. Statutory compulsion and the distortion of competition by funding bonuses or other subsidies are to be rejected.'

results, it is certainly necessary in the field of OERs too to sound out as far as possible the options with which publicly funded content can be made freely accessible online and more competition ensured in the school books segment as well.

The Study Commission recommends that the German Bundestag ask the Länder to examine the form in which open access arrangements and licensing issues (for example, creative commons) could be taken into consideration when teaching and learning materials are procured. As a first step, it would be conceivable to trial and evaluate the creation and management of OERs in separately financed pilot projects.

The Study Commission notes that the system of ready-made licences based on the model propounded by the CC organisation is enjoying major successes and making it possible to extend access to works under copyright law. It also notes that CC represents a form of private regulation through standardisation, but above all that there are ways in which it is incompatible with the collecting societies, which only allow the use of CC licences in isolated cases.

For these reasons, the Study Commission recommends that CC licences be used purposefully for publicly funded, copyright-relevant works. Collecting societies should be urged to also take on authors who use CC licences if they take this option for the purposes of monetisation (under the licence that is applied). [308] Finally, the Study Commission recommends that the dissemination of CC licences be promoted in a targeted fashion, and more educational work about distribution options and rights for authors be included in the curriculums at artistic and cultural training institutions.

On 1.10: Access to academic information via 'open access' rights management models

Strengthen open access publication for academics and researchers

Academic work and research thrive on openness and the exchange of academic findings. Academic publishing houses also contribute decisively to the digital society, allowing the academic community to access research results in high quality forms. At the same time, the Internet is making new channels of distribution possible. The Study Commission recommends that research institutions, higher education institutions, the Federal Government and the Länder strengthen existing channels for open access distribution that have already proved their worth ('gold access'), as well as authors' rights. It is of the opinion that open access methods can enrich academic publishing in the digital society and should therefore be accepted on a footing of equality alongside long-standing distribution channels. What is decisive is that a user or author-financed model (open access) can be chosen as individually as possible depending on the author, the academic discipline and the reason for publication.[309/310]

When it comes to the disbursement of public funds, it should be examined case by case whether open access publication can be made a condition in order to ensure that the granting of exclusive rights of use to publishing houses does not hinder academic debate.

On chapter 2: New forms of distribution/remuneration and business models on the Internet

On 2.3: Equitable remuneration/total buy-outs

The Study Commission recommends the unrestricted enforcement of the royalty principle. Authors have an entitlement to equitable remuneration for every use made of their work, in particular every commercial use.[311]

[308] See the dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Dr Wolf Osthaus, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon in Footnote 307.

[309] The Left Party and Alliance 90/The Greens parliamentary groups voted against the text drafted for this passage and delivered a dissenting opinion: 'It is recommended that copyright contract law be used to grant academic authors an inalienable right of second publication that would need to be defined in greater detail so as to be adequate for academic purposes and would allow them to publish their works with identical formatting after an appropriate embargo period.'

[310] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.1).

[311] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that, as the law stands at present, Sections 32 and 32a UrhG, and the relevant case law already guarantee equitable remuneration for authors. Section 32b UrhG also stipulates the compulsory application of these two sections.'

On 2.4: New remuneration models

New remuneration models

When new approaches to the regulation of the relationships between authors, intermediaries and users are investigated, the individual output of those who create works and their corresponding individual entitlements to share in the proceeds from the exploitation of their output must on no account be disregarded. The Study Commission is of the opinion that models in which all authors receive the same level of benefits conflict with fair rewards for creative work and respect for what individuals achieve by the sweat of their brow, and are consequently to be rejected.[312/313/314]

The Study Commission recommends support be given to new remuneration and payment models beyond the established channels of exploitation and common micropayment platforms. Proposals such as the 'culture flat rate' and the Chaos Computer Club's 'culture token' are to be examined without prejudice to ascertain their potential yields and social benefits. The same also applies for the further development of concepts for anonymous digital cash.

The Study Commission believes it would be advisable to apply the provisions on private copying to downloads on the Internet and, in addition to this, recommends the statutory anchoring of an entitlement for authors to obtain the payment of remuneration from providers through the collecting societies in accordance with their distribution plans.[315]

[312] The Alliance 90/The Greens parliamentary group delivered a supplementary dissenting opinion on this passage: 'It is noted that there are different models for the organisation of remuneration for works that have appeared online. It is initially recommended that support be given to commercial subscription services.'

[313] The Left Party parliamentary group voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.7).

[314] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.6).

[315] The CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Dr Wolf Osthaus, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.5).

On chapter 3: Copyrights and users' rights

On 3.1: Enforcement of rights on the Internet – a challenge for copyright law

Regulate treatment of contraventions of copyright equitably and transparently

Cease and desist notifications directed against copyright infringements are in conformity with the current German legal provisions. However, their foundation in law is often felt to be incomprehensible or unjust by the parties affected. There is therefore a need for greater transparency to promote acceptance of prosecutions, and at the same time provisions to hinder possible abuses of this civil law instrument. Certainly, the legislature should avoid setting incentives that could encourage refinancing on the basis of notifications instead of the development of innovative business models. The Study Commission therefore suggests that the German Bundestag examine whether it would be possible to specify in greater detail the costs that would be incurred for a notification in addition to the compensation for damages that is demanded.[316/317]

Legal instruments

The unidentifiability of users on the Internet often proves to be a central obstacle to the enforcement of rights. However, despite the risks with which they are associated, the anonymity and unobserved nature of communication via this medium deserve to be protected as preconditions for societal discourses, quite regardless of users' right to informational self-determination. Against this background, the Study Commission recommends it be examined whether there should be changes to host providers' liability or a statutory framework should be established for a notice and take down procedure.[318/319]

[316] The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.13).

[317] The Left Party parliamentary group voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.12).

[318] The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.13).

[319] The Left Party parliamentary group voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.12).

Controls and sanctions

Access to the Internet is an essential element of the digital society and a precondition for participation in social life. The Basic Law guarantees citizens' ability to obtain information from generally accessible sources unhindered. For these reasons, it is necessary to weigh up carefully between freedom of opinion and conflicting legal goods. State sanctions must not be disproportionate, and this is also the case when they have an impact on the Internet as a medium of communication. Furthermore, the same applies especially for access to the Internet. The Study Commission recommends that, as far as action to combat infringements of copyright on the Internet is concerned, the Federal Government therefore prefer other effective instruments and make the most of the legal instruments at its disposal. The Study Commission will take up the questions connected with this issue at length in the Internet Access, Structure and Security project group.[320]

Technical measures and their limits

An open societal discussion is needed about the possibilities and limits of technical solutions and the meaningfulness of unilateral national action. However helpful content filters may be in combatting spam mail, across-the-board filtering measures would restrict the right to freedom of information and the privacy of telecommunications. The Study Commission recommends that the Federal Government not take any initiatives to bring in statutory Internet blocks as a means of dealing with infringements of copyright. The Study Commission recommends that, in addition to this, the Federal Government deliberate in depth on the results of the study commissioned by the Federal Ministry of Economics and Technology[321] on copyright infringement warning models and examine the options for their implementation.[322/323/324]

On 3.1.1: Combatting copyright infringements

The enforcement of rights must be proportionate. Measures for the prosecution of copyright infringements must not interfere with users' freedom of information, freedom of opinion and freedom of communication. Socially unacceptable models that entail the monitoring of Internet traffic or even the blocking of the Internet should be clearly rejected.[325]

On 3.1.3: Improving awareness of the significance of copyright law as a general social task[326]

Efforts should be made to create understanding for the specific needs of all concerned. For this purpose, it is indispensible to convey knowledge about the statutory provisions by means of balanced state education campaigns. Information platforms that are responsive to users' concerns may serve as models for formats that provide easily comprehensible information about copyright issues.

Furthermore, since schoolchildren, in particular, are also being confronted with copyright issues, it seems obvious for this subject matter to be taught in schools.

The possibilities of licence-free content and content licensed to all-comers, as they are realised by open-source software and CC licences, should also be publicised and promoted. Projects such as Linux and *Wikipedia* offer impressive evidence of how creativity can be promoted by such means – and how this can be done with copyright law and not in opposition to it.

[320] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.11).

[321] See the press release issued by Cologne University of Applied Sciences when it was awarded the contract for this study, online: http://www.verwaltung.fh-koeln.de/imperia/md/content/verwaltung/dezernat5/sg51/presse11/pm_58_2011_medienrecht.pdf.

[322] The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.13).

[323] The Left Party parliamentary group voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.12).

[324] The SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch voted against the text drafted for this paragraph and delivered a dissenting opinion (see section 5.8.11).

[325] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring and Dr Bernhard Rohleder: 'It is noted that the existing legal foundations for the protection and enforcement of copyrights are proportionate and therefore also in conformity with the constitution. They ensure a respectful balance between the fundamental rights that are to be borne in mind.'

[326] See also Footnote 293 at the beginning of chapter 4.

The Study Commission recommends the education of professional and non-professional creative workers about their rights in the digital sphere and the provision of financial resources for relevant projects.[327]

The Study Commission recommends education instead of intimidation: the promotion of measures that educate authors and users about their rights in the digital sphere – instead of questionable 'awareness raising' campaigns such as 'Copyright Pirates are Criminals'.[328]

Furthermore, efforts should primarily be made to foster understanding for the particular needs of all the actors. If this is to be done, it will be indispensable to convey knowledge about the statutory provisions through balanced state education campaigns. Here, Internet services that are responsive to users' concerns, such as the private iRights.info project, may serve as models for formats that provide easily comprehensible information about copyright issues.

Furthermore, since schoolchildren, in particular, are also being confronted with copyright issues, it seems obvious for this subject matter to be taught in schools as part of their efforts to convey media skills.

Of course, it should go without saying that, just as under the Beutelsbach Consensus,[329] an impartial, balanced standpoint is to be maintained.

Apart from these measures that primarily build on education and information, modern copyright legislation could improve the acceptance of copyright. For example, when the second basket of the copyright reform was adopted, the introduction of a *de minimis* clause in Section 106 UrhG was discussed, but not implemented. A *de minimis* clause of this kind would not represent a threat to authors' rights and would help to decriminalise a form of creativity that has become an everyday phenomenon. The acceptance of copyright provisions among the broad population could be improved markedly in this way.

Similar effects would be achieved by the extension and more precise drafting of Section 97a(2) UrhG, a limitation of accessory liability and the introduction of a protective exemption that would allow non-commercial creative activities based on existing works.

The possibilities of licence-free content and content licensed to all-comers, as they are realised by open-source software and CC licences, should also be publicised and promoted. Projects such as Linux and *Wikipedia* offer impressive evidence of how creativity can be promoted in this way – and how this can be done with copyright and not in opposition to it.[330]

On 3.2: Scale of copyright infringements on the Internet – consequences of rights infringements

The Study Commission notes, firstly, that there are hardly any reliable figures on the volume of copyright infringements and, secondly, that there is no easily identifiable causal connection between downloads from the Internet and turnover in the creative sector. As far as this is concerned, it is to be recommended that the German Bundestag commission a study that looks objectively at the different perspectives on this issue.

[327] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that, in principle, any form of information about the current legal situation in the digital environment is desirable and should be supported. However, such information must not just deal one-sidedly with users' rights, but must give a comprehensive account of both the actors' rights and their duties. Irrespective of this, each right holder is free to decide how and with what communicative tools they draw attention to misconduct.'

[328] See the dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon in Footnote 327.

[329] For an account of the 'Beutelsbach Consensus', see for example: German Federal Agency for Civic Education: 'Beutelsbacher Konsens', online: http://www.bpb.de/die_bpb/88G2RH,0,Beutelsbacher_Konsens.html.

[330] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that since the introduction of the civil law entitlement to obtain information in September 2008 copyright infringements have been almost exclusively prosecuted through the channels of civil law, and criminal law investigations have only rarely been instituted. The introduction of *de minimis* clauses is rejected because any trivialisation of rights infringements in the field of copyright will always be accompanied by the trivialisation and devaluation of culture and the production of culture.'

On 3.4: Negotiation of international agreements on copyright

Developments at the international level

A lack of transparency about international agreements, the talks on ACTA for example, is counterproductive and does nothing to help strengthen copyright. It is not acceptable if resolutions first have to be passed by the European Parliament or national parliaments before treaty negotiations and their results are disclosed, while there is absolutely no input from civil society or non-governmental organisations. The Study Commission therefore recommends that the German Bundestag make stronger demands for transparency in relation to such international negotiations and agreements, not least in order to ensure the legitimacy of the agreements in question.

The Study Commission notes that international agreements have increasingly bolstered authors' rights and, in this respect, the balance of interests that was originally the purpose of copyright law has receded into the background. Apart from this, the Study Commission notes that the public and concerned parties are not participating in these processes to the extent that would be desirable.[331]

It therefore recommends that efforts be made to bring about the participation of non-governmental organisations and to refocus attention on the balance of interests in treaty negotiations.

On 3.6: Collecting societies: supervision, transparency, international cooperation, working methods

Greater equality of competition among the collecting societies in Europe

On account of the cross-border character of the Internet, German collecting societies increasingly find themselves in competition with their counterparts in other countries and comparable rights administrators. In order to prevent German collecting societies from suffering competitive disadvantages in this situation, the Study Commission recommends that the German Bundestag and the Federal Government seek to ensure that all institutions that operate as collecting societies on the European internal market are subject to the same requirements with regard to authorisation, operation and supervision.

Collecting societies

The Study Commission recommends the implementation of the recommendations made by the Study Commission on Culture in Germany be evaluated. If they have not yet been fully implemented, the Study Commission itself should adopt the following selection from the recommendations made by the Study Commission on Culture in Germany:

– '[...] The Study Commission recommends that the German Bundestag and the Federal Government uphold and defend the system of collective rights management by collecting societies, partly as an important factor in its efforts to ensure cultural diversity.

– [...] The Study Commission recommends that the German Bundestag place a statutory obligation on the collecting societies to make the content of their reciprocal agreements and information on those agreements' implementation available to the general public.

– [...] The Study Commission recommends that the collecting societies comply with the obligations to ensure transparency imposed on them by the Copyright Administration Act to a greater extent than in the past, and in this respect address the performance of their social and cultural functions, in particular.

– [...] The Study Commission recommends that the collecting societies ensure the comprehensive representation of all right holders who are crucially involved in the creation of value on the bodies that take significant decisions, particularly concerning the distribution of revenues. Where necessary, the German Bundestag should take legislative action accordingly.

– [...] The Study Commission recommends that the German

[331] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring and Dr Bernhard Rohleder: 'It is noted that copyright is one of the constitutionally guaranteed personal and property rights and, as such, is protected by European and German constitutional law, as well as international agreements and treaties. Copyright is primarily an expression of property rights and personal rights, and the fact it serves the balance of interests with the user is of merely secondary importance.'

Bundestag markedly strengthen the supervision of the collecting societies.

– [...] The Study Commission recommends that the German Bundestag make supervision under the Copyright Administration Act a matter for a regulatory authority of the German Federation and equip this authority with the requisite staffing resources.[332/333]

On 3.6.1: Promotion of (online) services by the administration and licensing of (online) rights

Build up a Europe-wide information platform for licences

With regard to the licensing of these works, providers of copyright-protected content on the Internet (music and films) find themselves confronted with a complex and confusing situation. Efficient, successful business models require the easiest possible access to information about the rights they need. Where the copyrights necessary for mobile and online services are not bundled and cannot be purchased from a 'one-stop shop', the Study Commission recommends that the German Bundestag and the Federal Government seek to bring about the creation of a central database at the European level, in which rights should be registered. This could facilitate the acquisition of rights.

The Study Commission recommends support be given to efforts to create rights registers at both the national and European levels. At the same time, graduated solutions are to be considered that, for instance, make the protection of a work for the purpose of particular uses dependent on the active extension of a form of basic protection that is yet to be defined. Incentives for the voluntary registration of rights also deserve to be supported.[334]

5 Dissenting opinions[335]

5.1 Dissenting opinion of the Left Party parliamentary group on section 1.5.1

The discussion of conflicts between various fundamental rights at the constitutional level is superfluous at this point, and incomplete and misleading in its present form. If the author's rights over their work are viewed as property rights within the meaning of Article 14 GG, the restrictions placed on them also derive from the social obligations that come with property. Freedom of information too is indisputably subject to particular exceptions. These are, however, not the same as the exceptions from copyright. They therefore do not need to be mentioned at this point. Nor is the fundamental right to freedom of information touched upon by protected works since, under current law these are, in particular, not 'generally accessible sources' (Article 5(1) GG), unless the author has authorised their 'free' use.[336] Quite particularly, this passage also lacks a reference to Article 2 GG as the source of authors' personal rights.

5.2 Dissenting opinion of the Left Party parliamentary group and the expert member Constanze Kurz on section 1.6[337]

The fact that the copyright protection of immaterial goods is always time-limited is founded on important differences from property in physical commodities. On the one hand, the personal rights component of the law plays a role here: Following the author's death, the legitimating connection between the right and the original creator of the work grows more tenuous with time. The more generations are entitled to protection, the more the continued duration of the protection loses its inherent justification. This

[332] Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, pp. 284f., online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[333] The CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke and Prof. Dr Wolf-Dieter Ring voted against the text drafted for this passage and delivered a dissenting opinion (see section 5.8.10).

[334] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring and Dr Bernhard Rohleder: 'Graduated solutions that make the protection of a work for the purpose of particular uses dependent on an active extension of a form of basic protection that is yet to be defined are rejected. These would conflict with international agreements and could not be implemented by means of unilateral, national action. In addition to this, the author would be put in a worse position because it would mean their copyright being made conditional on registration.'

[335] Where dissenting opinions that have been delivered by a parliamentary group or an expert member are endorsed by another parliamentary group or individual expert members, this is indicated in a footnote to the dissenting opinion in question.

[336] BVerfG, judgement of 24 January 2001 – 1 BvR 2623/95, *BVerfGE*, 103, p. 44 – Court Room Television Recordings II.

[337] The expert member Alvar Freude endorses this dissenting opinion – in addition to the majority opinion.

conclusion is also reached when the interests of property are weighed up against the interests of the general good. Following the expiry of a certain period, the general public's interest in the free use of the intellectual good that has been created outweighs the interests of the right holder.

Current law takes account of such considerations. However, it is rooted in the environment of the analogue world. The fact that the Internet has made it easier to reproduce and disseminate copyright-protected works, which can *de facto* no longer be controlled effectively, makes the current terms of protection definitely appear too long.

The Federal Constitutional Court comments in its Gramophone Records decision that the appropriateness of the period of copyright protection may 'be judged differently at different times depending on the assessment of conflicting interests.'[338] The judgement states that the guarantee for the right of ownership in the constitution neither offers any guarantee for an eternal period of protection, nor obliges the legislature to stipulate it should be valid for a particular period of time.

In addition to this, a later Federal Constitutional Court judgement, the Prisons judgement, confirmed that works have the tendency to lose their ties to private rights with increasing distance of time from publication: 'Upon its publication, the protected musical work is no longer solely at the disposal of its creator. Rather, in accordance with the law, it enters the societal realm and can therefore become an independent factor that plays a part in shaping the cultural and intellectual landscape of the age.[339] In time, the private rights to dispose of the work lapse and it becomes common intellectual and cultural property.[340] Simultaneously, this is the intrinsic justification for the time restriction of copyright by Section 64(1) UrhG.'[341] It follows from this that the duration of rights can be shortened, in principle, even if acceptance would have to be gained for this at the EU level.[342]

The explanatory memorandum to the legislation that enacted the 1965 copyright reform mentions that only very few works are still of interest in property rights terms once the period of protection has expired.[343] *Thomas Dreier* too expresses scepticism in his commentary on copyright law.[344] *Till Kreutzer* believes that, as a rule, the period of protection goes far beyond what would be required to incentivise creative output. Rather, he argues long terms of protection are a positive hindrance, in particular when it comes to technical and functional works, whose 'useful life' is much shorter due to the impacts of technology.[345] Furthermore, *Gerd Hansen* refers to the fast-moving nature of a modern media society, arguing the great majority of works are only exploited for a relatively short period of time.[346]

Taking up a proposal put forward by *Lawrence Lessig*, *Hansen* suggests the term of protection be cut to, for example, five years from publication. After this, right holders should have an option to pay for their protection to be extended.[347] By contrast, *Kreutzer* pleads for a variable arrangement based on the conception of remuneration for authors' successors in title.[348] He believes protective rights should accordingly only be granted as exclusive rights for a certain period, after which they should be formulated as entitlements to royalties (possibly only from commercial uses) before the use of the work becomes completely free of copyright.[349]

Extensions to the term of protection like those that are being discussed at present, for instance for the related rights possessed by the record companies, would benefit the media companies that are the holders of these rights, but not the artists themselves.

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[338] BVerfG, judgement of 8 July 1971 – 1 BvR 766/66, *BVerfGE*, 31, p. 275 – Gramophone Records.

[339] *BVerfGE*, 31, p. 229 (p. 242); 49, p. 382 (p. 394).

[340] *BVerfGE*, 58, p. 137 (pp. 148f.).

[341] BVerfG, judgement of 11 October 1988 – 1 BvR 743/86 and 1 BvL 80/86, *BVerfGE*, 79, p. 29 – Prisons.

[342] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and related rights (codified version), *OJ L*, 372, 27 December 2006, pp. 12-18.

[343] Explanatory memorandum to the government bill, Bundestag Printed Paper IV/270, pp. 27-117, online: http://www.urheberrecht.org/law/normen/urhg/1965-09-09/materialien/ds_IV_270_A_01_00.php3.

[344] Cf. Dreier, Thomas/Schulz, Gernot: *Urheberrechtsgesetz*, 2008, '§§ 64ff.', preliminary remarks, para. 1.

[345] Cf. Kreutzer, Till: *Den gordischen Knoten durchschlagen – Ideen für ein neues Urheberrechtskonzept*, 2010, p. 45 (p. 54).

[346] Cf. Hansen, Gerd: *Warum Urheberrecht? Die Rechtfertigung des Urheberrechts unter besonderer Berücksichtigung des Nutzerschutzes*, 2009, p. 369.

[347] Cf. ibid., pp. 370ff.

[348] Cf. Kreutzer, Till: *Das Modell des deutschen Urheberrechts und Regelungsalternativen*, 2008, pp. 481ff.

[349] Cf. ibid., p. 485.

In particular, the problem of orphan works, for which no solution has been found as yet at either the national or the EU levels, is a result of the current, excessively long terms of protection. Since it is foreseeable that works will be orphaned even faster in the digital world than in the analogue world, this problem is likely to be exacerbated even more if nothing is done to bring about a fundamental shortening of the terms of protection.

5.3 Dissenting opinion of the Left Party parliamentary group and the expert member Constanze Kurz on section 1.8[350]

Unfortunately, the consumer protection law approach is meeting with considerable resistance from the rights exploitation industries. While the individual negotiation of general terms and conditions between an online shop and the user does not represent a feasible alternative to the *status quo* of unilaterally dictated conditions, it is certainly conceivable for the general terms and conditions for the distribution of incorporeal copies of works to be standardised to a greater degree. It could also be stipulated with binding force that contracts of this kind were contracts of sale, and not copyright contracts, in order to make an unambiguous value judgement possible where consumer protection conflicts with protection for authors. This is important not least because it is not possible to talk of real freedom of choice, particularly for private customers, as users are usually not in the least aware of the limitations that are imposed on them by the relevant contracts. Experience suggests that licence conditions are frequently accepted with a click without actually being read when they are set out in general terms and conditions.

Yet the private customer sector is not the only area where the interests of the common good and business diverge. In addition to large enterprises, local authorities too are deploying ‘second-hand’ software at present, not least for cost reasons. Critics believe there is a need for the situation in this field to be clarified at the European level, and that this should take account of the interest in the existence of a functioning second-hand market for immaterial works. Yet the cases concerning the interpretation of relevant provisions in the European legislation that are currently pending before the Court of Justice of the European Union are hotly contested. Should the clarification of the legal situation actually find in the end that, on account of the right to reproduce, it is not possible to resell immaterial works second-hand, the trade in such works would be harmed to a not insignificant degree. This would also throw up considerable problems in consumer law, problems that, by contrast to the claims made by the rights exploitation industries, could probably hardly be resolved by the self-regulating powers of the market.

5.4 Supplementary dissenting opinion of the Left Party parliamentary group on section 3.1.1[351]

The Authority evaluated its work during its first 18 months up to and including June 2011 in a report published on 29 September 2011. It admitted that it had issued approximately 650,000 first warnings in total. There had been only 44,000 repeat infringements.[352] At present, the suspension of access and fines are only being considered for approximately 60 Internet subscribers.[353] Not only do the figures point to a mismatch between the amount of effort devoted to these activities and what they actually achieve, there is also criticism of the reliability of the software that is being deployed.[354]

[350] The Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl, Alvar Freude and Dr Jeanette Hofmann endorse this dissenting opinion.

[351] The Alliance 90/The Greens parliamentary group and the expert member Alvar Freude endorse this dissenting opinion.

[352] See *01net*, ‘La Hadopi revient sur dix-huit mois d'activité mouvementée’, online: http://www.01net.com/editorial/542590/la-hadopi-revient-sur-18-mois-d-and-039-activite-mouvementee/.

[353] See *01net*, ‘Hadopi: une soixantaine d'internautes passibles de déconnexion’, online: http://www.01net.com/editorial/542872/hadopi-une-soixantaine-dinternautes-passibles-de-deconnexion/.

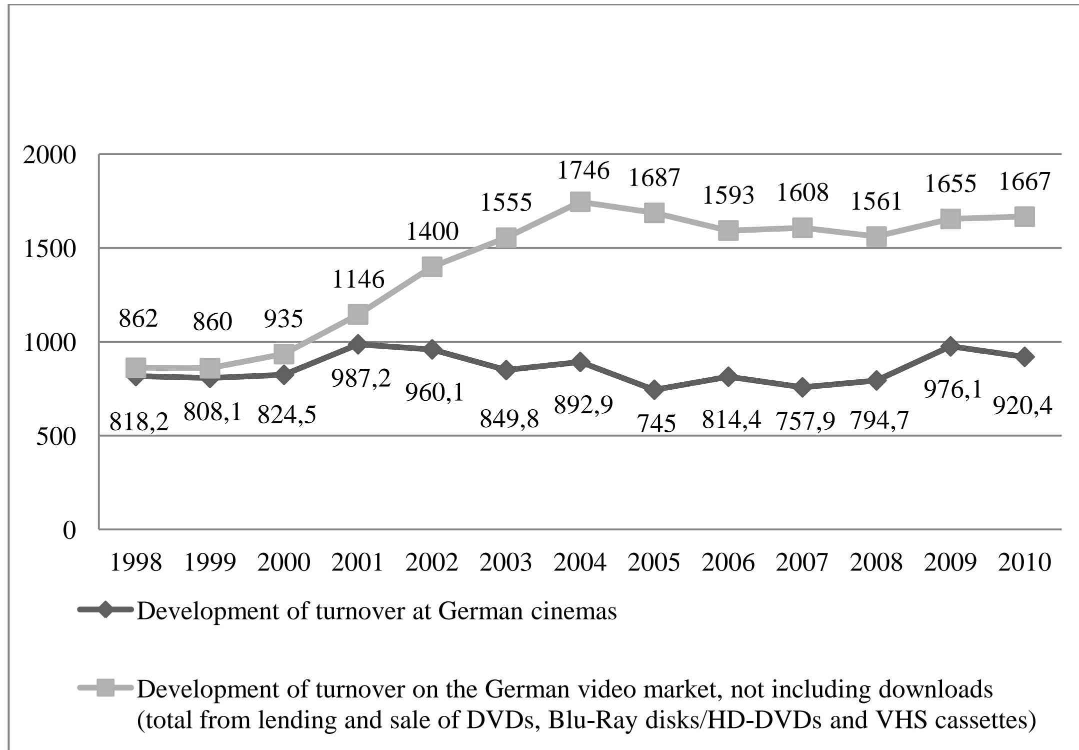
[354] Bright, Peter: ‘French “three strikes” anti-piracy software riddled with flaws’, *Ars technica*, 26 May 2011, online: http://arstechnica.com/tech-policy/news/2011/05/french-three-strikes-anti-piracy-software-riddled-with-flaws.ars.

5.5 Supplementary dissenting opinion of the expert member Alvar Freude on section 3.2

Further figures on the turnover of the music and film industries in Germany, 1998-2010

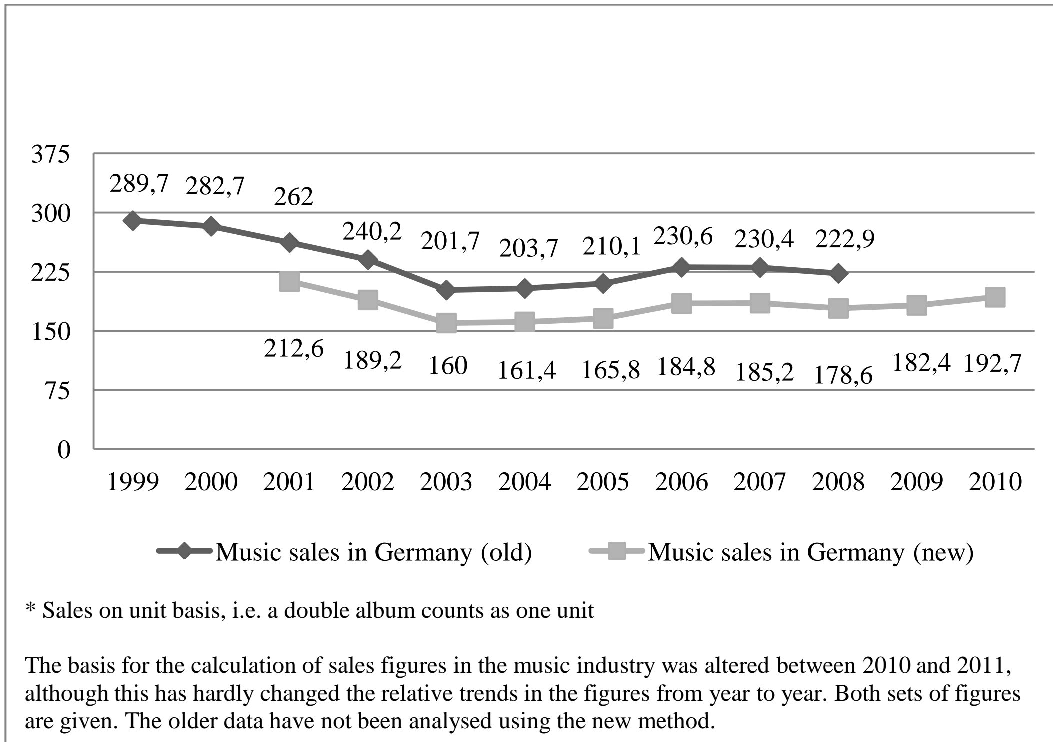
These figures are based on calculations or estimates supplied by the industry representative bodies.

Figure 7: Development of turnover on the film market (in million euros)



Source: German Federal Film Board (FFA): 'Umsatzentwicklung der deutschen Filmtheater', online: http://www.ffa.de/downloads/marktdaten/3_Besucher_Umsatz_Preise/3.2_bundesw_alteundneue_BL/1998_bis_2002.pdf, http://www.ffa.de/downloads/marktdaten/3_Besucher_Umsatz_Preise/3.2_bundesw_alteundneue_BL/2003_bis_2007.pdf, http://www.ffa.de/downloads/marktdaten/3_Besucher_Umsatz_Preise/3.2_bundesw_alteundneue_BL/2006_bis_2010.pdf; GfK Panel Services Consumer Research GmbH for the FFA: *Video Market 2010 BVV-Business-Report*, p. 57, online: http://www.bvv-medien.de/jwb_pdfs/JWB2010.pdf.

Figure 8: Music sales in Germany (in million units*)

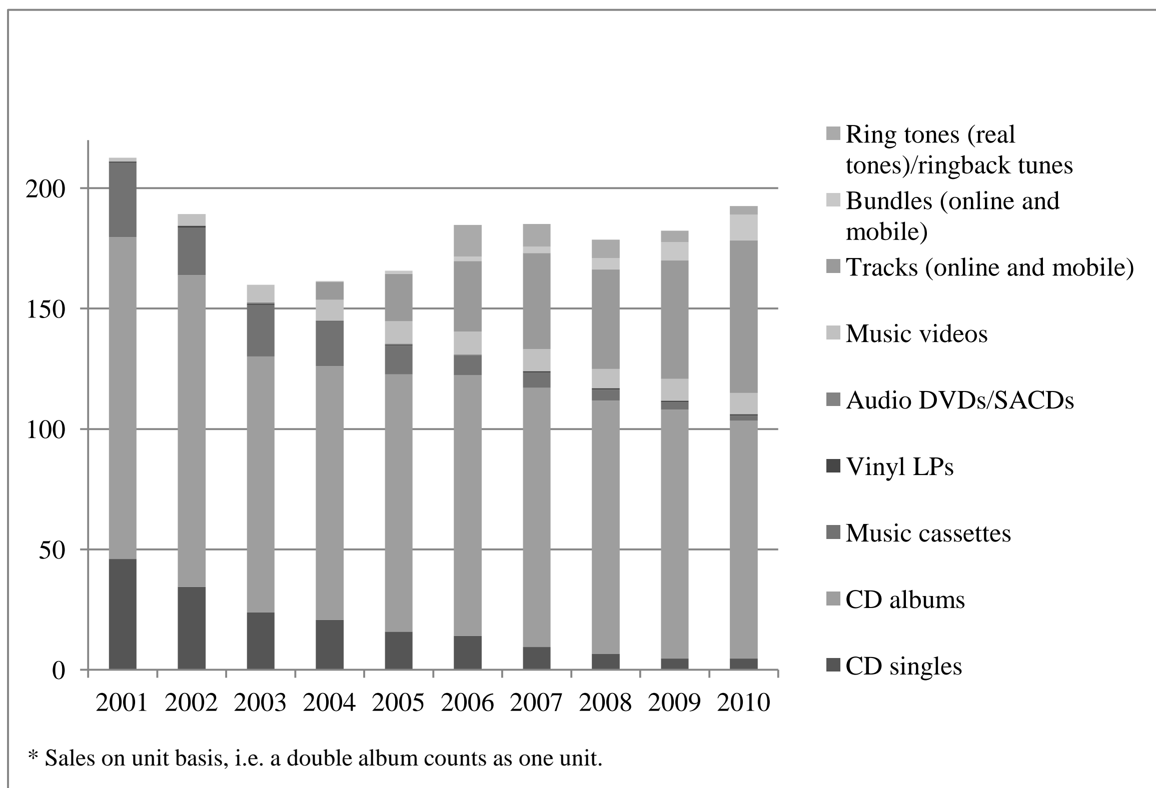


* Sales on unit basis, i.e. a double album counts as one unit

The basis for the calculation of sales figures in the music industry was altered between 2010 and 2011, although this has hardly changed the relative trends in the figures from year to year. Both sets of figures are given. The older data have not been analysed using the new method.

Source: Federal Association of the Music Industry: *Jahreswirtschaftsbericht 2008*, p. 19, online: http://www.musikindustrie.de/uploads/media/ms_branchendaten_jahreswirtschaftsbericht_2008.pdf; Federal Association of the Music Industry: 'Übersicht Jahreswirtschaftsbericht 2010 – Absatz', online: http://www.musikindustrie.de/jwb-absatz-10/.

Figure 9: Music sales in Germany by format (in million units*)



* Sales on unit basis, i.e. a double album counts as one unit.

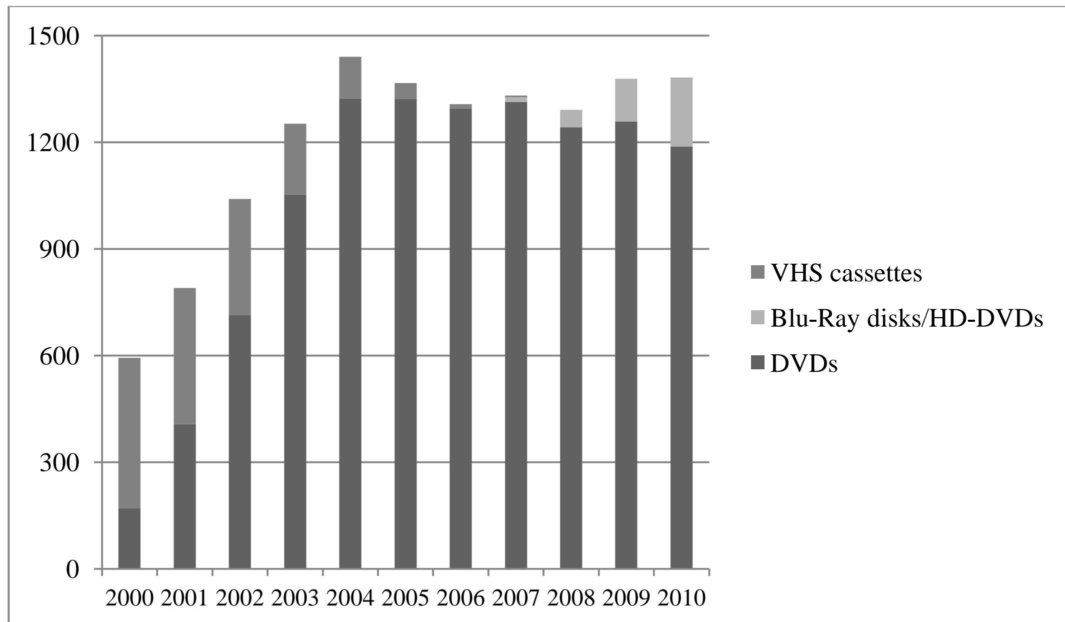
Source: German Federal Association of the Music Industry: 'Übersicht Jahreswirtschaftsbericht 2010 – Absatz', online: http://www.musikindustrie.de/jwb-absatz-10/.

Table 1: Music sales in Germany by format (in million units*)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
CD singles	46.0	34.5	23.8	20.7	15.8	14.1	9.5	6.7	4.7	4.7
CD albums	133.7	129.4	106.3	105.4	106.9	108.3	107.6	105.1	103.3	98.7
Music cassettes	30.8	19.8	21.4	18.2	12.0	8.0	6.4	4.5	3.1	2.1
Vinyl LPs	0.6	0.6	0.6	0.5	0.4	0.3	0.4	0.5	0.5	0.6
Audio DVDs/SACDs	0.1	0.2	0.5	0.3	0.4	0.2	0.2	0.3	0.3	0.2
Music videos	1.4	4.7	7.3	8.5	9.2	9.6	9.1	7.9	8.9	8.7
Tracks (online and mobile)	-	-	-	7.5	19.7	29.2	39.9	41.3	49.2	63.3
Bundles (online and mobile)		-	-	0.4	1.4	1.9	2.6	4.6	7.6	10.7
Ring tones (real tones)/ringback tunes	-	-	-	-	-	13.2	9.5	7.7	4.7	3.6
Total	**212.6**	**189.2**	**160.0**	**161.4**	**165.8**	**184.8**	**185.2**	**178.6**	**182.4**	**192.7**

* Sales on unit basis, i.e. a double album counts as one unit
Source: Federal Association of the Music Industry: 'Übersicht Jahreswirtschaftsbericht 2010 – Absatz', online: http://www.musikindustrie.de/jwb-absatz-10/.

Figure 10: Video market: Development of sales turnover (in million euros)



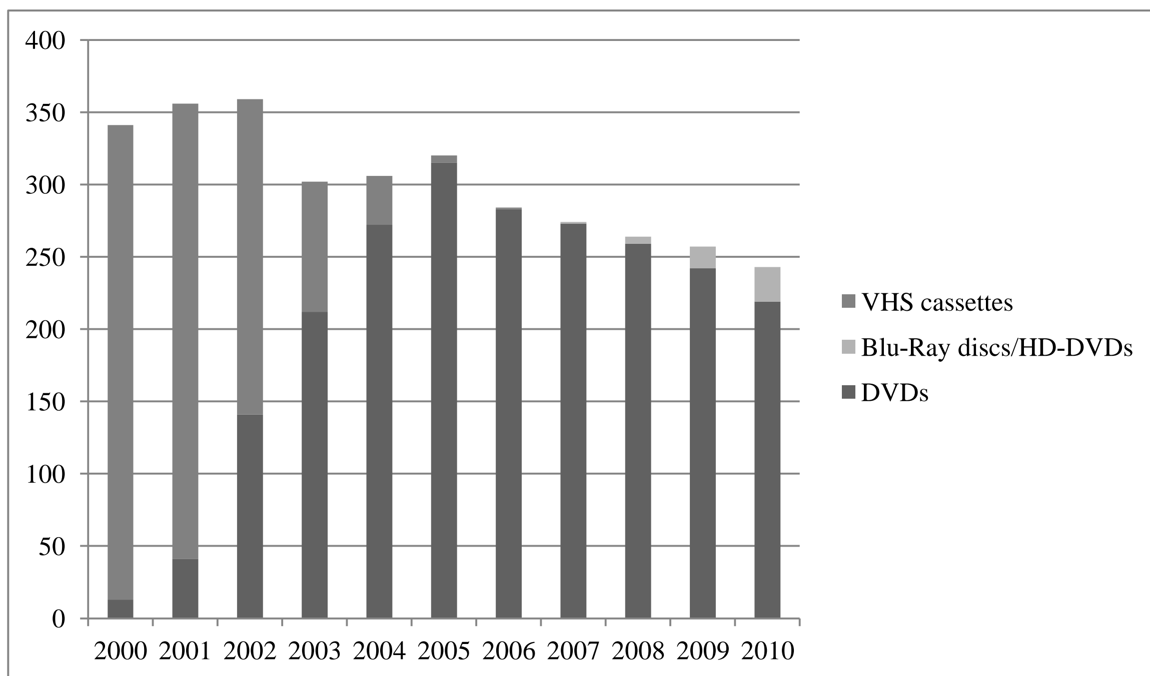
Source: GfK Panel Services Consumer Research GmbH for the FFA: *Video Market 2010 BVV-Business-Report*, p. 15, online: http://www.bvv-medien.de/jwb_pdfs/JWB2010.pdf.

Table 2: Video market: Development of sales turnover (in million euros)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
DVDs	170	407	713	1053	1323	1322	1295	1313	1242	1258	1188
Blu-Ray disks/HD -DVDs	-	-	-	-	-	-	-	14	48	119	193
VHS cassettes	423	383	327	199	117	44	12	4	1	1	1

Source: GfK Panel Services Consumer Research GmbH for the FFA: *Video Market 2010 BVV-Business-Report*, p. 15, online: http://www.bvv-medien.de/jwb_pdfs/JWB2010.pdf.

Figure 11: Video market: Development of rental turnover (in million euros)



Source: GfK Panel Services Consumer Research GmbH for the FFA: *Video Market 2010 BVV-Business-Report*, p. 44, online: http://www.bvv-medien.de/jwb_pdfs/JWB2010.pdf.

Table 3: Video market: Development of rental turnover (in million euros)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
DVDs	13	41	141	212	272	315	283	273	259	242	219
Blu-Ray disks/HD -DVDs	-	-	-	-	-	-	-	1	5	15	24
VHS cassettes	328	315	218	90	34	5	1	-	-	-	-

Source: GfK Panel Services Consumer Research GmbH for the FFA: *Video Market 2010 BVV-Business-Report*, p. 44, online: http://www.bvv-medien.de/jwb_pdfs/JWB2010.pdf.

5.6 Supplementary dissenting opinion of the Left Party parliamentary group and the expert member Constanze Kurz on section 3.6[355]

On the whole, the obligations to ensure transparency put in place by the Copyright Administration Act have proven to be insufficient, so that in its Final Report the Study Commission on Culture in Germany of the German Bundestag called upon the collecting societies to do more than in the past to comply with their transparency obligations. The Study Commission on Culture in Germany also criticised the inadequate structures for democratic participation within the collecting societies.[356] The collecting societies were recommended to ensure the comprehensive representation of all right holders who are actually involved in the creation of value, in particular on bodies that take decisions about the principles of distribution; it was argued that parliament should take action as necessary.[357]

The collecting societies' distribution plans are usually set by their general meetings. The roughly 430,000 authors represented by VG WORT[358] can only take part in decisions to a limited degree because, although any author is able to conclude a deed of assignment with VG WORT, not every author can become a member. The only people who can become members are those who have received an average of at least €1,000 a year from VG WORT's distributions over the preceding three years. Even if the right to be involved in decisions were merely to be granted to individuals who spend at least 50% of their time writing, the typical income from VG WORT's distributions for this group is just €600.[359] As a result of its statutes, VG WORT therefore systematically excludes a majority of its right holders from democratic participation.

Things do not currently look any better as far as GEMA is concerned: It distinguishes between affiliated, extraordinary and full members. Royalties are distributed under what is known as the 'PRO' procedure, which is highly opaque.[360] Furthermore, *Robert Gehring* has used an analysis of GEMA's annual reports to prove that in recent years an ever greater proportion of the sums distributed has gone to the relatively small group of full members. As in the case of VG WORT, GEMA's distribution plan is also adopted at its General Meeting. As *Gehring* explains, the 34 representatives of the extraordinary and affiliated members face 3,251 representatives of GEMA's full members. It is accordingly unlikely that royalties will be distributed more democratically.[361]

The supervisory body, the DPMA, should have admonished such evident violations of the principle of fiduciary administration by the collecting societies a long time ago. The report of the Study Commission on Culture in Germany devotes several pages[362] to a negative account of the DPMA's supervisory activities and finally recommends that the Federal Government entrust these supervisory duties to a regulatory authority under the auspices of the German Federation. Such an authority should be 'instructed not to limit itself to the scrutiny of evident misconduct, but also to check that the collecting societies perform their statutory obligations properly in individual

[355] The Alliance 90/The Greens parliamentary group and the expert member Alvar Freude endorse this dissenting opinion.

[356] Cf. the Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, p. 280, online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[357] Cf. ibid., p. 285.

[358] Cf. VG WORT: *Bericht des Vorstands über das Geschäftsjahr 2010*, p. 4, online: http://www.vgwort.de/fileadmin/pdf/geschaeftsbericht e/Gesch%C3%A4ftsbericht_2010.pdf.

[359] The figures date from 2005, so relate to the sums distributed in 2004. Cf. Kretschmer, Martin/Hardwick, Philip: *Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers*, pp. 18, 148, online: http://www.cippm.org.uk/alcs_study.html. Kretschmer's graphs also show the income distribution among the right holders. The number of right holders is taken from the press release issued by VG WORT on March 2011. Cf. VG WORT: *Zurückweisung des Google-Vergleichs ist ein Erfolg für das Urheberrecht*, online: http://www.vgwort.de/fileadmin/pdf/vg-pi-230311.pdf. In 2008, 110,719 right holders were represented by the society. See on this topic *VG WORT Report*, August 2008, p. 3, online: http://www.vg-wort.de/fileadmin/wortreport/Wort_Report2008.pdf. In 2006, the society represented 144,942 right holders, which was 4% more than in 2005. Cf. the VG WORT press release of 19 May 2007, online: http://www.openpr.de/news/136086.html.

[360] Cf. the account given by the BGH in its judgement of 19 May 2005 – I ZR 299/02, *BGHZ*, 163, p. 119.

[361] Cf. iRights.info: *Arbeit 2.0: Urheberrecht und kreatives Schaffen in der digitalen Welt: Abschlussbericht*, p. 69, online: http://irights.info/fileadmin/texte/material/Abschluss bericht.pdf.

[362] Cf. the Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, pp. 282-284, online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

cases.' Furthermore, the Study Commission felt it should be equipped with the requisite staffing resources.[363] The Federal Government has not complied with this recommendation to date. Instead, the staffing resources devoted to this area of work within the DPMA have been increased from three legal officers in 2007 to eight in 2010.

In the context of Europe-wide rights management on the Internet – and so in contrast to the classic exploitation of rights – GEMA is relying on a purely competition-oriented approach, under which not only the collecting societies' cultural and social functions, but at the same time important control functions of the public sector – like those of the DPMA as the body with supervisory powers in this sector – are being lost. A creeping privatisation of rights management is therefore taking place at the level of online music rights. As a limited liability company, CELAS, which was cofounded by GEMA and is responsible for the Europe-wide management of the rights to EMI's repertoire on the Internet,[364] is not subject to supervision by the Patent and Trademark Office. It has no cultural and social functions.

Furthermore, there is criticism that GEMA's contractual conditions do not allow its members to make music rights available to the general public under CC licences and release them to Internet users for non-commercial purposes. Restrictive rules of this kind clash with many artists' needs for flexibility and self-determination.

The right holders who are represented by collecting societies include not just authors, but intermediaries as well. In this respect, the distribution of the collecting societies' revenues between rights exploiters and authors lacks transparency at times, as the following examples illustrate: The press publishers receive a share of the reprographic levy attributable to popular magazines from VG WORT to fund the training of journalists (about 30% in the 2009 financial year[365]). However, right holders are not provided with any proof of how this money is spent. During the 2010 financial year, 35/85, i.e. more than 41%, of the 'METIS royalty'[366] for each registered online text remained with the publishers.[367]

Since texts can also be registered by publishers if they are not registered by authors, the actual proportion of the overall METIS distribution that goes to publishers is likely to be higher. As regards the distribution of levies from electronic press digests, for which VG WORT has concluded a contract with Presse-Monitor-GmbH, a company owned by leading newspaper and magazine publishing houses, VG WORT makes no comment and refers to its freedom of contract.[368]

5.7 Supplementary dissenting opinion of the Left Party parliamentary group on section 3.6.3

However, the idea of a one-stop shop conflicts with the territorial monopolies currently held by the collecting societies, which generally have no interest in increased competition. For instance, there was a protracted conflict with the RTL Group, which sought to take action against the system of reciprocal agreements, citing competition law as the grounds for its complaint. RTL argued a broadcasting corporation could not be expected to purchase rights from different collecting societies for different countries. Eight years later, RTL finally won the complaint it had filed with the Commission: On 16 July 2008, in antitrust proceedings against the International Confederation of Societies of Authors and Composers (CISAC), the European Commission prohibited particular clauses in the Model Contract for reciprocal agreements. In line with the Model Contract, 17 of the 23 collecting societies, including the German GEMA, had agreed in their reciprocal agreements not to issue any rights to licensees outside their own country's territory. The EU Competition Directorate General deemed such arrangements to be anti-competitive. Apart from this, it ruled that in future authors should be able to choose to entrust their rights to a foreign collecting society as well.

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[363] Cf. ibid., p. 285.

[364] Cf. on this topic also sections 3.6.2 and 3.6.3.

[365] Cf. the absolute figures for VG WORT: *Bericht des Vorstands über das Geschäftsjahr 2010*, p. 6, point 2, online: http://www.vgwort.de/fileadmin/pdf/geschaeftsbericht e/Gesch%C3%A4ftsbericht_2010.pdf.

[366] METIS: Registration System for Texts on Internet Sites.

[367] VG WORT (June 2011): *Newsletter*, p. 2, online: http://www.vgwort.de/fileadmin/pdf/newsletter/Newslet ter_Juni_2011.pdf.

[368] Cf. iRights.info: 'Die VG Print/Online kommt', online: http://www.irights.info/index.php?q=node/845.

Subsequently, a number of private collecting societies were then formed, mainly as cooperations between national collecting societies and private labels. For instance, CELAS, which has been mentioned several times, is a joint subsidiary of the German GEMA and the British MCPS/PRS.

5.8 Dissenting opinions on the recommendations for action

5.8.1 Dissenting opinions of the SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch on the recommendations for action on chapter 1

On 1.5: Exceptions[369]

Increasing flexibility

It should be examined at the European level whether and to what extent the Member States could be granted greater scope when it comes to the definition of exceptions in order to increase the provisions' flexibility. In this connection, it should also be examined whether the exceptions in national law could be made more flexible, by means of opening clauses for instance, if not with a general fair use blanket clause. The German Bundestag is recommended to call upon the Federal Government to examine whether a revision of the Directive and steps to make the exceptions more flexible should be initiated at the European level.

Non-commercial, private adaptation and making available to the public

Non-commercial, private adaptation and making available to the public could be allowed by an extension of free adaptation or a specific exception that takes account of authors' interests in an equitable fashion. When steps are taken to extend free adaptation or develop a new exception, it would also be possible to base this on the criterion of transformative use, which is familiar from American law.

Securing access for academic users

Copyright law should reflect the structural changes to production methods in academia and research with appropriate exceptions. The German Bundestag is recommended to extend the existing exceptions for educational, academic and research activities in order to take sufficient account of the challenges of the digital society and the needs of education, academia and research. In this respect, use should be made of the scope currently offered by European law. In addition to this, the German Bundestag is recommended to call upon the Federal Government to also work at the European level for the exceptions to be made more flexible on these grounds.

Technology-proofing and non-overridability of exceptions

In view of the increasing significance of technical access controls, it is to be examined how far the exceptions are resilient to technological change in order to ascertain whether and how it can be ensured that they will not become ineffective.

As the law stands at present, it is not sufficiently ensured that the ability to make private copies within the bounds of what is foreseen by the legislation is not ruled out by general terms and conditions. Since consumers are typically unable to enforce this exception individually in contracts, it could be prohibited by legislation for this exception to be excluded under general terms and conditions.

5.8.2 Dissenting opinions of the Left Party parliamentary group on the recommendations for action on chapter 1

The overview drawn up by the project group has found that current copyright law is reaching its limits in the age of digitisation. It is ever less able to fulfil the fundamental aspiration of protecting creative workers and their remuneration. Furthermore, it no longer does justice to the changed technological environment and constellations of actors in a digitised society. Modern copyright law should both strengthen authors' entitlements in their dealings with rights exploiters, and govern access to knowledge and information in such a way that this redounds to the greatest possible societal advantage. It is therefore in need of comprehensive reform, and must mediate between the interests of authors, users and rights exploiters in ways that are appropriate to contemporary circumstances.

– Account is to be taken of the technical and cultural developments of the last few decades by means of a reformulation of the overarching regulatory purpose of copyright law.

[369] The Left Party parliamentary group and the expert member Constanze Kurz endorse this dissenting opinion.

Today, copyright law no longer governs just the fields of literature, academia and art, but is having an impact on ever more areas of the information society. Accordingly, the purpose of protection must not remain limited to particular interests, but must be refocused on cultural and social concerns. This expressly includes strong protection for individual rights in the interests of society.

– The further development of copyright law should not look back to natural law justifications of intellectual property, but to its function of promoting creative output in the interests of authors and users. Where authors' interests are particularly worthy of protection, they must be placed on appropriate foundations. Rights of prohibition should exclusively serve the particular protection of the preconditions for production, intermediary services and use.

– No one-to-one application of regulatory models from the analogue world to the digital world. Adaptation of copyright law to the Internet while upholding the greatest possible self-determination on the part of authors and users. Promotion of civil-society solidarity between creative professionals and consumers.

– De-ideologise discourse: clear differentiation between personal rights and exploitation rights in the copyright debate.

– The author's right to dispose of their work must not be made absolute on the basis of false analogies with property in physical commodities. Rather, the general public's interest in the most unhindered use of works that, by their nature, are communicative goods is to be placed on an equal footing with the interests of right holders. The fundamental difference between non-rivalrous immaterial goods and scarce material goods must be taken into consideration more than in the past in the further development of copyright legislation that is intended to function in the digital sphere.

– No further extension of the terms of protection at the European or international levels. Any new provisions should comply with the principle that legislation should be 'as long as necessary, as short as possible'. Stronger differentiation of the terms of protection for the value chains and cycles of use typical of different types of work. The setting of longer terms of protection for commercial uses than for non-commercial uses is worthy of consideration. Entitlements to royalties also come into question as a means of providing compensation for rights of protection.

– Authors' personal rights must be robustly formulated so that they can be asserted against the interests of rights exploiters. This is true in particular for the recognition of authorship and the right to be credited as the author.

– Reform of copyright contract law:

  – The concept of 'equitable remuneration' in Section 32 UrhG should be supplemented with a more exact definition of the term 'equitable' in the text of the legislation, for instance using a catalogue of criteria.

  – Creation of an option to put remuneration agreements into force for individual subsectors by means of secondary legislation. Where possible, the rates agreed should be calculated by analogy to licence conditions. In other cases, expert opinions or relevant court judgements should be taken as the basis for the calculation of rates.

  – Review of how far smaller associations of authors can be enabled to take part in the negotiations in order to make it possible for the specific interests of smaller professional groups within the culture and creative industries to be represented as well.

  – Introduction of a right for associations of authors to take class actions to obtain equitable remuneration.

  – Improve arbitration procedures. Development of criteria that give associations of rights exploiters the unambiguous authority, and therefore an obligation, to conduct negotiations concerning equitable remuneration on their members' behalf and engage in arbitration procedures where necessary. A lack of passive legitimation must not be an excuse to leave authors without anyone to

bargain with. The ability to take legal action to have the conduct of an arbitration procedure declared impermissible should be limited in the interests of regulated self-regulation. If the result of the arbitration is not accepted unanimously, the higher regional court responsible for the place where the arbitration board has its legal domicile should be able to stipulate the content of the joint remuneration agreement as appears equitable, in particular the type and level of remuneration.

- In order to prevent authors losing their statutory entitlement to equitable remuneration under Section 32 UrhG as a result of disproportionately protracted negotiations, the legislature should clarify unambiguously that the period of limitation does not commence until the conclusion of a remuneration agreement or a ruling by the court of last instance.
- The German Bundestag is recommended to ensure that authors' associations are able to assert an entitlement to obtain cease and desist orders against contractual clauses that block authors' way to equitable remuneration.
- Introduction of a legal obligation to use rights that have been acquired. Where they are not exploited, contractually granted exclusive rights of use should revert automatically to the author after the expiry of an appropriate period, so that they can be offered to third parties on the market ('use it or lose it').
- It should only be possible for rights of use to be assigned in advance for limited periods in order to deal with the problems caused by exploitation rights that 'fall dormant' and ensure that the remuneration paid reflects the actual economic value of the rights granted, even if appropriate forms of exploitation only become feasible later.
- Buy-out contracts conflict with the royalty principle and, in so far as this is the case, contravene a statutory principle of copyright law. This has been confirmed with desirable clarity by the legal precedents,[370] but is still being ignored by many rights exploiters. As a consequence of this, a clear statutory prohibition of such contracts is recommended.
- Introduction of an inalienable right of second exploitation for academic authors. The granting of exclusive rights of use to publishing houses must not result in the dissemination of knowledge and, therefore, academic dialogue being obstructed.

5.8.3 Dissenting opinions of the Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann on the recommendations for action on chapter 1

On 1.1: The Internet and digital technologies as tools for creative activities, self-marketing and distribution/transformed constellation of actors[371]

In conclusion, it is found that digitisation is making it increasingly easy to publish works. This also means citizens are able to perform the functions of users as well as authors. With the proliferation of collaborative projects, such as *Wikipedia* and YouTube, and open-source projects, such as Linux, citizens are increasingly participating in the creation of works. Furthermore, it is noted that German copyright law has not kept pace with technological progress. Instead, the specific characteristics of digital commerce have mostly only been taken into consideration where this has resulted in a strengthening of the position of right holders as represented by the rights exploitation industries.

Recommendation for action: For these reasons, it is recommended that, by analogy to the fair use provisions in US law, an exception be introduced for non-commercial types of use that are aimed at the further development and adaptation of existing works (e.g.: parodies, remakes, musical variations, sampling) ('transformative use'). Apart from this, it is recommended that non-commercial uses of copyright-relevant works under the provisions on private copying also be allowed on the

[370] BGH, judgement of 7 October 2009 – I ZR 38/07; OLG Hamburg, judgement of 1 June 2011 – 5 U 113/09.

[371] The Left Party parliamentary group endorses this dissenting opinion.

Internet and this exception be reformed accordingly.

Services such as search machines, including image search engines, should also be regulated in statute with exceptions that guarantee the balance of interests between users on the Internet and right holders.

On 1.3: The concept of intellectual property[372]

It is noted that the Internet is expanding the opportunities for collaborative creative activity, and there is increasing discussion of the dividing line between producers and consumers. Today, most authors, composers and artists are part of a knowledge and entertainment industry that is often much less interested in protecting works than in protecting its own investments. The term 'intellectual property' is not clear legally and is therefore constantly being redefined by policymakers. Apart from this, it is noted that this term involves a problematic equation of immaterial and material goods. Immaterial goods have non-rivalrous attributes, which means they can be used by many people at the same time. Authors too have a desire to let an audience or users share in their artistic and creative activities. Most authors do not object to the adaptation and derivative use of their original creative output by others, as long as consideration is given to both their personal rights and equitable remuneration. Under the conditions that prevail at the moment, however, it is primarily the rights exploitation industries that profit from the protection of 'intellectual property'. In this connection, it is increasingly becoming necessary to seek justifications for time-limited exclusive rights of the kind that are still stipulated at present since, as current copyright law is applied, they primarily serve the creation of artificial scarcity and economic utilisation by the rights exploitation industries.

For these reasons, the Study Commission has avoided using the term 'intellectual property' when drawing up this text.

On 1.4: Constitutional law and copyright[373]

The conclusion is drawn that, constitutionally, it is possible for exceptions to be formulated in either broad or narrow terms. Since the formulation of exceptions is a matter for parliament, it is recommended that the existing exceptions be drafted more broadly and generalised. At the European level, it is recommended that steps be taken urgently to seek a reform of the three-step test and the Information Society Directive.

It should be examined how protection for rights of exploitation formulated as property rights can be reconciled adequately with freedom of access for the general public against the background of the changed technical environment. To this end, the individual exceptions are to be put under the microscope, extended in certain cases, and new ones created as necessary.

On 1.5: Exceptions[374]

It is concluded that the current system of exceptions is felt to be too narrow and too ponderous, but these exceptions could be made more flexible within the parameters prescribed by European law. Furthermore, there is doubt that the current exceptions in the German Copyright Act will adequately fulfil their purpose in the digital age as well.

Recommendation for action: It is recommended that the system of exceptions be fundamentally redesigned or reformed. When this is done, the exceptions should be formulated more broadly and a general exception for academic and educational uses introduced. Furthermore, it is suggested that the analogous application of US fair use principles be examined. Apart from this, it is recommended that an exception for user-generated content be introduced and that a prohibition be placed on the deployment of digital protection measures that interfere with personal rights, digital rights management for example. It is suggested that libraries' position be strengthened by having competition law principles incorporated into licence agreements.

On 1.6: Questions about terms of protection[375]

It has been observed that terms of protection have been extended further and further in the past, and this is still happening through to the present. Above all, a tendency for them to grow ever longer is identifiable at the international and European levels. This

[372] The Left Party parliamentary group endorses this dissenting opinion.
[373] The Left Party parliamentary group endorses this dissenting opinion.
[374] The Left Party parliamentary group endorses this dissenting opinion.
[375] The Left Party parliamentary group endorses this dissenting opinion.

is making it harder for libraries and archives to offer access to digitised works because, as terms of protection get longer, it becomes more difficult to identify authors' successors in title. Extended terms of protection increase the danger that more works will be orphaned, i.e. it will no longer be possible to find their authors. By contrast, shortening the terms of protection would ensure greater competition and, under certain circumstances, curb the danger of works becoming orphaned.

Recommendation for action: For these reasons, it is recommended that, within the framework of the provisions laid down in the international treaties, the terms of protection be cut and linked to the sector-specific cycles in which works are exploited. It should be made possible for authors to participate in the calculation of the terms of protection for rights of exploitation. This should be done in parallel to the introduction of an option for right holders to extend the protection they enjoy. Apart from this, it is recommended that a reform of international treaties such as the RBC, TRIPS and ACTA be sought, under which a flexibilisation and shortening of terms of protection could create incentives for transformative use.

On 1.7: New approaches to regulation in copyright law[376]

It is noted that the academic literature discusses whether the individual justificatory model, which is primarily focussed on the protection of authors in their relationship to the work created by them, is still relevant to the current situation. In this connection, there is a discussion going on about a stronger distinction between the protection of intellectual and material property. Copyright law has failed to keep pace with the speed at which the Internet has transformed the 'public sphere'. This structural transformation is one of the reasons why the private/public opposition no longer does justice to actual habits of use.

Recommendation for action: For these reasons, it is recommended that when copyright law is being formulated attention be centred on the balance of interests between authors, users and rights exploiters as the aim of the legislative process. Furthermore, it is recommended that it be examined whether and how authors can be granted a right to share in the economic proceeds of their personal rights, and authors' personal rights decoupled from rights of exploitation. It is suggested that it be examined what scope is offered by the provisions of the international treaties on copyright law.

On 1.8: Private licence agreements for digital information goods

It is noted that in the digital world licence agreements are increasingly supplementing and replacing contracts of sale for digital goods. Digital goods such as digitised music recordings are no longer acquired in the form of physical media (CDs or DVDs, for example), but can only be used by the holder of a licence that has been granted. In this respect, licence agreements can rule out activities even though in principle they would be allowed under the copyright exceptions. In addition to this, there is the fact that the texts of licence agreements are usually difficult to understand, long and complex. These factors are altering the balance of power between providers and users of digital goods, which may hold a danger of abuse.

Recommendation for action: For these reasons, it is recommended that reviews of general terms and conditions also be extended to licence agreements for information goods. In this context, consumer rights should be strengthened, and legal clarity established concerning the equal treatment of digital and physical goods. Apart from this, it is recommended that the relationship between a licence agreement and copyright law be determined legally by giving priority to copyrights, i.e. it be stipulated that the principle of exhaustion applies in this connection as well. Furthermore, it is recommended that the exceptions be formulated in inalienable forms, so that they cannot be excluded by private rights. Apart from this, it is felt there is a need for legislative action to set legal parameters for a second-hand market in digital licensed goods.

5.8.4 Dissenting opinion of the expert member padeluun on the recommendations for action on chapter 1

On 1.3: The concept of intellectual property[377]

More correct terminology

More neutral terms are to be preferred to less neutral ones. This is necessary for

[376] The Left Party parliamentary group endorses this dissenting opinion.

[377] The Left Party parliamentary group endorses this dissenting opinion.

successful efforts to reach understanding and purposeful solutions to the problems that are being faced, particularly as a transparent discussion will only take place if the participants in the talks can meet on an unprejudiced level. For these reasons, it is recommended that the term ‘intellectual property’ be avoided. Instead, ‘law of immaterial goods’ should be used because this is a value-free, descriptive term that is conducive to open-minded debates.

5.8.5 Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Dr Wolf Osthaus, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon on the recommendations for action on chapter 2

On 2.4: New remuneration models

The CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Dr Wolf Osthaus, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon note that, as the law stands at present, the provisions laid down in Section 53(1) UrhG (‘private copying’) already apply to legal downloads on the Internet, or reproduction can sometimes be allowed if the author gives their authorisation. Where this is the case, there is no need for legislative action.

Authors already have an entitlement to obtain remuneration from content providers (download platforms, for example) for legitimate uses, and this is usually administered by the collecting societies. The legalisation of illegitimate uses by a ‘culture flat rate’ or ‘culture token’ is to be rejected in line with the other recommendations for action made by the Commission.

5.8.6 Dissenting opinions of the SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch on the recommendations for action on chapter 2

On 2.3: Equitable remuneration/total buy-outs

Right of second exploitation

Authors should be granted an inalienable right of second exploitation that allows them to make academic articles and chapters in periodicals and collections of essays available to the public if their research was mainly financed from public funds. They should be able to publish their articles and chapters on the Internet following an embargo period of six to twelve months.

Equitable remuneration

The Study Commission on Culture in Germany of the German Bundestag previously made the recommendation that it be ‘examined once again what provisions and measures in copyright contract law could be used to arrive at equitable remuneration for all authors and performing artists that is adapted to economic conditions since the provisions in place hitherto in the Act to Strengthen the Contractual Position of Authors and Performing Artists are insufficient.’[378]

In the light of this recommendation, the Federal Government is called upon to take immediate action to evaluate the legislative changes made to copyright contract law in 2002 and, where necessary, to put forward proposals with which adjustments can be made in order to achieve the still correct aim of this revised legislation, and arrive at a fair balance of interests between authors and rights exploiters.

In order to prevent authors losing their statutory entitlement to equitable remuneration under Section 32 UrhG as a result of disproportionately protracted negotiations, the legislature should clarify unambiguously that the limitation period does not commence until a remuneration agreement has been concluded or a judgement has been handed down by the court of last instance.

It is recommended that it be examined what can be done to ensure the arbitration board’s decisions under Sections 36 and 36a UrhG are binding.

Furthermore, the German Bundestag is recommended to examine whether the levels of remuneration could also be reviewed in the light of Section 32 UrhG by means of class actions (scrutiny of general terms and conditions).

Examine the culture flat rate and comparable models[379]

[378] Final Report of the Study Commission on Culture in Germany, 11 December 2007, Bundestag Printed Paper 16/7000, p. 267, online: http://dipbt.bundestag.de/dip21/btd/16/070/1607000.pdf.

[379] The Left Party parliamentary group endorses this dissenting opinion.

A general culture flat rate and comparable models appear attractive at first sight, but do not represent an alternative to a differentiated approach that analyses in advance where a system based on the enforcement of exclusive rights is called for or where entitlements to remuneration are sufficient. Furthermore, it may tend to inhibit the development of new business models, something that should actually be promoted. The extent to which the culture flat rate and comparable models represent options for particular subsectors should be reviewed. Proposals such as the culture flat rate and the 'culture token' are to be examined with an unprejudiced attitude to ascertain their potential yields, their societal benefits and how they should be deployed in certain subsectors.

Resale of incorporeal copies

At present, it is unclear, legally at any rate, whether a user is able to resell a digital copy of a work they have acquired from a download service such as iTunes. By contrast, if the user had purchased the same album on CD, this would be permissible without further complication. The German Bundestag is therefore urged to examine whether there is a need for legal parameters to be put in place for the resale of digitally licensed goods.

5.8.7 Dissenting opinions of the Left Party parliamentary group on the recommendations for action on chapter 2

There was unanimity in the project group that digitisation has facilitated the production and distribution of creative content. Digital content can be reproduced and distributed easily and with almost no losses. At the same time, neither reproduction nor distribution can be controlled any longer, which means the exercise of exclusive rights encounters practical difficulties. However, the opening of access to knowledge and cultural goods, networking and the emancipatory extension of the possibilities of creative activity offer great opportunities for both authors and users. The use of these opportunities deserves greater political support:

– Strengthening of authors' rights with inalienable statutory entitlements to remuneration that are independent of any rights of prohibition.

– As a matter of principle, an improvement in the protection for authors cannot be achieved by the introduction of new protective rights for rights exploiters, in particular the introduction of new related rights. Rather, it is to be ensured that the tendency for rights to remain with authors is supported with provisions to this effect in contract law.

– Stronger differentiation between exclusive rights and entitlements to royalties. The assertion of exclusive rights by rights exploiters must not lead to comprehensive monopolisation and therefore to the blocking of second or derivative uses.

– The development of a comprehensive regulatory model for the activities of the collecting societies in the EU. The initiation of a discussion about the definition of the collecting societies' functions.

– At the EU level, it is necessary to work for the binding regulation of the law on collecting societies' reciprocal agreements, which would make it possible to acquire rights over the most comprehensive possible repertoire for multiple territories from any European collecting society.

– If copyright law is to be capable of dealing with the challenges of the future, it must promote innovative intermediary services. Where rights of prohibition interfere with competition more than is proper, regulatory countermeasures are to be taken in the interests of the most intensive possible use of creative works.

5.8.8 Dissenting opinions of the Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann on the recommendations for action on chapter 2

It is noted that users are prepared to pay for digital content as well. This willingness to pay rises proportionally with the provision of attractive, legal services. The turnover generated from downloads is continuing to rise. New business models are also being based on revenues from advertising that can be targeted at particular users by analysing their behaviour. Further channels of

distribution are offered by separately marketed access to premium or archive content, and 'flat rate services'. Cloud computing too has now developed into a viable business model, under which users will cease to have permanent copies on their devices in future, yet will still enjoy constant, nomadic access to music, films and software.

In the case of free-of-charge, open source software, value is created by linking it with pay services.

Micropayment systems have developed as ways of moving money, but have still not spread widely to become common means of payment.

One problematic issue for business models on the Internet is the question of rights clearance in collective rights management. Here, the fragmentation of rights and intransparency in this field are to be deplored, problems that have, furthermore, not been resolved following the European Commission's recommendation in 2005 that the practice of reciprocal agreements be discontinued. In this connection, in particular, there are complaints about the intransparency of the reciprocal agreements between the European collecting societies.

The competition among collecting societies also recommended in 2005 by the European Commission could distort the market as well if it were decided to dispense with the double obligation to accept contracts that is found in national legal systems. There is felt to be a danger of a small number of collecting societies forming an oligopoly, in particular as it becomes more difficult for the individual collecting societies to build up appropriate in-house repertoires.

Recommendation for action: For these reasons, it is recommended that the willingness to pay for digital content be encouraged, among other things by giving new business models legislative support. To this end, the German Bundestag should examine the transparency of the collecting societies' contractual negotiations and address the matter in legislation as necessary.

Authors' position under copyright contract law should be improved with regard to the multiple exploitation of their works on the Internet.

New business models could also be promoted by the introduction of central rights clearance mechanisms. In this connection, the promotion of a clearing and information agency to be established by the collecting societies is recommended. Its database would make rights clearance easier for the operators of relevant business models.

In order to lay foundations for competition between collecting societies, it is recommended efforts be made to legislate at the European level for a most favoured nation principle, under which the double obligation to accept contracts and social functions would become equally obligatory for the collecting societies of all the Member States.

Finally, the introduction of a register or central database is regarded as a measure that would be helpful for the promotion of legal certainty and clarity. This should not be a precondition for the establishment of copyright protection, but merely make rights clearance easier.

On 2.3: Equitable remuneration/total buy-outs

It is noted that to date there are merely four subsectors in which the imprecise legal term 'equitable remuneration' has been fleshed out by the negotiation of remuneration rates between the parties.

Recommendation for action: In order to strengthen authors' financial situation, it is recommended that it be made mandatory to apply the arbitration procedure already provided for by copyright contract law where remuneration negotiations have broken down. Apart from this, it is recommended that the obligation to deposit the remuneration demanded by the collecting society that is laid down in Section 11(2) UrhWahrnG be extended to tariff disputes concerning statutory entitlements to remuneration. Furthermore, it is recommended that the economic imbalance between authors, on the one hand, and rights exploiters, on the other, be rectified, and a strengthening of authors' rights in copyright contract law encouraged.

5.8.9 Dissenting opinions of the expert member padeluun on the recommendations for action on chapter 2

On 2.4: New remuneration models

Digital cash

Alternative remuneration models require the ability to make payments over the Internet with confidence in the technology and the legal position. It must be possible to pay very small sums (for example for reading an article) without leaving behind data traces.

Projects such as PayPal and Flattr attempt to offer such systems. However, these are based more on the ‘transfer’ model than the ‘cash’ model. Hence the various problems they suffer:

There are considerable data protection law concerns.

They are organised as private businesses and therefore may not be neutral (as became evident in the case of PayPal and *Wikileaks*).

They skim a certain proportion of the money from the system (in charges), which leads to ‘inflation’ over the long term or makes independent development impossible.

It is therefore necessary to introduce a form of anonymous digital cash. This must be state regulated and organised, and designed in such a way that it is not possible to trace who spends it where and on what. At the same time, it has to be ensured that a ‘digital coin’ can never be spent twice and that it cannot be transported in such large quantities that it could be used for currency speculation, etc. In the case of real cash, it was decided how large the biggest note should be by looking at how many notes would fit into a wallet and how much this sum would weigh.

Such a form of cash is to be distinguished above all from phenomena like the ‘Facebook dollar’, which is valid as a means of payment on that platform. Here, ‘currency systems’ are being created that are entering into competition with (supra)national currencies in completely uncontrolled ways. They have a high potential to encourage dependency among their users, because the provision of goods that can be purchased with these ‘currencies’ is completely dependent on the arbitrary decisions taken by portal operators, in addition to which they make every payment transaction traceable.

As far as this money is concerned, there must be no distinction between traders and customers. A grandmother should also be able to simply give her grandson money, just as is already possible with cash today.

Consequently, business models could be built up that would allow extremely small sums to be paid without the effort involved in transfers. They could be used to pay extremely small sums, for reading an article on the Internet for example, without my having to give up my anonymity.

A form of money with which this would be possible should be researched and promoted by the state.

5.8.10 Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke and Prof. Dr Wolf-Dieter Ring on the recommendations for action on chapter 3

On 3.6: Collecting societies: supervision, transparency, international cooperation, working methods

The CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke and Prof. Dr Wolf-Dieter Ring note that the recommendations for action – on collective rights management – made by the Study Commission on Culture in Germany were accepted and many of them have also been implemented. Numerous measures have been put into practice to increase transparency. The societies’ internal structures have been reformed, and the numbers of delegates increased. Any encroachment on the collecting societies’ autonomy is to be rejected on account of the principles of the law of associations, to protect justified interests and to ensure the functioning of collective rights management.

5.8.11 Dissenting opinions of the SPD parliamentary group, and the expert members Alvar Freude, Dr Wolfgang Schulz and Cornelia Tausch on the recommendations for action on chapter 3

On 3.1: Enforcement of rights on the Internet – a challenge for copyright law

Increasing digitisation and worldwide networking are creating a diversity of new opportunities to engage in artistic and creative activities, and have a stake in

cultural works. The Internet, in particular, is opening up channels of access that have hardly been possible up until now. However, they are also accompanied by debates about whether, and to what extent, there is still an equitable balance between the interests of creative professionals and the interests of users, and where there may be a need for adjustments that adapt copyright law to meet the challenges of the digital society. It is therefore not surprising that copyright law has been in constant flux for years. Under the influence of the European and international efforts to reform the law in this field, the German Copyright Act has been modified several times over the last ten years and adapted to meet the challenges of the new digital world. New provisions have been introduced that relate above all to the digital (online) use of copyright-protected works. In doing this, the legislature has attempted to strike a balance between the different interests of authors, distributors and users (consumers), who are all affected by copyright law.

The overview has shown that different approaches can be taken when responding to illegal uses on the Internet that by no means rule each other out, but can complement each other as components of a modular system. It is proposed these approaches be built on to develop effective measures that will optimise the enforcement of rights while protecting users' justified interests:

Adaptation of the law

The adaptation of copyright law, for instance by the expansion of the exceptions and the extension of copyright to new types of content, must also take account of the development of new forms of use, as well as the increasing problems with the enforcement of copyright. It should be possible to discuss steps to clarify the forms of use about which there is legal uncertainty at present (e.g.: streaming services) or even the legalisation of certain new and now widespread forms of use (e.g.: mash-ups and remixes), not as solutions for the rights enforcement problem, but as solutions for certain subsectors or supplementary measures, particularly as, in contrast to the current situation, they will prevent an erosion of the social rules in this field. The esteem in which the law of immaterial goods is held will not be damaged by the legalisation of particular forms of use. Rather, this damage is the result of a tolerated grey area of rights infringements on the Internet.

Limits of enforcement

It is also conceivable for particular areas to be defined in which the enforcement of rights is impossible or only possible subject to prohibitively high costs (including losses of freedom as a result of controls such as the across-the-board monitoring of communications, which also affect informational self-determination and the privacy of telecommunications). Flat rate remuneration can be seen as a form of financial compensation for such costs, even if this alone will not be sufficient. A reconceptualisation of flat rate remuneration would be necessary for this purpose in order to ensure the authors concerned receive appropriate shares of the revenues generated.

In view of the changed perception of rights to immaterial goods and the problems with their enforcement in the digital world, the German Bundestag is recommended to press ahead with the further development of copyright law. In the digital environment, the general enforcement of exclusive entitlements under copyright law poses a danger of inappropriate losses of freedom due to monitoring measures (for example data filtering) that are inappropriate in a liberal, democratic society. For these reasons, the object of copyright protection could always be limited to entitlements to remuneration where works are not protected by authors or rights exploiters using technical protection measures. As some compensation for the limitation of exclusive entitlements with regard to freely accessible works in the digital environment, the flat rate remuneration and collective rights management systems should be strengthened in order to guarantee the authors concerned an appropriate share in the fruits of their creative output.

Increasing acceptance[380]

As far as the acceptance of legal provisions and users' motives are concerned, the data that is available is generally weak. There is certainly a need for research into these issues. It is already evident, however, that many individuals use works illegally, even though they recognise the norms in principle. It would appear sensible to provide

[380] The Left Party parliamentary group endorses this dissenting opinion.

education in this field, although to date there has been hardly any provision available that has been appropriate for specific target groups, and what has been available has not been used. Furthermore, an interesting connection is evident between the behaviour of the industry – for instance with regard to business models that are perceived to be fair – and the recognition of social rules that protect rights to immaterial goods.

This means user-friendly intermediary models are a decisive building block for the prevention of illegal use. Only if it proves possible to establish intermediary models that can be paid for and are accepted by users, and in which authors are able to have a sufficient stake, can 'the information society flourish without friction,' as *Karl-Nikolaus Peifer* put it in his statement to the public hearing held by the Study Commission on the Internet and Digital Society of the German Bundestag on 29 November 2010.[381] Consequently, it will be necessary to rely on business models that are accepted equally by authors and users, flat rate services for example, becoming better established than in the past. Here, rights exploiters too have a duty to develop and trial appropriate business models. The German Bundestag is recommended to set appropriate parameters for this.

Controls and sanctions[382]

When it comes to controls and sanctions, it is initially to be noted that it does not appear very promising to improve enforcement systematically using criminal law. The roundabout methods that were common before the introduction of the entitlement to information and involved the use of the criminal law to obtain user data were indicative of the large amounts of public resources tied up in this area, which could otherwise have been devoted to legal goods that would certainly have been no less worthy of protection. Sanctions such as the suspension of Internet connections, as provided for in the UK and France, for example, do not represent an option in Germany for constitutional reasons. Were right holders to explicitly abandon their demands for measures of this kind, this might make the discussion more objective and encourage the development of options for the socially responsible treatment of creative goods.

Technical measures and their limits[383]

There is a need for an open societal discussion about the possibilities and limits of technical solutions. Socially, however, they can only form a sustainable building block for the resolution of problems if across-the-board content filtering is ruled out, the right to informational self-determination and the privacy of telecommunications remain protected, and abuse of the filtering infrastructure is to be ruled out. The German Bundestag is therefore expressly recommended to also reject concepts for (automated) warning systems where they depend on across-the-board filtering of data streams.

On 3.3: Digital preservation and useability of cultural goods – treatment of orphan works[384]

Digitisation can make the cultural and academic heritage accessible to everyone over the Internet. However, books whose right holders are unknown or unidentifiable ('orphan works') are in danger of disappearing from our memory. The German Bundestag is therefore recommended to put in place statutory provisions concerning the treatment of out-of-print and orphan works.

5.8.12 Dissenting opinions of the Left Party parliamentary group on the recommendations for action on chapter 3

Rights exploiters, i.e. publishing houses and music labels, performed an important function as intermediaries in the analogue world. In the digital world, consumers' original creative activities and publications are becoming ever more important. It is true of the Internet that authors are users are authors. Up-to-date copyright legislation must protect the interests of users as producers just as much as it protects the interests of authors who exploit the rights to their own works and therefore act as these works' first users:

[381] Cf. on this topic the Written Statement by Prof. Dr Karl-Nikolaus Peifer for the Public Hearing on the Development of Copyright in the Digital Society of the Study Commission on the Internet and Digital Society of the German Bundestag, 29 November 2010, Committee Printed Paper 17(24)009-D, p. 8, online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/A-Drs__17_24_009_D-_Stellungnahme_Prof__Peifer.pdf.

[382] The Left Party parliamentary group endorses this dissenting opinion.

[383] The Left Party parliamentary group endorses this dissenting opinion.

[384] The Left Party parliamentary group endorses this dissenting opinion.

- As a matter of principle, a system that recognises users' rights only as exceptions from the standard case of the obligation to obtain authorisation is no longer appropriate to contemporary circumstances. The prevailing hierarchy of authors and users' interests must be overcome in favour of a balance that recognises the rights of both sides in the interests of making it as easy as possible to facilitate creative activities on a footing of equality.
- Reform of the collecting societies, democratisation and transparency of their governing bodies and distribution plans. Strengthening of supervision, scrutiny of the general terms and conditions that apply to existing deeds of assignment. In particular, action to improve the democratic participation of all right holders in decision-making bodies. It must be ensured that collective rights management systems are fully compatible with the issue of CC licences. The conclusion of a deed of assignment with a collecting society must not result in creative workers being denied the use of CC licences.
- The preservation and expansion of the ability to make private copies in the digital sphere. The 'right' to make private copies must not be excluded by contractual provisions, in end user-licence agreements for instance.
- As part of the further development of copyright law, it is to be ensured that, in addition to providing metadata, libraries, archives, museums, media libraries and other publicly funded or non-commercial commemorative organisations that serve cultural purposes are also enabled to present their audiovisual resources for exclusively documentary purposes in publicly accessible Internet databases, and to do so in forms that are appropriate to the medium.
- The unlimited use of orphan works must be made possible as a matter of urgency. In this respect, an exception is to be preferred to other models that would leave public institutions with sole responsibility under criminal law for copyright infringements committed in connection with their digitisation projects. Furthermore, it is to be guaranteed that no provisions are introduced that fall short of the recommendations made by the European High Level Expert Group.
- No undermining of consumer protection by licence agreements, and general terms and conditions. Creation of a binding legal framework for contractual provisions of these kinds. Organise the law that governs general terms and conditions so that it is consumer-friendly and enforceable.[385]
- The forward-looking development of the law must have priority over sanctions against consumers. Action to curb the practice of forum shopping. Enforcement of the existing *de minimis* provisions on filesharing, capping of fees and values at stake for notifications issued due to unintentional contraventions of copyright law.
- In so far as they are copyright-protected, documents issued by authorities and public institutions should be made available to the public under CC licences as a matter of principle.
- At the EU level, the existing catalogue of exceptions is to be formulated so that it sets binding minimum standards. In addition to this, over the long term, the relevant directive should be amended with technology-neutral blanket clauses based on the model of the American fair use provisions in order to ensure European law displays greater openness. This is important, in particular, for the non-commercial use of works and the academic sector. Legal clarity can be achieved by listing groups of cases or standard examples on the model of the fair use doctrine. The harmonisation of Community law must not remain limited to the ever further widening of the fields protected and the reach of the protection.
- The enforceability of existing exceptions from technical protection measures has not proved its worth in practice and should be replaced at the European level by a right to self-help. Such a right to circumvent DRM features

[385] Dissenting opinion of the CDU/CSU and FDP parliamentary groups, and the expert members Prof. Dieter Gorny, Harald Lemke, Prof. Dr Wolf-Dieter Ring, Dr Bernhard Rohleder and Nicole Simon: 'It is noted that the current provisions on the use of general terms and conditions already guarantee that surprising or inequitable clauses are ineffective. It is for this reason, in particular, that general terms and conditions have proved their worth when it comes to the sale of files with copyright-protected content.'

must apply for all exceptions, not just those that are enforceable.

– Within the framework of the options provided for by the Information Society Directive,[386] state educational institutions should be exempted from the obligation to pay remuneration for uses allowed by exceptions from copyright. This exemption must apply explicitly for child daycare settings as well.

– Unconditional examination of the advantages and disadvantages of copyright provisions that are in place beyond Germany's national framework. In particular, it is to be investigated how far reforms could draw on the existing Scandinavian system of extended collective licenses or its regulatory techniques, and what statutory preconditions would have to be put in place for this outside copyright law.

5.8.13 Dissenting opinions of the Alliance 90/The Greens parliamentary group, and the expert members Markus Beckedahl and Dr Jeanette Hofmann on the recommendations for action on chapter 3

On 3.1: Enforcement of rights on the Internet – a challenge for copyright law

It is noted that digitisation and the Internet are making completely new dimensions of dissemination, adaptation and reproduction possible. The difficulties involved in applying analogue instruments to rights on the Internet are correspondingly great.

Apart from this, it is noted that the debates about efficient rights enforcement are comparable with the discussions in the 1960s after devices that could make copies such as private cassette recorders, etc. arrived on the market. At that time, consumers were granted the ability to make private copies because it was assumed it would not be possible to control who was doing how much copying in the private sphere, i.e. there was a fear of deficiencies in enforcement. It is noted that the provisions on private copying have become successfully established in the 'analogue sphere'.

Recommendation for action: For these reasons, it is recommended that the authorities refrain from using repressive methods to enforce authors' rights. Furthermore, the German Bundestag is recommended to examine the applicability of flat rate forms of remuneration for various types of non-commercial Internet use or to apply the provisions on private copying to downloads as well.

On 3.1.1: Combatting copyright infringements

It is noted that both repressive and preventive action can be taken to combat copyright infringements. The idea of giving providers further-reaching liability for copyright infringements by users is viewed very critically because this would ultimately lead to a shifting of responsibility and therefore the privatisation of prosecution.

Recommendation for action: Rather, it is recommended that initiatives be taken at both the federal and Land levels to support the establishment of commercial subscription services in the music and film sectors.

Apart from this, it is recommended that Section 97a UrhG be reviewed and the imprecise legal terms defined with greater exactitude. The provisions should be formulated more clearly so that they can be interpreted uniformly by the courts. This would not be a question of limiting the provisions that cap charges to the first notification, but extending them to the first rights infringement.

On 3.3: Digital preservation and useability of cultural goods – treatment of orphan works

It is noted that the clearance of rights for works that are subject to a long period of protection becomes more difficult with the increasing passage of time. As a result, it can happen that a work remains withheld from the general public, although its dissemination might be in the right holder's interests.

Recommendation for action: For these reasons, it is recommended that, in order to prevent the orphaning of works, the terms of protection be adjusted to match the cycles in which works are exploited. Apart from this, provisions should be adopted that, among other things, allow public educational and research institutions to make orphan works accessible non-commercially. When criteria

[386] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L*, 167/10, 22 June 2001).

are determined for a diligent search, it is to be borne in mind that the costs of rights clearance must not exceed the costs of digitisation so that they do not have prohibitive effects. If the right holder is subsequently identified, they should have a right to object to the use of their work. Apart from this, it is to be recommended that a register that would help to facilitate the clearance of rights be established and promoted.

6 Report on the Copyright project group's public consultation

Digitisation and the Internet are allowing copyright-protected works to be used in highly diverse ways, so making copyright protection one of the core issues for an information society in the digital age. Questions around the topic of copyright therefore affect many people directly, particularly as the Internet is permitting and encouraging new forms of creative activity. It is no longer easily possible to draw a sharp division between producers and consumers. For these reasons, the Copyright project group was particularly interested in incorporating the views and ideas of citizens – as what are known as 'prosumers' – into its discussions.

Public consultation in the forum on the Study Commission on the Internet and Digital Society microsite

The forum on the Study Commission's microsite [387] is available to the interested public as a place for them to submit their comments, requests and suggestions to the members of the Copyright project group. Up until 8 June 2011, a total of 33 threads had been started on the forum. 15 of them contained targeted questions for the experts who were questioned at the Public Hearing on the Development of Copyright in the Digital Society on 29 November 2010. Four specific questions were read out during the Study Commission's public meeting and answered by the expert witnesses who attended.

Public consultation on the Study Commission's online participation platform

After the Study Commission's online participation platform had been launched on 24 February 2011, the Copyright project group involved the public in its work in two consultation phases. As of 26 February 2011, all texts drawn up by the project group were posted on the online participation platform for discussion and comments. In all, 39 texts were issued on the three thematic complexes, 'Overview, and technical, social and economic challenges' (thematic complex I), 'New forms of distribution/remuneration and business models on the Internet' (thematic complex

[387] The forum on the Study Commission's microsite can be viewed online: https://forum.bundestag.de/forum.php.

II) and 'Copyrights and users' rights' (thematic complex III). As the work in the project group progressed, the texts were amended on an ongoing basis. The texts could be edited until 21 March 2011, and proposals could subsequently be voted on until 24 March 2011. Altogether, 19 proposals were drawn up by the interested public during the first consultation phase and put forward for voting.

As the Study Commission on the Internet and Digital Society continued its work, the Copyright project group concentrated on drafting recommendations for policy action that would serve to further improve the parameters for the information society in Germany.[388] In so far as this was the case, particular emphasis was placed on making public consultation possible, especially when it came to the formulation of recommendations for action. To this end, members of the public were specifically requested to submit recommendations for action on the online participation platform between 20 April 2011 and 29 May 2011. In order to guarantee easier participation during this consultation phase, the decision was made not to activate the formalised voting facility available within the system. Instead, the votes were held using the option for users to directly indicate whether they were 'for' or 'against' each proposal.

Eleven proposals were submitted during this second consultation phase, so that a total of 30 proposals had been put forward by the time it closed. In all, 318 comments had been posted on these proposals.

Of the 30 proposals submitted, 28 were of – in many cases very direct – substantive relevance to the problems that had already been discussed by the project group as it was drawing up its recommendations for action. Some of the proposals from citizens were in fact largely identical with ideas that had been introduced into the discussion by members of the project group. This was true, for instance, of the discussion about the introduction of an exception for user-generated content that would allow the private production of derivative works by users and couple it to an obligation to pay remuneration. On this topic, a concrete proposal with the title 'Release of copyright-protected works for non-commercial use' was drafted on the online participation platform and went on to be discussed in the project group (see section 1.5.2). Other proposals related to, for instance, questions about the period of protection for copyright (see the proposals on the online participation platform: 'Periods of protection', 'Cut the period of protection for artworks to 20 years max.', 'Restrict periods of protection') – a topic that was dealt with by the Copyright project group (see section 1.6).

A proposal entitled 'State-funded public works belong to citizens' gained the greatest approval from the participating users (68 for, 3 against). This too is a topic that was discussed by the project group (see section 1.10).

Altogether, 30 proposals had been submitted by the end of the consultation, 17 of which were put forward during the first consultation phase. Two proposals had no direct relevance to the issues discussed by the project group. The following table lists the proposals in chronological order by the date when they were posted, beginning with the most recent proposal (see the table on the following page).[389]

Overall, it is therefore evident that a large majority of the topics that were important to the participating users have been taken up and discussed in different parts of the copyright project group's report.

[388] Cf. the Decision Establishing the Study Commission on the Internet and Digital Society, Bundestag Printed Paper 17/950, p. 4.

[389] The Copyright project group's area on the Study Commission's online participation platform can be viewed online: https://urheberrecht.enquetebeteiligung.de/instance/urheberrecht.

Table 4: Proposals submitted via the online participation platform

No.	Title of proposal	Votes For:Against	Number of comments	Paper(s) attached
1	Mandatory participation of hosters and providers in the prosecution of illegal content!	2:2	---	---
2	Online piracy complaints system for right holders	4:2	1	---
3	Conduct a societal discussion about the concept of intellectual property	1:0	---	---
4	Rights valid on the Internet as well!?	5:3	4	---
5	Make our audiovisual cultural heritage visible on the Internet	6:4	---	---
6	Use published knowledge authorisation-free for academic work and free-of-charge for education	9:1	5	---
7	Introduction of a Section 45b UrhG as a general educational and academic-use clause	10:0	3	2
8	General principle for exceptions	5:0	---	---
9	Costs-free court decisions for free databases	9:0	1	---
10	Allow non-commercial use	10:1	4	---
11	Cut the period of protection for artworks to 20 years max.	8:4	5	---
12*	Right of second use	8:0	3	---
13*	Statement on copyright law and market economy principles	4:4	2	1
14*	Copy.Right.Now!	3:0	3	---
15*	Against the one-sided approach taken in the papers	7:3	3	---
16*	Release of server software when servers are decommissioned	5:4	4	---
17*	State-funded public works belong to citizens	68:3	36	---
18*	Filesharing notifications & consumers: New Section 97a(3) UrhG	28:2	19	---
19*	Repeal Section 52a UrhG!	1:25	5	---
20*	Significance of (private) copying for social policy	32:0	7	---
21*	Ban on software activation	12:8	10	1
22*	No copyright for public authorities	26:0	14	---
23*	Periods of protection	22:2	7	---
24*	Right of second publication for academics	20:2	6	---
25*	Effectiveness of digital copy protection measures	37:1	8	1
26*	Balance of rights over goods acquired by purchase	22:0	16	---
27*	Release of copyright-protected works for non-commercial use	47:4	23	1
28*	Restrict periods of protection	6:4	19	---
29**	Information material on copyright law	3:0	1	---
30**	Stop work in protest	3:32	6	---

* Proposals submitted prior to 20 April 2011
** Proposals not directly relevant to the topics addressed by the project group

7 Annex 1 – Survey of international treaties on copyright and the framework of EU law[390]

Revised Berne Convention (RBC)

The Revised Berne Convention [391] of 9 September 1886 is one of the oldest international treaties on the protection of works of art and literature still in force today.[392] The Berne Convention was most recently revised at Paris in 1971. This version mainly governs the bilateral relations between the parties to the Convention. The Berne Convention protects the works of authors who are nationals of a country of the 'Berne Union' and the works of authors who are not nationals of a Berne Union country, but whose work is published in one of these countries. 164 states have acceded to the RBC.[393] The RBC entered into force with respect to Germany on 10 October 1974.[394]

Universal Copyright Convention (UCC)

The Universal Copyright Convention [395] was adopted on 6 September 1952 at Geneva. The UCC put in place a lower level of protection than the RBC for, in accordance with Article XVII UCC, the RBC has priority among the states of the Berne Union. The UCC primarily protects not the author, but the work. The UCC was intended to integrate states that would not be able to achieve the high level of protection laid down by the RBC in the foreseeable future – the People's Republic of China, for example – into an international system of protection.[396] Since these states too have since joined the RBC, the UCC is now of very minor significance.[397]

The Rome Convention (RC)

The International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted on 26 October 1961 at Rome. [398] The RC grants performing artists, phonogram producers and broadcasting organisations from other Contracting States national treatment, which means the protection afforded by the national legislation of the Contracting State is extended to foreign nationals.[399]

Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (Geneva Phonograms Convention (GPC))

The GPC [400] was a response to the rapid development of recorded music piracy and serves to supplement the RC. It was signed on 29 October 1971 with the aim of protecting phonogram producers against unauthorised duplications of their products and entered into force for Germany on 18 May 1974.[401]

TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights)

In April 1994, the General Agreement on Tariffs and Trade (GATT) was reformed into the World Trade Organisation (WTO). The TRIPS Agreement was adopted as Annex 1 C to the WTO Treaty of 15 April 1994.[402] TRIPS expressly recognises rights to immaterial goods as private rights, and obliges the Member States to incorporate minimum standards for commercial rights and copyrights into their law. Although the TRIPS Agreement only provides a basis for minimum standards of

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[390] The following text is taken, with slight editorial revisions, from the Bundestag progress report by Nawarotzky, Klaus/Doege, Jan-Christoph: *Grundlagen und neuere Entwicklungen des Urheberrechts auf übernationaler Ebene*, WD 7 – 3000 – 022/11. Substantive additions have been drawn from the Bundestag progress report by Vockel, Sylvia: *Rechtsquellen des Urheberrechts*, WD 7 – 3000 – 216/10.

[391] Berne Convention for the Protection of Literary and Artistic Works, revised at Paris, 24 July 1971, online: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

[392] Cf. Schack, Haimo: *Urheber- und Urhebervertragsrecht*, 5th edition, 2010, para. 949.

[393] Cf. WIPO: 'Contracting Parties', as of 15 April 2011, online: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

[394] *BGBl. II*, 1974, p. 1079.

[395] Universal Copyright Convention, 6 September 1952, online: http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=208.

[396] Cf. Schack, Haimo: *Urheber- und Urhebervertragsrecht*, 5th edition, 2010, para. 967.

[397] Consent was given to the Federal Republic of Germany's accession on 15 September 1965. Cf. *BGBl. II*, 1955, p. 892.

[398] International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1971, online: http://portal.unesco.org/en/ev.php-URL_ID=13645&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[399] The German Bundestag gave its consent to the Federal Republic of Germany's accession to the RC on 15 September 1965. Cf. *BGBl. II*, 1965, p. 1243.

[400] Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, online: http://www.wipo.int/treaties/en/ip/phonograms/trtdocs_wo023.html.

[401] *BGBl. II*, 1974, p. 336.

[402] Cf. Fezer, Karl-Heinz: *Markenrecht*, 4th edition, 2009, 'Zweiter Teil', A.I.1., para. 17.

protection for intellectual property, they are very high compared those required by other international agreements. [403] The TRIPS Agreement applies to the WTO's 153 members.[404]

World Intellectual Property Organisation treaties

The World Intellectual Property Organisation (WIPO) was founded in 1967 to promote the protection of intellectual property and has its seat at Geneva, Switzerland.[405] Since 1974, the Organisation has held the status of a UN special agency. The WIPO's main function is the development of international laws and standards to protect intellectual property, promote the harmonisation of domestic legal provisions and support developing countries in establishing protection for intellectual property. At present, 184 countries are members of the WIPO. Germany ratified the treaties on 5 June 1970.[406]

WIPO Copyright Treaty (WCT)

The Copyright Treaty was adopted by the WIPO on 20 December 1996 at Geneva. The WCT was intended to put in place substantive provisions that would supplement and clarify the RBC as it had been revised at Paris in 1971. In particular, copyright legislation was to be adapted to the new technologies of digitisation and the Internet. Protection also extends to database and computer programs. Germany ratified this treaty on 10 August 2003.[407]

WIPO Performances and Phonograms Treaty (WPPT)

The WIPO Performances and Phonograms Treaty was also adopted on 20 December 1996 at Geneva. This treaty is structured like the WCT and supplements the Rome Convention of 26 October 1961, but is limited to the rights of performing artists and phonogram producers. One innovation was the recognition of artists' 'moral rights' in Article 5 WPPT. The recognition of an author's moral rights is alien to the US copyright system, in particular.[408] The Treaty contains provisions on the distribution and reproduction of phonograms and the right of communication to the public. Together with the WCT, the WPPT entered into force for Germany on 10 August 2003.[409] The EU Member States jointly ratified the WIPO Internet Treaties on 14 December 2009. The Treaties entered into force for the EU Member States on 14 March 2010. This signified a shift in competences in favour of the EC and therefore a significant step towards the standardisation of European copyright law.[410]

Anti-Counterfeiting Trade Agreement (ACTA)

On 3 December 2010, a group of states – the EU, the USA, Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and Switzerland – signed the Anti-Counterfeiting Trade Agreement (ACTA).[411] The aim of the Agreement, which is due to be ratified at the end of 2011, is – without prejudice to the requirements of the WCT, WPPT and TRIPS – to establish harmonised standards for the enforcement of intellectual property rights so as to facilitate more effective action against intellectual property rights infringements around the world.

A group of academics has criticised that some of the provisions in ACTA are not compatible with Directive 2004/48/EC because, for example, the principles of due process are not guaranteed. [412] The one-sided protection extended to right holders without binding provisions being stipulated for the protection of conflicting user and general interests also meets with criticism.[413]

Framework of EU law

The copyright law of the EU Member States is characterised by various copyright systems. In the European internal market, this diversity conflicts with the free movement of goods and services. The directives adopted over the last few decades have been intended to contribute to the harmonisation of authors' rights in the EU. The core of the EU's Community *aquis* in this field is formed by the directives that date

[403] Cf. ibid., para. 18.
[404] The current membership figure is taken from the World Trade Organisation website, online: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
[405] WIPO Copyright Treaty, online: http://www.wipo.int/treaties/en/ip/wct/.
[406] *BGBl. II*, 1970, p. 293.
[407] *BGBl. II*, 2003, p. 754.
[408] Cf. Schack, Haimo: *Urheber- und Urhebervertragsrecht*, 5th edition, 2010, para. 1007.
[409] *BGBl. II*, 2003, p. 754.
[410] Cf. Schack, Haimo: *Urheber- und Urhebervertragsrecht*, 5th edition, 2010, para. 1005.
[411] Anti-Counterfeiting Trade Agreement, online: http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf.
[412] Cf. *Opinion of European Academics on Anti-Counterfeiting Trade Agreement*, online: www.statewatch.org/news/2011/jul/acta-academics-opinion.pdf.
[413] Cf. Stieper, Malte: 'Das Anti-Counterfeiting Trade Agreement (ACTA) – wo bleibt der Interessenausgleich im Urheberrecht?', *GRUR Int*, 2011, p. 124 (p. 132).

from the years 1991 to 2004, as well as the case law of the European Court of Justice (ECJ) on the fundamental freedoms.

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society[414]

This directive was intended to adapt and supplement the existing framework of Community law on the protection of copyright and related rights where this was necessary for the smooth functioning of the internal market. To this end, those national legal provisions on copyright and related rights that vary considerably from one Member State to another or cause legal uncertainties that hinder the smooth functioning of the internal market and the development of the information society in Europe were to be adjusted, and inconsistent responses by the Member States to technological developments avoided. The Copyright Directive implemented the WIPO Copyright Treaty at the European level.

Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art[415]

Directive 2001/84/EC was intended to eliminate existing legal disparities in so far as they impacted negatively on the functioning of the internal market in order to guarantee the smooth functioning of the art market. The resale right was intended to give the author of a work the opportunity to receive a royalty every time their works were resold.

Directive 2004/48/EC on the enforcement of intellectual property rights[416]

This Directive was intended to approximate the Member States' legislative systems by enforcing substantive intellectual property rights. The aim was to 'ensure a high, equivalent and homogeneous level of protection in the internal market.' As a result of this, inventors and creators were to be put in a position to derive a legitimate profit from their inventions or creations.

Even though Directive 2004/48/EC did have positive impacts on the protection of intellectual property under civil law in the Member States, the Directive is not adequate to the increasing challenges of the digitised world. In particular, there are repeated infringements of intellectual property rights on the Internet. Furthermore, numerous questions concerning sanctions still need to be clarified, for example the deployment of injunctions and procedures to gather and preserve evidence, the recall and destruction of counterfeit products, the entitlement to information, and the award and calculation of damages.[417]

[414] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L*, 167/10, 22 June 2001).

[415] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (*OJ L*, 272, 13 October 2001, pp. 32-36).

[416] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (*OJ L*, 157, 30 April 2004). See also the corrected version of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (*OJ L*, 195, 2 June 2004, pp. 16-25).

[417] See on this issue the *Report from the Commission: Application of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*, COM(2010) 779, 22 December 2010.

8 Annex 2 – Public Hearing on Copyright of the Study Commission on the Internet and Digital Society

The Study Commission heard the following expert witnesses at its Public Hearing[418] on the Development of Copyright in the Digital Society on 29 November 2010:

– **Dreier**, Prof. Dr iur. Thomas

(Center for Applied Legal Studies, Karlsruhe Institute of Technology (KIT))

– **Kopf**, Wolfgang

(Deutsche Telekom AG)

– **Peifer**, Prof. Dr Karl-Nikolaus

(Institute for Media and Communications Law, University of Cologne)

– **Schild**, Ronald

(CEO, MVB Marketing- and Verlagsservice des Buchhandels GmbH (Libreka))

– **Schimmel**, Wolfgang

(Lawyer)

– **Schwartmann**, Prof. Dr iur. Rolf

(Cologne Media Law Research Department, Cologne University of Applied Sciences)

– **Spielkamp**, Matthias

(iRights.info)

– **Spindler**, Prof. Dr Gerald

(Department of Civil Law, Commercial and Economic Law, Comparative Law, Multimedia and Telecommunication Law, University of Göttingen)

– **Tschmuck**, Prof. Dr Peter

(Institute of Culture Management and Cultural Sciences (IKM), University of Music and Performing Arts Vienna)

– **Wunsch-Vincent**, Dr Sacha

(Senior Economic Officer, UN World Intellectual Property Organisation (WIPO))

[418] All the documentation on the Public Hearing can be viewed online: http://www.bundestag.de/internetenquete/dokumentation/Sitzungen/20101129/index.jsp.

9 Abbreviations

ACE	Association of European Cinémathèques
ACTA	Anti-Counterfeiting Trade Agreement
BASCAP	Business Action to Stop Counterfeiting and Piracy (BASCAP), an initiative of the International Chamber of Commerce
BGB	German Civil Code
BGH	German Federal Court of Justice
BITKOM	German Association for Information Technology, Telecommunications and New Media
BMJ	German Federal Ministry of Justice
BMWi	German Federal Ministry of Economics and Technology
BVerfG	German Federal Constitutional Court
CC	Creative Commons
CD	Compact disc
CDU/CSU	Christian Democratic Union/Christian Social Union
CELAS	Centralized European Licensing and Administration Service
DJV	German Federation of Journalists
DPMA	German Patent and Trademark Office
DRM	Digital rights management
DSU	Dispute Settlement Understanding
DVD	Digital versatile disk
EC	European Community
ECJ	European Court of Justice
EP	European Parliament
EU	European Union
FAZ	*Frankfurter Allgemeine Zeitung*
FDP	Free Democratic Party
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GEMA	German Society for Musical Performing and Mechanical Reproduction Rights
GfK	Gesellschaft für Konsumforschung
GG	German Basic Law
GPC	Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (Geneva Phonograms Convention)
GPL	GNU General Public License
GVL	German Society for the Administration of Neighbouring Rights

GVU	German Federation against Copyright Theft
Hadopi	French High Authority for transmission of creative works and copyright protection on the Internet
ICT	Information and communications technology
IFPI	International Federation of the Phonographic Industry
IPRED	Intellectual Property Rights Enforcement Directive
ISP	Internet service provider
IViR	Institute for Information Law, Faculty of Law, University of Amsterdam
KG Berlin	Berlin Higher Regional Court
KSK	German Artists' Social Fund
LG Hamburg	Hamburg Regional Court
OECD	Organisation for Economic Co-operation and Development
OERs	Open educational resources
OLG Düsseldorf	Düsseldorf Higher Regional Court
OLG Hamburg	Hanseatic Higher Regional Court Hamburg
PAECOL	Pan-European Central Online Licensing
PRS	UK Performing Right Society
RBC	Revised Berne Convention
RC	Rome Convention
RIAA	Record Industry Association of America
SaaS	Software as a service
SACEM	French Society of Authors, Composers and Music Publishers
stop	German Code of Criminal Procedure
TMG	German Telemedia Act
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UGC	User-generated content
UrhG	German Copyright Act
UrhWahrnG	German Copyright Administration Act
ver.di	German United Services Union
VG WORT	Verwertungsgesellschaft Wort (German writers' and publishers' collecting society)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

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Deputy chairwoman: Dr Jeanette Hofmann

Researcher: Antje Franz (until January 2011)/Silvia Saupe (from January 2011)

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Gorny, Prof. Dieter (expert member)

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Thomae, Stephan (Member of the German Bundestag, substitute member of the Study Commission, FDP)

Wawzyniak, Halina (Member of the German Bundestag, The Left Party)

Zypries, Brigitte (Member of the German Bundestag, substitute member of the Study Commission, SPD)