

# ALAI Congress 2017 in Copenhagen

## Copyright, to be or not to be

### *Questionnaire – Country Report Germany*

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#### **I. The traditional justifications for copyright and related rights**

##### **1. In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?**

The German Act on Copyright and Related Rights (Gesetz über Urheberrecht und verwandte Schutzrechte, Urheberrechtsgesetz, UrhG)<sup>1</sup> of 9 September 1965<sup>2</sup>, as last amended by Article 1 of the Act of 20 December 2016 (Federal Law Gazette Part I, p. 3037) does not contain a preamble or explanatory remarks (“recitals”). The following justifications have been assembled from explanatory memoranda to draft bills for the original Urheberrechtsgesetz of 1965 and later amendments to this act. These draft bills were in most cases tabled by the federal government for consideration by parliament. In some cases, the committee for legal affairs of the parliament added justificatory remarks. The most frequent justifications for authors’ rights set out in these documents are:

- It is appropriate to ensure that authors (as defined by § 7 UrhG) participate in the economic success of their work, that their financial interests should be protected and that ideally they should be able to make an independent living from their creative work.<sup>3</sup>
- An original work in the sense of § 2 UrhG is the result of an author’s personality. Thus, there is an intellectual and personal relationship between the author and the work (§ 11 first sentence UrhG). This relationship is also presented as the main reason for granting moral rights (§§ 12-14 UrhG).<sup>4</sup>
- It is appropriate to create an incentive for authors to create new works which the public can benefit from.<sup>5</sup> In close connection to this justification, the importance of creative works for

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<sup>1</sup> An English translation of the UrhG as of 1.10.2013 is available at [https://www.gesetze-im-internet.de/englisch\\_urhg/index.html](https://www.gesetze-im-internet.de/englisch_urhg/index.html).

<sup>2</sup> Federal Law Gazette Part I, p. 1273.

<sup>3</sup> All documents cited in the following are available <http://pdok.bundestag.de/>. Bundestags-Drucksache (BT-Drucks.) IV/270, p. 28, 43 et seqq.; BT-Drs. 10/837, p. 9 et seqq., 11, 36; BT-Drs. 14/6433, p. 1, 7, 10; BT-Drs. 16/1828, p. 49.

<sup>4</sup> BT-Drs. IV/270, p. 28, 40 et seqq., 43 et seqq.; BT-Drs. 10/837, p. 9, BT-Drs. 14/6433, p. 14, 18.

<sup>5</sup> BT-Drs. 14/6433, p. 7; BT-Drs. 16/1828, p. 29.

Germany's economy, cultural identity, scientific progress and democratic decision-making process is often emphasized.<sup>6</sup>

- The German federal constitutional court (Bundesverfassungsgericht) has acknowledged that author's rights are protected under the fundamental right to property under Article 14 as well as (regarding the moral rights aspect) under Articles 1 par. 1 and 2 par. 1 ("general right of personality") of the German Basic Law.<sup>7</sup>
- In order to comply with Germany's obligations following from various EU Directives and international copyright treaties (in particular the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty), German copyright law has to be amended.<sup>8</sup>
- Recent technological developments have made it much easier and cheaper to make near perfect copies of creative works and distribute them, thereby endangering the livelihood of authors.<sup>9</sup>
- Authors are at a structural disadvantage vis-à-vis companies marketing their creations (producers) and vis-à-vis collecting societies so that an adequate statutory framework needs to be established for author's dealings with these companies and collecting societies.<sup>10</sup>
- Copyright protection has to be balanced against the interests of other affected parties and the public at large.<sup>11</sup>

## **2. Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?**

Some justifications concern all rights related to author's rights (§§ 73 et seq. UrhG).

- The main justification for related rights in Germany is the aim to encourage and incentivize certain technical or financial efforts, which are in turn necessary to make the creation of complex works such as films possible, to bring existing works created by others into a form that is accessible to the public or to produce products which are not works in the sense of the German Copyright Act, but are useful and valuable for the public nevertheless.<sup>12</sup>
- The German constitutional court has recognized that related rights are protected under the fundamental right to property (Article 14 German Basic Law).<sup>13</sup>
- The creation of new related rights or amendments to existing rights often occurred in the course of the implementation of EU Directives in this field.<sup>14</sup>

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<sup>6</sup> BT-Drs. IV/270, p. 44, 63; BT-Drs. 10/837, p. 26; BT-Drs. 14/6433, p. 7; BT-Drs. 16/1828, p. 37.

<sup>7</sup> BT-Drs. 10/837, p. 1, 32, 36 et seqq.; BT-Drs. 14/6433, p. 10; BT-Drs. 16/1828, p. 15 ff., 49.

<sup>8</sup> BT-Drs. IV/270, p. 27, 47, BT-Drs. 15/38, p. 1, 14 et seqq.; BT-Drs. 16/1828, p. 1.

<sup>9</sup> BT-Drs. IV/270, p. 27; BT-Drs. 10/837, p. 10 et seq., 17, 20; BT-Drs. 15/38, p. 14; BT-Drs. 16/1828, p. 14.

<sup>10</sup> BT-Drs. 14/6433, p. 7 et seqq., 12 et seqq.

<sup>11</sup> BT-Drs. IV/270, p. 45 et seq., 62 et seqq.; BT-Drs. 10/837, p. 9, 14 et seqq., 27 et seqq., 38; BT-Drs. 15/38, p. 18 et seq., 26 et seqq.; BT-Drs. 16/1828, p. 14 et seq., 20 et seq., 37.

<sup>12</sup> Compare, for example, BT-Drs. IV/270, p. 33 et seq.

<sup>13</sup> See, for example, BT-Drs. 14/6433, p. 10; BT-Drs. 16/1828, p. 16 et seq.

<sup>14</sup> See, for example, BT-Drs. 13/7385, p. 39 et seqq., 96 et seq.; BT-Drs. 15/38, p. 14, 26 et seq.

- The explanatory memoranda also refer to the minimum requirements set out in international treaties in this area (especially the Rome Convention, the TRIPS Agreement, and the WPPT), which Germany has to comply with.<sup>15</sup>
- Recent technological developments, especially digitization, make it much easier and cheaper to copy and distribute photographs, audio recordings, and other products, for which reason additional protection is considered necessary.<sup>16</sup>

On a more granular level, the following justifications are given for particular related rights:

According to § 70 UrhG, scientific editions of works or texts which are not protected by copyright shall be protected *mutatis mutandis* under the provisions regarding copyrightable works if they represent the result of scientifically organised activity and differ substantially from previously known editions of the works or texts. The author of the edition shall be entitled to exercise the right, which expires 25 years after publication or production. This hybrid right was created because the efforts of such an editor have been considered comparable to an author's creative achievement.<sup>17</sup> In addition, the creation of scientific editions often necessitates rigorous scientific work and large investments, which ought to be encouraged.<sup>18</sup>

Under § 71 UrhG, anyone who releases a previously unreleased work for the first time after the expiry of the copyright or communicates it to the public shall have the exclusive right to exploit the work. This achievement was also considered comparable with the creative achievement of an author,<sup>19</sup> and because of the efforts and investments typically necessary to release such works.<sup>20</sup>

The necessity of protecting simple photographs not fulfilling the requirements for copyright (§ 72 UrhG) is explained with the difficulty of differentiating between copyright protected photographic works and such simple photographs,<sup>21</sup> and with the argument that a photographer's achievement is comparable to the achievement of an author creating a work.<sup>22</sup>

The protection of performers under §§ 73 et seq. UrhG was justified with reference to

- the fact that their services are rendered in connection with existing works, which they perform and thereby make accessible to a wider audience;<sup>23</sup>
- the personal relationship between a performer's personality and his performance;<sup>24</sup>
- the wish to grant performers a share in the economic benefits resulting from their labor;<sup>25</sup>
- the power imbalance between performers and producers.<sup>26</sup>

The protection of organizers of performances (§ 81 UrhG),<sup>27</sup> producers of audio recordings (§§ 85, 86 UrhG)<sup>28</sup>, broadcasting organizations (§ 87 UrhG),<sup>29</sup> producers of databases (§§ 87a-87e UrhG),<sup>30</sup>

<sup>15</sup> BT-Drs. IV/270, p. 89; BT-Drs. 15/38, p. 14, 17, 23.

<sup>16</sup> BT-Drs. 13/7385, p. 39; BT-Drs. 17/11470, p. 6.

<sup>17</sup> BT-Drs. IV/270, p. 86.

<sup>18</sup> BT-Drs. IV/270, p. 87.

<sup>19</sup> BT-Drs. IV/270, p. 86.

<sup>20</sup> BT-Drs. IV/270, p. 87 et seq., 113.

<sup>21</sup> BT-Drs. IV/270, p. 88 et seq.; BT-Drs. 10/837, p. 11 et seq.

<sup>22</sup> BT-Drs. IV/270, p. 86.

<sup>23</sup> BT-Drs. IV/270, p. 86

<sup>24</sup> BT-Drs. IV/270, p. 94 et seq.

<sup>25</sup> BT-Drs. IV/270, p. 88 et seqq.; BT-Drs. 14/6433, p. 7.

<sup>26</sup> BT-Drs. 14/6433, p. 7 et seqq.

<sup>27</sup> BT-Drs. IV/270, p. 94.

<sup>28</sup> BT-Drs. IV/270, p. 95 et seqq.; BT-Drs. 15/38, p. 25.

and of news publishers (§§ 87f-87h UrhG)<sup>31</sup> respectively is justified with the high-quality technical expertise and large economic investments that are necessary to organize performances or make audio recordings, broadcasts, databases and press products respectively.

The necessity of protecting producers of cinematographic works (§ 94 UrhG) is justified with the technical expertise and enormous investments that are necessary to create a cinematographic work, but also with the complexity of involving many people in creating such a work, and the need of producers to be able to exploit the cinematographic work in such a way that they can realize a return on their investment.<sup>32</sup>

The protection of the producers of simple moving pictures, which are not protected as cinematographic works (§ 94 UrhG) is justified with many of the same arguments, and in addition with the practical difficulty of distinguishing between cinematographic works and moving pictures (see supra regarding the protection of simple photographs).<sup>33</sup>

Compared to the justifications given for author's rights, many justifications for the protection of related rights are similar in some ways, but, unlike copyright, related rights are not granted to reward and incentivize the creation of original works, but for making other kinds of efforts that are necessary to bring existing works into a form accessible to the public or that are considered to be similarly valuable for the public as works for other reasons.<sup>34</sup> The justification underlying moral rights, namely the intellectual and personal relationship between the author and the work, and the need to protect them as weaker parties vis-à-vis producers, are only used to justify the protection of performing artists, but not that of other holders of related rights (though editors of special editions and photographers are also granted the moral rights granted to authors mutatis mutandis, see §§ 70, 72 UrhG).<sup>35</sup>

### **3. Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?**

The justifications summarized above are clearly reflected in many features of the act itself:

(1) Copyright is an author's right:

- § 1 UrhG: "The authors of works in the literary, scientific and artistic domain enjoy protection for their works in accordance with this Act."

(2) Personal relationship between authors and performers and their works and performances:

- Works are "own intellectual creations" of authors (§ 2 para 2 UrhG);
- § 11 first sentence UrhG: "Copyright protects the author in his intellectual and personal relationships to the work and in respect of the use of the work.";

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<sup>29</sup> BT-Drs. IV/270, p. 17, 97.

<sup>30</sup> BT-Drs. 13/7385, p. 40.

<sup>31</sup> BT-Drs. 17/11470, p. 6.

<sup>32</sup> BT-Drs. IV/270, p. 98 et seqq.

<sup>33</sup> BT-Drs. IV/270, p. 102.

<sup>34</sup> Compare BT-Drs. IV/270, p. 86 et seq.

<sup>35</sup> BT-Drs. IV/270, p. 94 et seq.

- Moral rights: right of divulgation, recognition of authorship, against distortions of the work (§§ 12-14 UrhG);
- Rights in adaptations and transformations (§ 23 UrhG);
- Right to access copies of works (§ 25 UrhG);
- Copyright not transferable (§ 29 para 1 UrhG – monistic theory);
- Prohibition of alterations and acknowledgement of source in case of limitations and exceptions (§§ 62-63 UrhG)

(3) Participation of authors and performers in the economic value of their works and performances:

§ 11 second sentence UrhG: “It shall also serve to ensure equitable remuneration for the exploitation of the work.”;

General exclusive exploitation rights (§ 15-22 UrhG);

Right of resale (§ 26);

Statutory remuneration rights for many exceptions/limitations, in particular private use (§ 54 UrhG);

(4) Protecting authors and performers as weaker parties:

- Remuneration right for rental and lending (§ 27 UrhG);
- Mandatory rights to equitable remuneration against the contractual partner (§§ 32-32c UrhG), backed up by joint remuneration agreements (§§ 36-36a UrhG);
- Mandatory termination right concerning contracts about future works (§ 40 UrhG as of 2016);
- Statutory remuneration rights not waivable, assignable in advance “only to a collecting society, or together with the grant of the right of publication to the publisher, provided that the publisher lets them be managed by a collecting society which manages publishers’ and authors’ rights jointly.” (§ 63a UrhG).

(5) Incentivizing production of cultural products:

- Related rights (see supra), including a one-year-right for news publishers

(6) Balance of rights:

- Free use (§ 24 UrhG);
- Limitations and exceptions (§§ 44a-63a UrhG);
- Limited duration of rights (70 years pma, 1-70 years related rights).

(7) Implementation of EU and international law:

- Specific sections for computer programs (§§ 69a et seq. UrhG), databases (§§ 87a et seq. UrhG)

#### 4. Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

##### a) Copyright

German legal literature generally recognizes that Germany's copyright legislation is centered on the author and his close personal connection to his work. The need to protect the author's financial and moral interests lies at the heart of the German copyright system<sup>36</sup>. Accordingly, some scholars consider copyright protection to be justified by natural law principles because an author's creations are his to use as he wishes because they are the result of his work and because of his perceived close personal connection to his creation.<sup>37</sup>

However, other scholars opine that to follow a more utilitarian approach would be helpful to create a copyright system that optimizes the conditions for the creation of new works and their exploitation while at the same time respecting the interests of the general public to have appropriate access to cultural assets.<sup>38</sup> They point out that in other jurisdictions, copyright is considered justified insofar as it fosters the creation, distribution, and utilization of creative works. In their view, exclusive rights are only granted as exceptions to the prevalent principle of freedom of competition in those cases, in which the market would otherwise fail to promote the desired results. Utilitarian narratives of this kind are becoming increasingly influential in German literature.<sup>39</sup>

The other justifications given in German legislation, such as the fact that the German constitutional court recognizes that copyright is protected by the fundamental rights to property and of personality;<sup>40</sup> that technological developments make it necessary to grant authors additional protection;<sup>41</sup> that obligations resulting from international treaties and/or EU Directives make it necessary to adjust German copyright law;<sup>42</sup> that copyright law should address the power imbalance between authors and producers;<sup>43</sup> that it is necessary to balance the interests of authors, producers, and the general public (users);<sup>44</sup> and that it is necessary to encourage the creation of new creative works for the benefit of society as a whole;<sup>45</sup> are also commonly expressed by representatives of the legal literature.

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<sup>36</sup> Dreier/Schulze (eds), *UrhG* (5th ed. 2015)-*Dreier*, Einleitung recital 10; Schricker/Loewenheim (eds), *Urheberrecht* (4th ed. 2010)-*Loewenheim*, Einleitung recital 10. For a significantly more detailed analysis of the different copyright law justification narratives and their practical implications, see *Nazari-Khanachayi*, *Rechtfertigungsnarrative des Urheberrechts im Praxistest* (2016).

<sup>37</sup> See, for example, *Schack*, *Urheber- und Urhebervertragsrecht* (7th ed. 2015), p. 3 et seqq.; *Ulmer*, *Urheber- und Verlagsrecht* (3rd ed. 1980), p. 105 et seqq.

<sup>38</sup> Schricker/Loewenheim (eds), *Urheberrecht* (4th ed. 2010)-*Loewenheim*, Einleitung recital 19.

<sup>39</sup> Compare Schricker/Loewenheim (eds), *Urheberrecht* (4th ed. 2010)-*Loewenheim*, Einleitung recital 18, with further references.

<sup>40</sup> *Schack*, *Urheber- und Urhebervertragsrecht* (7th ed. 2015), p. 4; Schricker/Loewenheim (eds), *Urheberrecht* (4th ed. 2010)-*Loewenheim*, Einleitung recital 10 with further references.

<sup>41</sup> For a detailed description of this issue see Dreier/Schulze (eds), *UrhG* (5th ed. 2015)-*Dreier*, Einleitung recital 22 et seqq.

<sup>42</sup> *Rehbinder/Peukert*, *Urheberrecht* (17th ed. 2015), p. 22.

<sup>43</sup> *Schack*, *Urheber- und Urhebervertragsrecht* (7th ed. 2015), p. 4.

<sup>44</sup> *Rehbinder/Peukert*, *Urheberrecht* (17th ed. 2015), p. 34 et seqq.; *Schack*, *Urheber- und Urhebervertragsrecht* (7th ed. 2015), p. 5 et seqq.; Schricker/Loewenheim (eds), *Urheberrecht* (4th ed. 2010)-*Loewenheim*, Einleitung recital 11 et seqq.

<sup>45</sup> Schricker/Loewenheim (eds), *Urheberrecht* (4th ed. 2010)-*Loewenheim*, Einleitung recital 19.

## b) Related rights

Most copyright scholars differentiate between the related rights protecting scientific editions, photographs and performers on the one hand (because these related rights grant natural persons some moral rights as well as exclusive rights or remuneration rights) and all other related rights, which do not include moral rights because they are granted also to legal persons for purely technical or financial efforts on the other hand.<sup>46</sup> The justifications expressed for related rights in the German legal literature do not differ significantly from those set out in legislative documents.<sup>47</sup>

## II. Economic aspects of copyright and related rights

### 1. Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

Yes:

- In 1989, *Marlies Hummel* conducted a detailed study on behalf of the German Ministry of Justice on the economic significance of the copyright industries in Germany.<sup>48</sup> According to this study, copyright industries in 1986 accounted for 2.9% of the German GNP (53.99 billion DM) and 3.1% of the total workforce (799.000 persons).<sup>49</sup>
- In 2003, the German Bundestag established an expert commission to study the situation of the cultural sector in Germany. In 2007, the commission published its results in a report which includes several pages on the economic relevance of the cultural and creative industries in Germany in the years 2000, 2004 and 2005.<sup>50</sup> According to this report, the cultural and creative industries accounted in 2005 for 2.6% of the German GNP (58 billion €) and for 2.7% of the total workforce (950.000 persons).<sup>51</sup>
- In 2010, the German Ministry of Economic Affairs and Energy commissioned the Zentrum für Europäische Wirtschaftsforschung (ZEW) and the Fraunhofer Institut für System und Innovationsforschung ISI (Fraunhofer ISI) to produce an annual monitoring report on the economic significance of the cultural and creative industries in Germany for the years 2009-2014.<sup>52</sup> According to this study, the „cultural and creative industries“ in 2014 accounted for

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<sup>46</sup> See, for example, Dreier/Schulze (eds), *UrhG* (5th ed. 2015)-*Dreier*, Vor §§ 70 ff, recital 2; *Schack*, *Urheber- und Urhebervertragsrecht* (7th ed. 2015), p. 33; *Rehbinder/Peukert*, *Urheberrecht* (17th ed. 2015), p. 36 et seq.

<sup>47</sup> See, for example, Dreier/Schulze (eds), *UrhG* (5th ed. 2015)-*Dreier*, Vor 70 ff. recital 1 et seqq.; *Rehbinder/Peukert* (17th ed. 2015), p. 233 et seqq.

<sup>48</sup> *Hummel*: Die volkswirtschaftliche Bedeutung des Urheberrechts (1989), BT-Drs. 11/4929, p. 69-166.

<sup>49</sup> *Hummel*, Die volkswirtschaftliche Bedeutung des Urheberrechts (1989), BT-Drs. 11/4929, p. 69, 77.

<sup>50</sup> Deutscher Bundestag, Schlussbericht der Enquete-Kommission "Kultur in Deutschland" (2007), BT-Drs. 16/7000, p. 335-340.

<sup>51</sup> Deutscher Bundestag, Schlussbericht der Enquete-Kommission "Kultur in Deutschland" (2007), BT-Drs. 16/7000, p. 336 et seqq.

<sup>52</sup> Zentrum für Europäische Wirtschaftsforschung GmbH (ZEW) and Fraunhofer-Institut für System und Innovativforschung ISI, Monitoring zu ausgewählten wirtschaftlichen Eckdaten der Kultur- und Kreativwirtschaft 2014 im Auftrag des Bundesministeriums für Wirtschaft und Energie, Langfassung, <https://www.kultur-kreativwirtschaft.de/KuK/Redaktion/PDF/monitoring-wirtschaftliche-eckdaten-kuk-2014-langfassung,property=pdf,bereich=kuk,sprache=de,rwb=true.pdf>; German Federal Ministry of Economic Affairs and

2.19 % of the German GNP (64 billion €) and 3.84 % of the total workforce (1.616.000 persons), generating a business volume of 146.9 billion €. <sup>53</sup> This most recent study also includes detailed statistics, which show the turnover, number of businesses, number of people employed, etc. for each individual sector (e.g. the music sector, the book sector and the software and games sector as well as many others) in the years 2000–2014. <sup>54</sup>

## **2. Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?**

We cannot take a position in this regard.

## **3. Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.**

Yes, we identified two studies.

In 2005, the UK Collecting Society ALCS commissioned *Martin Kretschmer* and *Philip Hardwick* to carry out a comparative study on authors' earnings. *Kretschmer* and *Hardwick* designed a questionnaire and sent it to 19.500 ALCS-members in the UK and 5.000 members of the Verband deutscher Schriftsteller VS (which predominantly represents literary authors and translators) and 450 members of the Verband der Drehbuchautoren VDD (which represents screenwriters) in Germany, requesting income data for the year 2004-05. 1.334 British and 242 German questionnaires were returned and subsequently evaluated. In 2007, *Kretschmer* and *Hardwick* published their study "Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers". <sup>55</sup> The key earnings measures used in this study are household earnings, individual earnings, earnings from self-employed writing, earnings by media/genre and earnings by profession. <sup>56</sup> The study controlled the results against collecting society payments, as

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Energy, Monitoringbericht 2016: Ausgewählte wirtschaftliche Eckdaten der Kultur- und Kreativwirtschaft, Kurzfassung (status as of November 2016), <https://www.kultur-kreativ-wirtschaft.de/KuK/Redaktion/PDF/monitoring-wirtschaftliche-eckdaten-kuk-2015,property=pdf,bereich=kuk,sprache=de,rwb=true.pdf>, p. 1-52.

<sup>53</sup> German Federal Ministry of Economic Affairs and Energy, Monitoringbericht 2016: Ausgewählte wirtschaftliche Eckdaten der Kultur- und Kreativwirtschaft, Kurzfassung (status as of November 2016), <https://www.kultur-kreativ-wirtschaft.de/KuK/Redaktion/PDF/monitoring-wirtschaftliche-eckdaten-kuk-2015,property=pdf,bereich=kuk,sprache=de,rwb=true.pdf>, p. 4 et seqq.

<sup>54</sup> Zentrum für Europäische Wirtschaftsforschung GmbH (ZEW) and Fraunhofer-Institut für System und Innovativforschung ISI, Monitoring zu ausgewählten wirtschaftlichen Eckdaten der Kultur- und Kreativwirtschaft 2014 im Auftrag des Bundesministeriums für Wirtschaft und Energie, Langfassung (status as of July 2016), <https://www.kultur-kreativ-wirtschaft.de/KuK/Redaktion/PDF/monitoring-wirtschaftliche-eckdaten-kuk-2014-langfassung,property=pdf,bereich=kuk,sprache=de,rwb=true.pdf>, p. 65 et seqq., 136 et seqq.; German Federal Ministry of Economic Affairs and Energy, Monitoringbericht 2016: Ausgewählte wirtschaftliche Eckdaten der Kultur- und Kreativwirtschaft, Kurzfassung (status as of November 2016), <https://www.kultur-kreativ-wirtschaft.de/KuK/Redaktion/PDF/monitoring-wirtschaftliche-eckdaten-kuk-2015,property=pdf,bereich=kuk,sprache=de,rwb=true.pdf>, p. 34 et seqq.

<sup>55</sup> *Kretschmer/Hardwick*, Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers (2007), <https://microsites.bournemouth.ac.uk/cippm/files/2007/07/ACLS-Full-report.pdf>.

<sup>56</sup> *Kretschmer/Hardwick*, at p. 11.



well as tax, insurance and social security data held by government statistical offices.<sup>57</sup> According to this study, in 2004-05, professional German authors (who allocate more than 50% of their time to writing) earned a median wage of 12.000 €. In the German sample, 1.7% of professional writers earned 145.000 € and no writers earned more than 500.000 €. The top 10% of professional writers earn about 41% of the total income, the bottom 50% earn about 12%. 60% of professional writers need another job to survive. German writers' households earned 41.644 € on average (mean income). Writers who bargain with their publishers/producers earn about twice as much as writers who don't. Female writers earn considerably less than male writers (69.5% of the male average (mean) earnings). Only 9.2% of German writers have received specific payments for internet use of their works. The typical earnings of authors in Germany deteriorated between 2000 and 2005.<sup>58</sup>

In another study, *Martin Kretschmer* inter alia looked into the data provided for by artists themselves as the basis for payments by a (compulsory) social insurance system ("Künstlersozialversicherungsgesetz"). His respective findings deserve being quoted at length: "In 1999, 107,167 authors and artists were insured in the insurance scheme Künstlersozialkasse. Of those that could be allocated unambiguously to one professional group, there were 29,245 ("Word") authors, with an average annual income (mean) of DM 25,686 (€13,133); 45,486 visual artists, with an average annual income of DM 19,889 (€10,169); 29,720 musicians, with an average annual income of DM 17,392 (€8,892); 12,433 performing artists, with an average annual income of DM 18,920 (€9,674). Overall, mean earnings per annum for all insured artists were DM 21,868 (€11,181); median earnings were DM 15,753 (€8,054). This compares to an average (mean) German net income in 2004 of €31,157, and a median of €28,730.39. The typical (median) German self-employed artist earns about one third of the income of a typical (median) worker."<sup>59</sup>

### **III. Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights**

#### **1. Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.**

There is a wide-spread culture of collective management of copyright and related rights in Germany. The collecting society GEMA manages copyright exploitation rights of music composers and lyricists as well as the derived rights of music publishers. Most important are the administration of "mechanical rights" for the production of phonograms, the distribution right, and the rights of broadcasting and public performance (except for stage performances).

VG Wort administers copyright exploitation rights and statutory remuneration rights of authors and publishers, in particular for the reprographic reproduction of literary works, for rental and public lending as well as for press reviews, and broadcasting and cable retransmission rights.

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<sup>57</sup> *Kretschmer/Hardwick*, at p. 7.

<sup>58</sup> *Kretschmer/Hardwick*, at p. 9 et seqq., but see also the very extensive and detailed diagrams for Germany on p. 137 et seqq.

<sup>59</sup> *Kretschmer*, Does Copyright Law Matter? An Empirical Analysis of Creators' Earnings, available at [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2063735](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2063735), with further data from other countries.

VG Bild-Kunst administers the rights of fine artists, designers, photographers, image agencies and film authors, and of book publishers, in particular reprographic rights, remuneration for public lending and press reviews, as well as resale rights for works of fine arts.

GWFF collects remuneration on behalf of authors and producers in the film and television industry in the case of reproduction and secondary use, as provided for under the law. In particular, it administers the remuneration rights for private copying, for rental and lending of videograms, the rights of cable retransmission, and the right of public performance.

AGICOA collects the remuneration for cable retransmission, in particular on behalf of foreign film producers.

VG Media deals with rights of broadcasters, in particular their remuneration right for cable retransmission.

GÜFA administers the remuneration rights of authors and producers of erotic films, primarily the remuneration for public performances.

In the area of neighbouring rights, GVL is the most important CMO in Germany. It manages the rights of performing artists, organizers of public performances and producers of phonograms, films and music videos. Among others, it administers the remuneration rights for broadcasting and communication to the public, for cable retransmission, private copying, as well as for rental and public lending.

VG Musikedition manages the rights in scientific editions and first editions in the area of music.

VFF administers the rights of communication to the public of broadcasts, cable retransmission and private copying for broadcasting organizations, their advertising companies and their commissioned film producers.

VGF manages the rights of producers and directors of cinematographic and other audiovisual works, in particular the rights of remuneration for cable retransmission, private copying and rental and public lending.

The latest CMOs to be admitted by the German Patent and Trademark Office are the VG TWF and GWVR. The former is concerned with film producers' rights of producers of commercials; the latter with rights of the organizers of performances.

Several "umbrella" organizations rejoining several CMOs collect the common remuneration for several of the above described CMOs, after which the latter share the total remuneration among themselves:

- ZPÜ for private copying for GEMA, VG Wort, VG Bild-Kunst, GVL, GÜFA, GWFF, TWF, VGF, VFF
- ZBT for public lending for GEMA, VG Bild-Kunst, VG Wort, GVL, GWFF, VFF, VG Musikedition and VGF
- ZFS for copying at schools for VG Wort, VG Bild-Kunst, and VG Musikedition
- ZWV for cable retransmission and public performances for VG Bild-Kunst, GWFF, VFF, GÜFA and VGF
- ZVV for video rental for GEMA, VG Bild-Kunst, VG Wort, GVL, GÜFA, GWFF, and VGF
- ARGE DRAMA for cable retransmission for stage rights for GEMA and VG Wort

- ARGE KABEL for cable retransmission for VG Bild-Kunst, VG Wort, and GVL.

**2. Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.**

In the German Act on the Management of Copyright und Related Rights by Collecting Societies, which implements the EU-Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, Par 2 sets out rights and obligations of collecting societies. Within this part of the Collecting Societies Act, Sections 48 and 49 determine a presumption in respect of rights to information and statutory rights to remuneration, respectively. Section 48 reads “Where the collecting society asserts a right to information that may only be asserted by a collecting society, it shall be presumed that it manages the rights of all rightholders.” Section 49 includes a corresponding legal presumption for the statutory rights to remuneration under sections 27, 54 (1), 54c (1), 77 (2), 85 (4), 94(4) and 1371 (5) of the Copyright Act (rights regarding rental, public lending, private copying and reprography). This reversal of the burden of proof is based on the one hand on the fact that those remuneration rights can only be administered by collecting societies, but not individually, and it follows on the other hand principles developed by the German jurisprudence during the last decades in favor of the biggest German collecting society GEMA (Society for musical performing and mechanical reproduction rights). According to this jurisprudence, it is generally presumed that a collecting society is entitled to exercise the rights within its competence on behalf of all rightholders if the collecting society holds a quasi-monopoly position. As this inverted burden of proof goes beyond the legal presumptions in Section 48 and 49 of the Collecting Societies Act, it is still applied.

Furthermore, Section 50 Act on the Management of Copyright und Related Rights by Collecting Societies regulates a similar presumption regarding outsiders of collecting societies in the case of the exclusive right of cable retransmission, in accordance with the Directive 93/83/EEC. Another case of a similar presumption in favor of a collecting society as regards the management of rights of outsiders concerns out-of-commerce works (Section 51 of the same Act, which stipulates a number of detailed conditions).

**3. Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.**

The German Copyright Act provides a closed list of limitations and exceptions.

a) Free use

In Section VI “Limitations on Copyright” of the German Copyright Act free use is granted for several explicitly named cases. First of all, Art. 44a Copyright Act states that certain temporary acts of reproduction as part of technical processes shall be permissible. Under Art. 45 et seq. Copyright

Act, a number of specified uses of works are permitted in form of an exception/limitation (the German law only uses the word “Schranken”) to the author’s rights, in particular, for the judicial administration and public security (Art. 45 Copyright Act); of works that are used as part of a school broadcast (Art. 47 Copyright Act); of speeches relating to current events for use in newspapers, periodicals or other printed matter or other data carriers; of speeches delivered during public negotiations (Art. 48 Copyright Act); and of individual broadcast commentaries and individual articles (Art. 49 Copyright Act). Further uses are permitted for the purpose of reporting on current events by broadcasting or similar technical means in newspapers, periodicals and other printed matter (Art. 50 Copyright Act); for the purposes of quotation, certain forms of academic teaching and research, and communication of works by public libraries (Art. 51 et seq. Copyright Act); for reproduction and making available to the public of orphan works (Art. 61 Copyright Act), and for works in public places (Art. 59 Copyright Act).

#### b) Statutory licensing

The German Copyright Act provides for a number of statutory licenses, again as a closed list. For example, Art. 45a Copyright Act allows the reproduction of works for non-commercial purposes for persons with disabilities but establishes the obligation to pay an equitable remuneration to the relevant collecting society. The same regulatory structure is chosen in Art. 46 Copyright Act for the reproduction, distribution and making available to the public of works or parts thereof that, after publication, have been included in collections for religious, scholarly and instructional use. Besides that, Art. 52 Copyright Act permits the communication to the public of a published work under certain circumstances but regulates at the same time the obligation for the organizer to pay an equitable remuneration. One of the main examples among many for a statutory license in the German Copyright Act is that of reproduction for private and other personal use including reprography under Art. 53 et seq. Copyright Act under further specified conditions.

#### c) Compulsory licensing

In the German Copyright Act, the regulatory system of a compulsory license is only used in the field of production of audio recordings, based on Art. 13 Berne Convention. According to Art. 42a Copyright Act the author who has granted a producer of audio recordings an exploitation right in a musical work for commercial purposes shall be required upon release of the work also to grant an exploitation right with the same content on reasonable conditions to any other producer of audio recordings in Germany. However, the practical significance of the provision is rather small as it is not applicable when the exploitation right referred to is lawfully administered by a collecting society (it is also not applicable if the work no longer reflects the author’s conviction).

#### d) Obligatory collective management

Besides provisions on the obligatory management of statutory remuneration rights through collecting societies (see for example Art. 26 (6), Art. 137I, and those mentioned under b) above), it is only Art. 20 b Copyright Act using the instrument of obligatory collective rights’ management for the exclusive right of cable retransmission. According to the provision, which implements the EU-Directive 93/83/EEC, the right to retransmit a broadcast work in form of a simultaneous, unaltered and unabridged retransmission of a program by means of a cable system or microwave system may be asserted only by a collecting society.

e) Others

For legal presumptions of management of rights of outsiders in favor of collecting societies, see under 2. above.