

German Report
Topic I
Torsten Bettinger*/Michèle Klein**

1. According to current law, the copyright status of the exploitation of works within the framework of online services has not been fully clarified.

Difficulties in the legal classification result in particular in the light of the concept of the communication of the work to the public, which requires as a matter of principle that the communication of the work reaches a number of people simultaneously, which is not the case according to the traditional interpretation of the term in the case of a successive enjoyment of the work by a number of persons. Since, however, it is generally acknowledged that the rights to the online use of a work must be reserved to the author, if only for constitutional reasons (Art 14 of the Constitution), it is the general view to classify this right amongst the intangible exploitation rights. In this sense, the District Court of Munich (ZUM 2000, 418, 422) has classified the online right as an unnamed right of communication to the public within the meaning of § 15 Para 2 of the Copyright Act, construing the concept of the public broadly so that it can also include the successive enjoyment of the work.

It is to be expected that the problem will be solved in the course of the pending copyright law reform that will take place on the basis of the proposed Amended European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (98/C 108/03) and in the light of the new WIPO Copyright Treaty (WCT). The Federal Ministry of Justice has announced that it is to reform the right of communication to the public (First Discussion Draft of a Fifth Act Amending the Copyright Act dated July 7, 1998). In future, the author's rights are to include the right to make the work accessible or simultaneously perceivable to a number of members of the public or to make it accessible to an individual member of the public on the basis of an offer directed to the public. The right of communication to the public is to cover the right necessary for the online sector to make the work available to an individual member of the public on the basis of an offer to the public or to make it accessible to the public outside an arranged program (§§ 15 Para 2, 19a of the draft).

2. The question whether the temporary reproduction of the digital version of a work in the RAM of a computer constitutes a reproduction has not yet been completely clarified. The assumption of a reproduction is countered by the argument that such a reproduction often does not permit an independent use of the work but serves technical working processes, perception on the screen or intangible reproduction. In the light of the purpose of copyright, namely to grant the author a commercial participation in all exploitations of the work as far as possible, a reproduction in the copyright law sense is to be assumed if the technical reproduction leads to an increased use of the work. Since the reproduction in the RAM as a rule permits further uses of the work independent of already existing copies, it is largely regarded as a copy. In the case of computer programs, the reproduction in the RAM is expressly regarded as a reproduction pursuant to § 69c Para 1 No. 1 of the Copyright Act).

However, it is disputed as to what extent extremely short reproductions that last only a fraction of a second are to be qualified as reproductions. In the light of the ephemeral character of a reproduction when browsing or caching, it has been asked whether the copyright concept of a reproduction must be construed restrictively. However, the overwhelming view is that even in these cases a reproduction is to be assumed but may be regarded as permissible on the basis of the rightholder's implicit consent.

In contrast, interim reproduction within the framework of routing activities in the transport of files on the internet is not regarded as a reproduction.

The question whether temporary reproductions are prohibited is addressed by the proposed European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (98/C0359). Art 5 Para. 1 of the Draft lays down that temporary acts of reproductions that which are an integral part of a technological process for the sole purpose of enabling use to be made of a work or other subject matter, and having no independent economic significance, shall be exempted from the right of reproduction. (See 13. below).

3. Following the implementation of the "Council Directive 92/100/EEC of 19 November 1992 on the Rental Right and the Lending Right and on Certain Rights related to Copyright in the Field of Intellectual Property", the German legislature has established the rental right as an exclusive right of prohibition that is not subject to exhaustion through the disposal to the copy of the work. This approach corresponds with the rule in Art. 4 c of the Computer Program Directive. Performing artists (§ 75 Para 2, Copyright Act), recording manufacturers (§ 85 Copyright Act) and film producers (§ 94 Para 1 Copyright Act), but not, on the other hand, broadcasting companies (§ 87 Para 1 No. 2 Copyright Act) are also entitled to rental rights as part of the right of distribution. Pursuant to § 27 of the Copyright Act, the author is entitled to an irrevocable claim to payments if he grants the rental right in a video or sound recording to the producer of the sound recording or film. This can only be assigned in advance to a collecting society.

In contrast to the rental right, the legislature has not established the lending right as a right of prohibition, but has made use of the possibility provided by Art. 5 of the Rental and Lending Right Directive and has merely established a statutory claim to remuneration for public lending.

4. German law currently provides no access right with respect to copyright works. The only provision that is comparable to an access right can be found in § 69 e Copyright Act, which grants to the user, under certain circumstances, the right of decompilation of software and access to interfaces in order to establish interoperability.
5. See Question 4 above.
6. According to current German law, the private reproduction of radio and television broadcasts is exempt from the right of reproduction (§ 53 Para 1 Copyright Act), but there is a claim to remuneration against the manufacturers of reproduction devices and sound and video recording material (§ 54 Para 1 Copyright Act). This claim is to be asserted through the collecting societies (§ 54 h Copyright Act). The same applies to the private copying of a digital radio or TV broadcast.
7. In order to harmonize the interests of the general public in a restricted authorization-free use of copyright works with the interests of the authors, private use is in particular exempt from the copyright law right of prohibition pursuant to § 53 of the Act. The author is only entitled to a statutory claim to remuneration that is not linked to the individual reproduction process but consists of a fee payable by the manufacturers of reproduction devices and sound and video recording material and the major operators of copying equipment, and which is passed on through the price to the user of the possibility of reproduction that this creates. The fee is collected by the collecting societies and distributed to the authors.

The statutory rates of remuneration have not been changed since 1985, and have not even been adjusted to increased cost of living. They are hardly sufficient to satisfy the legitimate financial

interest of the author in participation even with respect to analog copies. This is all the more so in the light of the fact that copies in the digital sector involve no loss of quality whatsoever and consequently substantially impair the sale of phonograms. For this reason, there is agreement that the corresponding restrictive rules require reform in the light of digital copying technology. The Max Planck Institute for Foreign and International Patent, Copyright and Competition Law prepared an expertise opinion for the Federal Ministry of Justice in 1996 dealing inter alia with the revision of § 53 of the Copyright Act. The proposals are to maintain the privilege of digital reproduction for private use pursuant to Para 1 and digital reproduction for personal scientific purposes pursuant to Para 2 No. 1, to permit inclusion in a digital archive in future only for private and personal scientific purposes, and in all these cases to restrict the exemption to acts that the privileged person himself effects. For the rest, digital reproduction is to be exempt from the privilege of § 53 Copyright Act. On a European level Art. 5 of the Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society lays down an exhaustive list of the restrictions on the right of reproduction which is mandatory only with respect to temporary acts of reproduction and voluntary in all other cases.

8. Pursuant to § 54 Copyright Act, a claim for remuneration is only granted for such recording devices and such sound and video recording material that is clearly intended for the recording of broadcasts on video or sound recording material or for the transfer from one video or sound recording to another, namely for the field of private or other personal use. This includes first of all tape-recording devices, cassette and video recorders and the corresponding tapes, as well as digital recording devices and storage media. Currently, the manufacturers of reader printers (Federal Supreme Court, 1993 GRUR 553), scanners (Hamburg Court of Appeals, 1999 ZUM 248) and facsimile devices (Federal Supreme Court, 1999 ZUM 649) but not the manufacturers of computer hard discs are obliged to pay the fee. In the light of the increasing possibility for transferring copyright works, it is expected that an obligation to pay the fee will be introduced for computers.
9. Limitations on copyright in relation to reprography reveal the following scenario: According to Sec. 53 of the Copyright act it shall be permissible to make single copies of a work
 - for private use (Subsection 1)
 - for personal scientific use, if and to the extent that such reproduction is necessary for the purpose (Subsection 2, Paragraph 1)
 - to be included in personal files, if and to the extent that reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction (Subsection 2, Paragraph 2)
 - for personal information concerning current events,(1) in the case of a broadcast work (Subsection 2, Paragraph 3)
 - for other personal uses, (1) in the case of small parts of published works or individual contributions published in newspapers or periodicals, (2) in the case of a work that has been out of print for at least two years (Subsection 2, Paragraph 4).

According to § 53 Subsection 3 it shall be permissible to make or to cause to be made copies of small parts of a printed work of individual contributions published in newspapers

- for teaching, in non-commercial institutions of education and further education or in institutions of vocational educations, in a quantity required for one school class;
or

- for State examinations and examinations in schools, universities, non-commercial institutions of education and further education and in vocational education, in the required quantity if and to the extent that such reproduction is necessary for this purpose

According to § 53 Subsection 4 reproduction

- of a graphic recording of musical works,
- of a book or a periodical, in the case of essentially complete copies,

shall, where it is not carried out by manual copying, only be permissible with the consent of the copyright owner, in accordance with Sec. 53 Subsection (2), Paragraph 2, or for personal use, in the case of a work that has been out of print of at least two years.

Pursuant to § 54 a Copyright Act instead of a right of prohibition, the author of the work shall have a claim for payment of a reasonable fee against the manufacturer of devices intended for copying a work or a process of comparable effect, such fee being payable for the possibility of making such reproductions created by the disposal or other putting into circulation of the devices. If devices of this kind are operated in schools, universities, vocational training institutions or other institutions of education and further education, research facilities, public libraries or in establishments that make available the devices for the making of copies, the author is also entitled to a claim against the operator of the device for the payment of a reasonable fee. The assertion of the claim may only be made by a collecting society (§ 54 h Copyright Act).

10. In Germany there have been numerous discussions and proposals regarding Internet and Multimedia related issues, where both the issues of protection of technological measures and the issue of prohibition of temporary copies have been considered. However a discussion on the development of an access right is only at the beginning. Different interest groups have not yet given any concrete opinion on the issue.
11. German copyright law does not include provisions enacting an access right as such. The issue regarding temporary copies was already addressed under No. 2 above.

With regard to the prohibition of breaking or circumventing technical devices in order to gain access to the work, the only relevant provision is contained in § 69 f (2) of the German Copyright Act, which implements the EC Computer Programs Directive. According to § 69 f, and in addition to its general claims, the copyright holder has a specific destruction claim not only against the proprietor or possessor of infringing copies, but also against the proprietor or possessor of any device whose sole purpose is to facilitate the breaking or circumvention of technical program protection devices. The technical devices are mainly copying programs intended to break through copy protection, such as dongle circumventing programs. This claim may be exercised against any possessor and is therefore not restricted to action against the infringer alone. Furthermore, the possessor of such a device does not have to have knowledge of or be assumed to have knowledge of an infringement.

A broader protection against the breaking and circumvention of technical safeguard measures is possible through § 1 Act Against Unfair Competition, whose prerequisites are: the competitive individuality of the infringed or unlawfully copied subject matter and the obstruction of competitors (Dreier, Copyright Law and Digital Exploitation of Works, at <http://www.intellecprop.mpg.de/online-publikationen/dreier-digi-exploitation.html>, 20). This protection is, however, only available if the involved parties are competitors.

12. See 11. Above.

13. In this context, it should be noted that Germany will be constrained to legislate and implement the discussed issues in line with the directives of the EU. Especially, the Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society (98/C 108/03) addresses both the issue of temporary copies and the issue of circumvention of technical protection measures. As it is known, in this context the Directive provides for member states: (i) to implement an exception to allow certain acts of temporary reproduction (Article 5 Para.1); and (ii) to implement legal protection against activities enabling or facilitating the circumvention of technical protection devices (Articles 6 and 7) (See also the Berne Convention).

(i) In the first case, pursuant to current German law, as stated above under 2., temporary copies are in principle prohibited and subject to the reproduction right. It is generally accepted that, since the digital environment facilitates the copying of digital data files that have been made available to the users, the protection of the rights holders should be strengthened by a broad application of the right of reproduction, as is already the case with respect to the protection of computer programs and databases (§ 69 c and 87 b Copyright Act, with some restrictions in case of databases protected by a related right) – which will remain unaffected by the Directive. Therefore, acts such as digitisation, uploading, storage, downloading and printing of protected works would, in any case, be covered by such reproduction right. This understanding conforms with Article 2 of the Directive, pursuant to which such an "exclusive right to authorise or prohibit directly or indirectly, temporary or permanent reproduction by any means and in any form, in whole or in part" must be implemented by those member states which do not yet recognise such right in a digital environment (See also Article 9 (1) of the Berne Convention).

However, it is also generally accepted that, as can be read in recital 23 and Article 5 Para. 1 of the Directive, "temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are made an essential and integral part of a technological process, including those which facilitate effective functions of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2" (see also Article 9 (2) Berne Convention). Article 5 Para. 1 would have to be implemented into German law. However, this exception would not, in principle, interfere with other general exceptions already existing under German law, which concern not only the reproduction right and which would have to be modified in line with the introduction of the "right of making available" (or "transmission right", as provided in the German Proposal) and with Article 5 Para 2, 3 and 4 of the Directive as well.

The exception should include those acts of reproduction that are necessary for the use of protected works in digital form by a lawful user, provided that such use is in accordance with the intended purpose (i.e. client caching), in a similar manner to the current §§ 69 d (1) and 55a Copyright Act regarding computer programs and databanks.

As stated in Article 5 Para. 4 of the Directive, the exception should only apply to certain specific cases and be subject to a restrictive interpretation, especially to avoid its use in a manner which unreasonably prejudices the rights holder's legitimate interests or conflicts with the normal exploitation of their works or other subject matter. The concepts of "incidental reproduction" and "no economic value itself" are certainly not yet determined and will have to be specified in practice, along with the technical and economical development of the digital environment. In this respect, recital 23 states that caching and browsing should be covered under this exception; however, the fact that particularly proxy or server caching may negatively affect the interests of

rights holders and the normal exploitation of their rights (for example, the delivery of cached copies may not be counted as a "hit" for royalty calculating purposes) makes the question of the scope of the exception, when worded in such a general way, a very controversial issue.

(ii) Protection against breaking or circumvention of technological protection devices has been partially introduced in Germany with regard to computer programs, but a general provision has also been claimed in Germany. However, there are well-known arguments that the protection of technology may trigger the risk that technology and not law will decide the issue of gaining access to the work and lead to unjustified restrictions of the freedom of access to information and negatively affect the effectiveness of copyright limits and exceptions. Therefore, protection of technical measures should only be provided with respect to circumvention devices which are designed to facilitate infringing acts and without a significant non-infringing use, that is, which intend to circumvent technical protection without authorisation of the right holder or without coming within an existing legal exemption. These conditions have been reflected in the current version of Article 6 of the Directive by linking the purpose of the circumventing device to an infringing result.

Several disputed questions in this context, such as the description of the means of circumvention or the acts which fall under the scope of protection have been partially dealt with in Article 6 (obligations as to technical measures) and Article 7 (obligations concerning rights-management information) of the Directive. According to Article 6 Para.1 and 2, protection is provided against activities (including manufacturing and distribution of devices or the performance of services) which have only a limited commercially significant purpose other than circumvention of technological measures of protection of copyright, related rights or sui generis rights provided by law. A prohibition of activities which only have the purpose of circumvention, such as the corresponding provision in § 69 d Copyright Act addresses, would be, in fact, too narrow, but providing an extremely wide protection should also be avoided.

In contrast with current protection under German law in § 69 f Copyright Act, as stated above, Article 6 of the Proposal requires that the person who carries out the prohibited activities acts with the knowledge of, or has reasonable grounds to know, that such activities will enable or facilitate without authority the circumvention. It is unclear whether the implementation of Article 7 in Germany could provide for broader protection by not requiring the conditions of knowledge or reasonable grounds to know, at least with respect to cease and desist and destruction claims, as is the case with the destruction claim of § 69 f Copyright Act.

The Directive is unclear as to which subjects - only right holders or also providers of encrypted material - would have claims in case of infringement of the obligations stated in Articles 6 and 7. The definitions of "technical measure" in Article 6 Para. 2 and "rights-management information" suggest that only rights holders would be entitled to raise claims in this respect, which, considering the risks stated above, appears to be justified.

Finally, the protection of technical measures does not interfere with the decompilation right of the lawful software user under the conditions of § 69 e Copyright Act.

14. The decisions provided hereinafter are not exhaustive, but representative for the questions dealt with.

(i) Decisions regarding the temporary reproductions within lawful use of a software program (§ 69 c Copyright Act):

- BGH GRUR 1994, 363/365 - Holzhandelsprogramm
- BGH GRUR 1991, 449/453 - Betriebssystem

(ii) Decisions regarding circumvention of technical measures (§ 69 f Copyright Act):

- OLG Düsseldorf CR 1997, 337 ff.
- OLG Karlsruhe CR 1996, 341/342
- OLG Düsseldorf CR 1996, 737/739
- BGH CR 1996, 79/80
- OLG München CR 1996, 11/16 ff
- OLG Stuttgart CR 1989, 685

* Dr. Torsten Bettinger, LL.M., BETTINGER - SCHNEIDER - SCHRAMM, Patent- und Rechtsanwälte, München;

** Dr. Michèle Klein, BAKER & McKENZIE, Frankfurt

RA Dr. Torsten Bettinger, LL.M.
Cuvilliesstr. 14a,
D-81679 München
Tel. +49 - 89 - 59 90 80 0
Fax. +49 - 89 - 59 90 80 22
E-Mail: bettinger@bettinger.de