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Questionnaire – Boundaries and Interfaces

Answers of the German Group of ALAI

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1. The Subject-Matter of Protection – Works

1.1 How do your legislators or case law define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

Under German law, literary works in the form of works of language are all those personal intellectual creations that express intellectual content by means of language.[2] The creator of the work must express a verbal or intellectual content or a feeling.[3] The personal intellectual creation can be embodied in the form or in the concrete content, thus by the selection or arrangement of the material.[4] The human creator must individually exert his expressive choice in creating the object. The threshold of originality is generally rather low with respect to literary works.[5] However, this might be different with regard to practical or scientific texts where the threshold is higher because the content as such will typically be unprotected in these fields, and only the structure of the text (the concrete form of shaping this content in an argument) can express the necessary individuality.

According to Article 2(1) No. 1 Copyright Act, works of language can be writings or speeches. Writings express the intellectual content by characters or different signs.[6]

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[2] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 79.

[3] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 81.

[4] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 84.

[5] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 89; *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 85.

[6] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 82.

Writings include e.g.: novels, stories, novelettes, poems, libretti, scientific papers and literature of all kinds.

According to Article 2(1) No. 1 Copyright Act, speeches are works of language as well that are defined as verbal expression of intellectual content.[7] Hence, ex tempore speeches will be protected, given the general conditions of copyright protection are met. But one has to bear in mind that speech constitutes a protectable work of language only on the condition that it is a personal intellectual creation (i.e. that substantial individuality is present). Examples of this are: recitals, addresses, lectures, sermons, interviews, reportages and impromptus (ex tempore speech). The latter are protected by the same requirements as other kinds of speeches. In context of impromptus speech it is important to mention that under German law a tangible embodiment of the work is *not* a precondition for copyright protection.

1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by de minimis rules? [In the EU discuss Infopaq and how the case is accommodated in national law].

Generally, very short works, work titles or phrases can be copyrightable under Article 2(1) Copyright Act either as part of a work or as a work title. However, in the individual case protection is mostly denied because the work does not meet the further requirements of protection. Both autonomous works and parts of works must constitute a *personal intellectual creation*. Though the eligibility for protection does not depend on the quantitative outline of a work in general, the originality standard of a personal intellectual creation, as a matter of fact, cannot easily be fulfilled within a small number of words. That is also the reason why the German Federal Court of Justice (*Bundesgerichtshof*) has not yet reached a conclusive decision on that matter. Concretely, in none of the already presented cases a sufficient degree of originality was present in slogans, work titles and the like.[8] With regards to advertising slogans only

[7] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 83.
[8] Federal Court of Justice, 1958 *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR) 354 – *Sherlock Holmes*; Federal Court of Justice, 1960 GRUR 346, at 347 – *Naher Osten*; Federal Court of Justice, 1977 GRUR 543 – *Der 7. Sinn*; Federal Court of Justice, 1991 GRUR 218, at 219 – *Verschenktexte*.

two rulings of lower courts exist that granted copyright protection – both of which were criticized as being questionable in terms of justification and their final outcome by the scholarly literature.[9] However, there is an alternative ground of protection for certain titles or slogans based on trademark law.

In its recent *Infopaq*-decision[10], the European Court of Justice ruled upon the interpretation of the requirements for protection of works in the context of the concept of partial reproduction in Directive 2001/29/EC. Against the background of international law and specific Community Directives for certain categories of works (e.g. databases, computer programs, photographs), the court held that to be eligible for protection a work must only be original in the sense that it constitutes the author's "own intellectual creation". Since European directives explicitly harmonize the definitions of copyrightable works *only* with regard to databases, computer programs and photographs, the judgment has been criticized as a surprising generalization in German doctrine. In fact, German doctrine still emphasizes that there is no uniform level of protection with regard to all copyrightable subject-matter in European copyright law. In the particularly intricate field of design protection, a concept of full harmonization would even explicitly contradict Art. 17 (2) Directive 98/71/EC. Consequently, in German literature, the decision has widely been regarded as only imposing a minimum requirement for copyright protection which leaves room for further concretization and differentiation by the national courts.[11] Thus, from the viewpoint of German law, national laws that demand a higher level of originality for particular categories of works do not interfere with European Community law.[12] This is because according to the *Infopaq*-decision, the *national court* has to determine in each individual case whether the work is an own intellectual creation of the author.[13] Hence, the European Court of Justice effectively leaves the *application* and *determination* of the level of creativity to the national courts. With regard to the determination of the protection threshold, the

[9] Cologne Court of Appeals, 1962 GRUR 534, at 535 – *„Der Mensch lebt nicht vom Lohn allein"*; Berlin Court of Appeals (*Kammergericht*), 1923 GRUR 20 – *Paradies der Damen*; Berlin Court of Appeals, 1926 GRUR 441, at 443 – *Alt-Heidelberg – Jung-Heidelberg*; Berlin Court of Appeals, 1929 GRUR 123 – *Wien, du Stadt meiner Träume*.
[10] ECJ, Judgment of 16 July 2009, C-5/08, [2009] ECR I-6569 – *Infopaq International A/S v Danske Dagblades Forening*.
[11] *Schulze*, 2009 GRUR 1019; *Von Ungern-Sternberg* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 15 note 40.
[12] *Walter* in Walter (ed.), Europäisches Urheberrecht, 1st ed. 2001, p. 1118, note 8.
[13] *Leistner*, 2010 GRUR 987, at 988.

national courts are granted a certain amount of discretion and can still differentiate between different categories of works according to the prevailing opinion in Germany.

With reference to the *Infopaq*-decision, the German Federal Court of Justice clarified in its recent *Perlentaucher*-decision[14] that small parts of a work can be eligible for copyright protection, provided that these small parts express the personal intellectual creation of the author in terms of Article 2(2) Copyright Act. However, single words or short sequences of words will generally not qualify for copyright protection due to the lack of a sufficient degree of originality.

1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

Artistic works are regulated by Article 2(1) No. 4 Copyright Act and comprise works of fine art, works of architecture, and of applied art. Article 2(1) Copyright Act lists rather comprehensively some types of works but does *not* give an *exhaustive* list of copyrightable subject-matter. Thus, the task of defining these works has been purposely left to the courts and scholarly literature. Accordingly, eligibility for copyright protection does not depend on formal requirements in terms of a classification as a certain type of work as listed in Article 2(1) Copyright Act, but rather on the originality standard of personal intellectual creation. Thus, a work must be of a somehow discernible design and express the personal intellectual creation of a human being. An intellectual content and the individuality of the creator thus form the essential characteristics of a copyrightable work.[15]

Works of fine art (e.g. sculpting, painting, art design) are works of non-functional art. The creator expresses the artistic content through means of form and color, whereby he aims especially at the aesthetic reception by the audience. The act of creation originates from the creator's activity whereby he shapes and forms the object.[16] Additionally, drafts of artistic works are protected by copyright law as well.

[14] Federal Court of Justice, Judgment of 1 December 2010, 2011 GRUR 134.
[15] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 137.
[16] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 136.

Works of applied art are objects of functional art that feature an artistic shape.[17] They serve a specific purpose. In this field, according to the prevailing opinion, the threshold of originality is substantially higher than in the field of fine art in the sense of a certain 'level of creativity' (*Schöpfungshöhe*).

A conclusive definition of "art" has not (yet) been achieved by case-law. However, it is also not necessary for the purposes of copyright protection. That is because copyright protection is not dependent on any classification of the work in question but only on the fact that the work is the creator's personal intellectual creation, *i.e.* that the work reflects the creator's individuality.[18]

1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- **surveillance art, installations, collage.**
- **performance art.**
- **Conceptual art**

Contemporary art can be defined as fine art produced by contemporary artists. A particular style, technique, form or the affiliation with a specific art movement is not required.

Only the art itself, *i.e.* the result of the artistic work but not the style, technique or a certain manner, is protected by copyright.[19] A copyrighted piece of art is created by means of a forming activity and primarily aims at generating a feeling of aesthetics in the observer.[20] The aesthetic content has to reach a level at which the relevant public, *i.e.* an average person who is reasonably amenable to the arts, considers the object artistic.[21] The kind of material used for the work of art is irrelevant with respect to its protectability. The work of art can be made of permanent and non-permanent[22] material

[17] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 158.
[18] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 134.
[19] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 148.
[20] *Schulze* in Loewenheim (ed.), Handbuch des Urheberrechts, 2nd ed. 2010, § 9 note 97.
[21] Munich Court of Appeals, 1987 GRUR 290, at 291 – *Wohnanlage*.
[22] Examples: eat art; ice sculpture.

or organic[23] substances.[24] The artistic value of a work of art is irrelevant with regard to its protectability.

The jurisdiction uses a quadrinomial concept of work (*Werkbegriff*) and defines it quite broadly. Therefore, in practice there are rarely disputes about the fact that a piece of art is a "work" in the meaning of the Copyright Act. Thus, only few court rulings touch on this point.

Difficulties may arise with regard to the classification in the field of fine arts, however, the case-law is rather generous regarding art: a Happening[25] as an art form, which involves actors or even the audience being a part of the event, as well as the light installation "Neonrevier" in Hamburg[26] or the completely covered Berliner Reichstag by the artists Christo and Jeanne Claude[27] were recognised by German courts as protectable works. In the happening case, the Federal Court of Justice left it open of whether art forms, such as happenings or fluxus, have to be characterised as works of the fine arts or as theatrical works, such as pantomime, dance and the like. Because of the open-ended catalogue of protectable categories of works, this issue of characterization could be left open by the court.

Thus, the concept of work is adequately dynamic to cover new developments of artistic expression. Only mere *objets trouvé* will be denied protection as they do not reflect the individual creativity of the artist. However, even in this field, the original selection, arrangement or presentation of different (surprisingly combined) materials, objects and other elements might vest such forms of art with the necessary individuality[28].

Copyright protection was denied to a contemporary work of performance art in the *Eva & Adele* judgment of the Regional Court of Hamburg (*Landgericht Hamburg*, overruling the court of first instance)[29]: The court did not regard a mixed sexual couple that always appears in exactly the same, very feminine make-up and clothes and stages

[23] Berlin Court of Appeals, 2001 *Zeitschrift für Urheber- und Medienrecht* (ZUM) 590, at 591.
[24] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 147.
[25] Protection affirmed in Federal Court of Justice, 1985 GRUR, 529 – *Happening*, where the Federal Court of Justice left the issue of characterization (as a work of fine art or as a work of pantomime) open; protectability was affirmed by the preceding instance: Berlin Court of Appeals, 1984 GRUR 507 – *Happening*, where the Berlin Court of Appeals tended to characterize the happening as a work of fine arts; not decided in Düsseldorf District Court, 2009 ZUM 975, at 976.
[26] Hamburg District Court, 1989 GRUR 591 – *Neonrevier*.
[27] Federal Court of Justice, 2002 GRUR 605 – *Verhüllter Reichstag*.
[28] See *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2, note 154.
[29] Hamburg District Court, 1999 ZUM 658 – *Eva und Adele*; for the judgment of the court of lower instance, *cf.* Hamburg Local Court, 1998 ZUM 1047 – *Eva und Adele*.

itself and *its whole life* as a *living artwork* as a work in terms of Article 2 Copyright Act (with numerous further amendments). In fact, this judgement has justifiedly been criticised in legal literature[30].

Conceptual art:

As far as conceptual art is concerned, the overall idea and its *specification* in an individually expressed conception are of importance. The Federal Court of Justice (*Bundesgerichtshof*) considers a purposefully organized and conceptualized artistic performance a work of art in terms of Article 2 Copyright Act. Whilst such planning can be of any kind, the existence of an individual conception which distinguishes the performance from the normal course of life is essential. This can even be achieved by rather general directions as to the aesthetic means and activities. Thus, even spontaneous Happenings can be protected by copyright as a detailed choreography is not an essential requirement for protection. In the end, the criteria for copyright protection are the same as for every other work of art. In the context of individuality copyright protection is provided if there is a substantial artistic effort that is aesthetic and differs from the normal course of life. The incorporation of an underlying conception can provide additional support to identify individuality. A permanent form is not required for copyright protection.

Surveillance art, installations, collage:

As to collages, it is important that it is never the abstract idea of combining several pictures or symbols that is protected, but solely the individual expression of this idea in a concrete work of art. Examples in point are the selection of concrete elements, their specific arrangement and proportion to each other and similar elements of individuality.

Article 2(1) No. 3 Copyright Act mentions a category of works headed “works of pantomime” including the art of dancing. Choreographic works form a subclass of this category. Pantomimic works are works where intellectual content is mainly communicated through physical expression, for example emphasized movements of the body, facial expressions, and gestures. These works can only be protected if they are personal intellectual creations. The expression of certain intellectual contents (e.g. thoughts, sentiments or emotions) is fundamental; this is not the case, when already

[30] See *Raue*, 2000 GRUR 951.

established activities are being performed (e.g. certain figures in figure skating) and consequently the personal touch is missing.

1.5 Are there any judicial decisions/ academic opinions on other forms of expression, whether protected or not (e.g. Perfumes)?

Only the specific expression of a work is protected and not its content. The content of the work has to remain free for further use by the general public to create new works, given that every creator borrows from earlier works. Judicial decisions on other forms of expression and its protection do not exist.

According to an academic opinion the scent of perfumes can be protected by copyright.[31] The protectability of perfumes is not contrary to Article 2(1) Copyright Act which does not enumerate perfumes, because the enumeration is non-conclusive. However, given the general conditions and scope of copyright protection in Germany, it seems hardly conceivable to establish individuality and a copyright relevant use with regard to scents.

Virtual figures or objects can be copyrighted.[32]

Copyright protection of modern art forms, like *objets trouvés*, Ready-Mades or Minimal-Art is limited to individual creations. In the case of Ready-Made-Works the artist presents an object which was not created by the artist himself but was previously produced by a third party. Minimal-Art employs the reduction of the object to its minimum, which means 'reduction to shapes or colours.[33] Copyright protection is not granted in the absence of a creative activity of a human being or expression of individuality. The presentation of an already existing object as such is not sufficient for copyright protection.[34] However, a sufficiently original combination and arrangement of different elements might be eligible for copyright protection[35].

[31] *Balaná*, 2005 *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (GRUR Int) 979; *Fröhlich*, 'Düfte als geistiges Eigentum', 2008, p. 74; *cf.* also *Fehlbaum*, 2009 *Archiv für Urheber- und Medienrecht* (UFITA) 23.
[32] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 149; *Schulze*, 1997 ZUM 77, at 80.
[33] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 150.
[34] *Bullinger* in Wandtke/Bullinger, Urheberrecht, 3rd ed. 2009, § 2 note 91; *Dreier* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 149; *Schulze* in Loewenheim, Handbuch des Urheberrechts, 2nd ed. 2010, § 9 note 103.
[35] *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 154.

1.6 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)

The basis of protection is the protection granted to pantomimic works, Article 2(1) No. 3 Copyright Act. Choreographic works are a subclass thereof (confer Question 1.4). Yet they are only protected if they constitute a personal intellectual creation. Dancing or pantomime as media of physical communication have to convey intellectual content or emotions to be copyrightable.

Sports and acrobatic performances usually do not fulfil said requirement as they do not express any kind of intellectual content – thoughts, sentiments or emotions – but have the mere purpose of achieving a certain athletic goal; physical strength, skilfulness and perfection are the dominant factors. Hence, the protection of such events under copyright law is impossible because athletes do not perform a copyrightable work of art.[36] Also with regard to figure skating the athletic contest is of major interest. Performances according to Article 2(1) No. 3 Copyright Act need to pursue an additional artistic objective to become subject-matter of protection.

2. Creativity – the Originality Standard

2.1 How does your legislation set out the requisite originality standard?

According to Article 2(2) Copyright Act, a copyrightable work has to be the result of a personal intellectual creation. Therefore, it is necessary that the author has sufficient expressive choice for the development of individual aspects. The personal creation has to reach a certain level of originality. The work has to express the creative mind of the author, which means that it needs to reflect a sufficient degree of individual characteristics. In general, it does not matter if these characteristics are part of the content or the shape; different criteria apply in the field of practical or scientific expressions (namely texts or works of applied art) where the content of the work as such remains free. The level of originality is the quantitative determination of the requirement of individuality. This definition merely sorts out those works that could not under any circumstances meet the threshold of originality, because they do not feature

[36] *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 146.

any individual characteristics. This applies to those works that everyone would construe in a similar way and those that are composed of obvious and easily accessible contents and forms. The criterion of individuality excludes from copyright protection the mass of usual and banal works that do not reflect any evidence of authorship. Facts such as novelty, function, quality and quantity, expenditures/costs and illegality are insignificant.

2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

In Germany, the requirements for a sufficient individuality are not set out in the statute. Consequently, the statute does not preclude case law from developing different criteria for different kinds of works. In general, for most kinds of works the courts require a quite similar rather low level of originality. Even the so-called "small coin" (*kleine Münze*), the simple but barely protected intellectual result, is regularly protected.[37]

The requirements are stricter for those works of writing that are not pure literary works, i.e. journalistic or other "practical" writing as well as works with scientific or technical content.[38] According to the jurisdiction, in these fields a substantial level of creativity in comparison to the average expressions in the field is necessary. These strict requirements have been criticised in parts of legal literature as being inconsistent in comparison to other categories of works.[39]

Works of applied art need an individual characteristic that reflects an aesthetic content to such a degree that the work can be considered a work of art according to the governing social norms and customs (*im Leben herrschende Anschauungen*). The requirements for works of applied art are stricter to assure that their copyright protection does not supersede the protection of registered designs for products of lesser individuality.[40] Criteria, such as the presentation in art exhibitions or the acceptance as art in circles of experts in the field can play a role here in order to determine the necessary substantial "level of creativity". However, the decisive criterion is the overall

[37] *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 4.
[38] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 32.
[39] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 36; *Nordemann* in Loewenheim (ed.), Handbuch des Urheberrechts, 2nd ed. 2010, § 9 note 22 ff; *Vinck* in Fromm/Nordemann, Urheberrecht, 10th ed. 2008, § 2 Rn 19, 63; *Katzenberger*, 1990 GRUR 94, at 99.
[40] *Loewenheim* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 2 note 34.

impression of the individual features of the work upon an average person who is familiar with art issues.

On the other hand the requirements for individuality and level of creativity can be lowered when the leeway for expressive choice is very narrow so that an individual creation becomes hard to achieve. Cases in point are summaries of writings that need to follow the structure and formulation of the original work, or maps and plans that do not leave much expressive choice in specifying the underlying geographical and other data either.

2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has "sweat of the brow" been treated in recent case-law?]

The courts do not require a specific level of creativity in this field; the so called "small coin" (*kleine Münze*) of copyright is protected.[41] Collections of works are copyrightable according to Article 4(1) Copyright Act. A database is a subset of collection works according to Article 4(2) Copyright Act. Collections and databases are defined as collections of works, data or other independent elements which constitute a personal intellectual creation. The personal intellectual creation in terms of Article 2(2) Copyright Act is divided into the selection (process of composition of elements) or arrangement (access of the selected elements) of the different elements of the collection works.[42] The intellectual creation has to become apparent in the selection and arrangement of the content so that an additional explanatory content is needed that goes beyond the mere compilation of the independent elements. Even if this organising principle by its own virtue, *i.e.* separated from the content, could not qualify for copyright protection, since abstract thoughts and ideas cannot be protected by copyright, it yields protectability to the collection as a concrete application, e.g. in form of a reference book, and thus results in a creative expression. The collection does not have to be very brilliant or extraordinary, but must only be different from the common and obvious criteria of arrangement that any creator would apply. The intellectual creation has to go beyond technical, schematic or routine selections and arrangements, which are not sufficient. The collection has to be characterized by an individual main emphasis in

[41] *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 11 et seq.
[42] *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 1.

terms of content or an individual organising principle which distinguishes the collection from other collections.[43] The existence of an in any rate minimal individual creation in comparison to the commonly used selections or arrangements is sufficient for the protectability. Stricter requirements are not necessary. It is irrelevant whether the collection of works comprises protectable or not protectable elements. Exemplarily we can refer to encyclopaedias, festschrifts, cookbooks, newspapers and electronic databases. In result, the criterion in this field protects any collection of elements which expresses a (minimal) own intellectual creation and thus reflects the European threshold of protection under Art. 3 (1) Directive 96/9/EC (Database Directive). Therefore, the German legislator did not chance the statute with regard to the protection threshold when implementing the Database Directive, as established case law in this field reflected the standard of "the author´s own intellectual creation" anyway.

The issue of the "sweat of the brow doctrine" has not been touched upon by German courts in a while. According to the prevailing opinion in Germany, the mere expense of labour, time and skill does not justify copyright protection. Protection of investment in the creation of a database is the main rational for the *sui generis* protection of databases according to Article 87a Copyright Act (see question 2.4).

2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).

Database works in terms of Article 4(2) Copyright Act constitute a subclass of collection works and also require a personal intellectual creation in the selection or arrangement of material to be eligible for copyright protection. For example, characterization as database works has been affirmed with regards to anthologies[44] and encyclopedias[45]. The issue of copyright protection for TV-programs has rarely been touched upon by the courts but has been left open in a more recent judgment of the

[43] *Schulze* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 2 note 12.
[44] Federal Court of Justice, 2007 GRUR 685.
[45] Hamburg Court of Appeals, 2001 GRUR 831.

Berlin Regional Court (*Kammergericht*)[46]. A rather practical, commercial database structure (for pharmaceutical sales data) was held to be copyright protected by the Frankfurt Court of Appeals (*OLG Frankfurt*) in its *IMS-Health* judgment[47]; as this structure (due to network effects, high switching costs and other factors) had developed into a *de facto* industry standard for the sales of such data to pharmaceutical companies, this consequently led to ultimately successful proceedings for a compulsory license on the basis of European competition law[48]. In contrast, protection as a database work was denied for telephone directories[49] and statute books[50], because they did not meet the minimum standard of personal intellectual creation in the collection or arrangement of their content.

According to Articles 87a *et seq.* Copyright Act, which implement the Database Directive 96/9/EC, a *sui generis* right of protection can be granted to the maker of a database for the protection of his substantial investment in the creation of such database[51]. A database within the meaning of Article 87a Copyright Act is a collection of works, data or other independent elements arranged in a systematic or methodical way the elements of which are individually accessible either by electronic or by other means.[52] The neighbouring right of Article 87a Copyright Act does not require a personal intellectual creation but a substantial investment. Subject of protection is the investment in the obtaining, verification and presentation of the database's content, *i.e.* the investment in the creation of the database. The investment can be of financial nature but also consist of labour, time and skill. In consideration of the investment as subject of protection, the protection relates to the database as such but not to its content or heading. That is, the protected specific substantial investment in the obtaining, verification and presentation of the content of the database has to be strictly distinguished from the content itself. Therefore, in theory the same data (content) can be gathered together independently by another database maker. This of course is impossible in so-called *sole source data* situations and where a protected database

[46] Berlin Court of Appeals, 2002 *Multimedia und Recht* (MMR) 483 – *Werbeblocker „Fernsehfee"*; *see* also *Leistner*, in: Erdmann, Leistner, Rüffer & Schulte-Beckhausen (eds.), *Festschrift für Michael Loschelder*, 2010, p. 189 *et seq.*
[47] *See* Frankfurt Court of Appeals, 2002 MMR 687.
[48] *Cf.* ECJ, Case C-418/01, [2004] ECR I-5039 – *IMS Health v NDC Health*.
[49] Federal Court of Justice, 1999 GRUR 923 – *Tele-Info-CD*.
[50] Munich Court of Appeals, 1997 *Neue Juristische Wochenschrift* (NJW) 1931.
[51] *See* comprehensively *Leistner*, The Protection of Databases, in: Derclaye (ed.), Research Handbook on the Future of EU Copyright, 2009, p. 427 *et seq.*
[52] *See* Article 87a Copyright Act.

structure has developed into a *de facto* industry standard which is why in such situations under certain conditions a compulsory license can be granted on the basis of competition law[53].

The maker of the database has the exclusive right to reproduce, to distribute and to communicate to the public the whole database or a qualitatively or quantitatively substantial part thereof. The reproduction of insubstantial parts of the database is protected against repeated or systematical reproduction provided that these acts run counter to a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.[54] The scope of protection is crucially dependent on the reproduction of a substantial part of the protected database. Eventually it is decisive, whether the reproduction of a part of the database causes a qualitatively or quantitatively substantial harm to the investment, which should generally be denied for the reproduction of separate sets of data.[55]

Sui generis protection of databases has been granted for: schedules of events[56], online railway timetables[57], link collections[58], online classifieds[59], topographic maps[60], and collections of online headlines[61]. Telephone books (*i.e.* the white pages) will not be protected as database works because of the absence of a sufficient degree of originality in the collection or arrangement of their content. However, they can be protected as a database under the *sui generis* regime[62].

3. Achieving Access for the visually impaired

[53] *See* ECJ, Joined cases C-241/91 P and C-242/91 P, [1995] ECR I-7430 – *Magill*; ECJ, Case C-418/01, [2004] ECR I-5039 – *IMS Health v NDC Health*. *See* further *Leistner*, Intellectual Property and Competition Law: The European Development from *Magill* to *IMS Health* Compared to Recent German and U.S. Case Law, 2005 *Zeitschrift für Wettbewerbsrecht* (ZWeR) 138 *et seq*.
[54] *See* Article 87b German Copyright Law.
[55] *Dreier* in Dreier/Schulze, Urheberrechtsgesetz, 3rd ed. 2008, § 87a note 5 et seq.
[56] Berlin Court of Appeals, 2000 *Computer und Recht* (CR) 812.
[57] Cologne Regional Court, 2002 MMR 689.
[58] Cologne Regional Court, 2000 CR 400.
[59] Cologne Regional Court, 1999 CR 593.
[60] Munich Regional Court I, 2006 GRUR 225.
[61] Munich Regional Court I, 2002 MMR 58.
[62] Federal Court of Justice, 1999 GRUR 923 – *Tele-Info-CD* = 31 International Review of Industrial Property and Copyright Law (IIC) 2000, 1055; *cf.* further on this case *Leistner*, 31 IIC (2000), 950 *et seq*.

3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?

The German Copyright Act provides for a limitation of protection in favour of disabled persons to overcome discrimination. According to Article 45a(1) Copyright Act protected works may be reproduced and distributed, but not communicated to the public (Article 15(2) Copyright Act), provided that the reproduction does not serve commercial purposes. The limitation of protection does not only apply to the visually impaired but anyone with reduced perception due to a physical handicap. The work must not be available in a perceivable form yet or the available form must not be suited for the individually intended purpose. [63]

The author of the work is entitled to remuneration for the use according to Article 45a(2), unless only individual copies have been made. Claims may be asserted by a collecting society only.

The consumption of the work in an individually appropriate way is additionally supported by the limitation for private and other personal use in Article 53(1) Copyright Act, provided that the person reproduces the work for private use only.

[63] *See* Explanatory Memorandum, Official Record of the German Parliament (*Bundestagsdrucksache*) 15/38, p. 18.

3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?

The limitation of protection relates to all types of protected works. Whilst the use of literary works is of major interest, also cinematographic works are concerned.[64] Article 45a Copyright Act facilitates the operation of libraries for the visually impaired. Access to the work is not exclusively granted through institutions so that the impaired have immediate access to copies of the work.

3.3 Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?

The limitation of protection provides for the reproduction and dissemination of the work in hardcopy. Communication to the public (Article 15(2) Copyright Act) is not permitted. The reproduction and dissemination are permitted solely if necessary to facilitate the consumption of the work and must not serve commercial purposes.

3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

The German Federal Government currently does not support any international initiative with regard to the expansion of limitations of protection of copyright in favour of the visually impaired. However, in response to the public consultation "Priorities for a New Strategy for European Information Society"[65] issued by the European Commission, the German Federal Government under the point "Steps to an open access content to people with disabilities" referred to the Directive 2001/29/EC on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. The German Government stated that in accordance with the relevant provisions of international

[64] *Melichar* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 45a note 1.
[65] Additional communication by the German Federal Government to point 6 "Promoting access to creativity at all levels" of the questionnaire issued by the European Commission „Post-i2010: Priorities for New Strategy for European Information Society (2010-2015)", Bonn, 6 October 2009.

treaties, anyone who intends to use a copyrighted work in a way that is not covered by exceptions to or limitations of protection as provided by the national copyright, needs to obtain the author's permission for that use. In that context the German Federal Government advocates (collective) licensing agreements between those institutions that are entrusted with the management of the authors' rights and the representatives of the impaired.

3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?

The aforementioned written comment points out a private licensing agreement between the collective management society VG WORT, representing authors and publishers, and the Mediengemeinschaft für blinde und sehbehinderte Menschen (Medibus) e.V., representing the interests of the blind and visually impaired with regard to access to literary works. This agreement facilitates the distribution of editions of literary works in embossed printing and audio books. It adapts the provisions of the general copyright administration agreement of the VG WORT with its members, thereby permitting Medibus e.V. to offer digital versions of the protected works to its members via download, streaming or e-mail. Hence, the private agreement complements the limitation of protection provided for by Article 45a Copyright Act with respect to the right to reproduction and distribution of the works but not with respect to the right to making available to the public.[66]

4. Access to the Internet as a Human Right

4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

Despite broadband access to the internet being a vital element to the information society, the access to the internet as such has not yet been regarded as a human right or a right similar thereto. In Germany, there is no constitutional or sub-constitutional

[66] *Ibid.*; *cf.* also *Melichar* in Schricker/Loewenheim (eds.), Urheberrecht, 4th ed. 2010, § 45a note 4 et seq.

provision for the right to enjoy broadband access to the internet. In consideration of the fact that the access to broadband infrastructure constitutes the basis of innovative media services with high economic potential, the German Federal Government is dedicated to supplying internet access with at least 1 Mbps[67] to 100% of all German households by the end of 2010 and even up to 50 Mbps to 75% of households by 2014 as part of the so-called "broadband strategy".[68]

Currently, there is a debate on qualifying broadband access as a universal service in terms of Article 78(1) German Telecommunications Act[69], so that the supply with affordable internet access especially in remote and rural areas would be secured. The incorporation of broadband access into the list of basic services is meant to countervail the digital separation of society. Each and every household and business that is constructed in accordance with the relevant building laws would be entitled to a broadband access in adequate quality. Still, a legislative implementation of such entitlement is not to be expected at this point. The German Federal Government as well as the Federal Network Agency have expressed their concerns with the qualification of broadband access as a universal service.[70]

4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

Does not apply.

5. Orphan Works

[67] According to the European Union and the International Telecommunications Union (ITU) broadband access is defined by an internet connection with at least 2 Mbps. According to the German Federal Ministry of Economics and Technology 348 Kbps are sufficient to be deemed broadband access.

[68] Federal Ministry of Economics and Technology, Broadband Strategy of the German Federal Government, available at http://www.zukunft-breitband.de/.

[69] *Cf.* http://www.vatm.de/fileadmin/publikationen/studien/18-02-2011_positionspa; http://www.gruene-bundestag.de/cms/medien/dok/316/316993.gruene_medienpolitik.html; pier_breitbandausbau.pdf (last visited 21 March 2011).

[70] Comment of the German Federal Government on the progress report 2006/2007 issued by the German Federal Network Agency for the market areas telecommunications and postal markets and special report No. 50 and No. 51 of the Monopolies Commission „Wettbewerbsentwicklung bei der Telekommunikation 2007: Wendepunkt der Regulierung" and „Wettbewerbsentwicklung bei der Post 2007: Monopolkampf mit allen Mitteln", p. 12, dated 4 November 2010, available at http://www.bmwi.de/BMWi/Redaktion/PDF/stellungnahme-der-bundesregierung-bundesnetzagentur-neue-version,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

5.1 Are there existent legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

To date, there are no legislative provisions in relation to orphan works; neither in German, nor in European law.

In the communication "Digital Agenda for Europe"[71] the European Commission has proposed as "Key Action 1" a directive on the preservation of orphan works by 2010 (page 9). A proposal for a directive has not yet been passed.

Additionally the communication from the Commission "Copyright in the Knowledge Economy"[72] states with regard to orphan works at that time:

> "The orphan works problem will be examined in an impact assessment which will explore a variety of approaches to facilitate the digitisation and dissemination of orphan works. Possible approaches include, inter alia, a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, an exception to the 2001 Directive, or guidance on cross-border mutual recognition of orphan works."

On German national level there is a Draft Amendment to the German Copyright Administration Act (UrhWahrnG) dated 30 November, 2010, which addresses the orphan works problem. Access to orphan works shall be improved by amending the provisions on the administration of such works by the collective rights management societies.

The Draft Amendment reads:

Article 13e, orphan works

(1) If the diligent search for the right holder of a protected work fails, the collective management society that generally administers rights in works of the given type, shall be deemed authorized to grant the right to electronic reproduction and the right to making available to the public. An equitable remuneration shall be paid for the usage.

[71] *See* http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf (last visited 21 March 2011).
[72] *See* http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf (last visited 14 March 2011).

The collective management society shall indemnify the user from any claim to remuneration of the right holder.
(2) If the identity of the right holder becomes known to the public, he shall be subject to the same rights and duties in relation to the collective management society as he would be subject to if he had authorized that society with the administration of his rights. The authorization of the collective management society ends ex nunc if the right holder declares the individual right management in writing.

Accordingly, the collective management society's authorization to license an orphan work depends on the fruitless "diligent search for the right holder" of the work in question. The management society then "shall be deemed authorized" to license the work, which constitutes a fiction of law granting the right to license certain uses of the work to the collective management society, given that an authorization deriving from the author himself cannot be obtained. Article 13e(2) reflects this fiction of law as well: "If the identity of the right holder becomes known to the public, he shall be subject to the same rights and duties in relation to the collective management society as he would be subject to if he had authorized that society with the administration of his rights." Consequentially, the management society's general collection agreement applies between the right holder and the society as a default rule, but is revocable any time according to Article 13e(2).

The requirement of a "diligent search" is meant to indemnify from damages for copyright infringement and from potential criminal liability due to unauthorized licensing.

Article 13e of the Draft Amendment to the German Copyright Administration Act does not specify any particular type of works affected by that provision.

In fact, aforementioned bill has been introduced into the *Bundestag* by the social democrat minority and therefore has no actual prospect of being enacted. However, in the course of the so called "Third Basket" of German copyright law revision, the orphan works issue is the central topic. A respective government bill is awaited for spring or early summer 2011.

5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

According to the aforementioned bill, the collective management society is authorized to grant rights in orphan works on the condition that a "diligent search" has been conducted prior to licensing. The requirements for a diligent search have not been defined expressively by the legislator. The explanatory memorandum states that the requirements for a diligent search have intentionally not been defined to accommodate for technological developments and improvements in searching methods.

In the event that the identity of the right holder becomes known to the public later on, his right to prohibit any previous uses of the work is waived with regard to third parties but will be compensated by royalty payments (see Article 13e(1)). The right holder's rights in the work are restored if he revokes the authorization of the collective management society.

No further judicial or administrative requirements must be met.

5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

As mentioned before, the communication "Digital Agenda for Europe"[73] issued by the European Commission proposes as "Key Action 1" a directive on the preservation of orphan works by 2010 (page 9).

Additionally, the „ARROW"-project aims at developing adequate requirements for a "diligent search". "ARROW" (Accessible Registries of Rights Information and Orphan Works towards Europeans), a project funded by the EU, teams publishers, collective management societies and libraries with the objective to collect and supply data on the identity of right holders and clarify the copyright status of works including whether they are orphan or out of print. The project is regarded as a crucial first step, but has not yet

[73] *See* http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf (last visited 14 March 2011).

been expanded to all EU Member States. Moreover, ARROW is not authorized to distribute licenses for the digitization and dissemination of protected works and is at the time restricted to literary works.

The German Library Association voiced concerns regarding the criteria of a Europe-wide diligent search that might be impossible to satisfy. In a letter addressed to the President of the European Commission, dated 02 September, 2010, the Association pointed out the prohibitively high costs and substantial efforts necessary to fulfil such a requirement as a "major obstacle to mass digitization". Other involved interest groups issued a "Memorandum of Understanding" in 2008 that passes criticism on criteria with regard to the sector-specific requirements of a diligent search.

On the national level, a bill for the so-called "Third basket" of German copyright law revision is awaited for spring or early summer 2011. In this context, the regulation of the orphan works issue will probably be covered.

6. Graduated Response Laws or Agreements

6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response "solution"? On what conditions? Three strikes, etc.?

There is no such legal institution or bill comparable to the "Graduate Response"[74] in Germany at the moment. Several interest groups call for the legislative implementation of a *Three-Strikes-regulation* in terms of a graduated system of sanctions that would prevent mass copyright infringement on the internet.[75] Reduction in bandwidth of the internet connection or temporary suspension of internet access could be considered as last resort. Such graduated system of sanctions has been criticized for its lack of

[74] Graduate Reponse translates to „abgestufte Erwiderung" in that context.

[75] German Booktrader's Association in response to public consultation of the Enquete-Commission „Internet and Digital Society" dated 29 November 2010; *cf.* also (with a generally supportive position) German Association of Music Industry, http://www.musikindustrie.de/fileadmin/news/presse/091023_Olivennes_Verfassungsgericht_HADOPI_FINAL.pdf (last visited 21 March 2011); Paper of Strategic Claims of the German Producers Alliance to the next German Federal Government, http://www.produzentenallianz.de/fileadmin/data/dokumente/090923_Forderungen_Produzentenallianz_neue_Bundesregierung.pdf (last visited 21 March 2011).

procedures to ensure the rule of law and effective means of legal protection. Also it raises concerns with regard to constitutional provisions and data protection law.[76] According to the Federal Minister of Justice, Sabine Leutheusser-Schnarrenberger, the German Federal Government objects to suspension of internet access and reduction in bandwidth. [77]

6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

Questions 6.2 to 6.4 do not apply.

6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services ?

6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

So far there has been no court ruling involving the use of blocking or filtering technology by an ISP to prevent copyright infringement. A contribution of the ISP to the copyright infringement as alleged by the GEMA in accordance with the principle of secondary liability has not yet been approved by the courts.[78]

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[76] *Greve/Schärdel*, 2009 *Zeitschrift für Rechtspolitik* (ZRP) 54; Position Paper on the Draft Anti-Counterfeiting Trade Agreement by BITKOM, http://www.bitkom.org/files/documents/20100902_BITKOM_PositionPaper_ACTA%282%29.pdf (last visited 21 March 2011).

[77] *Cf.* Berlin Speech on Copyright of 14 June 2010; Objected by the governing parties CDU/CSU & FDP in their coalition agreement „Wachstum. Bildung. Zusammenhalt" p. 103 *et seq*., available at http://www.cdu.de/doc/pdfc/091026-koalitionsvertrag-cducsu-fdp.pdf (last visited 21 March 2011).

[78] *Kamlah*, 2005 *Medien und Recht International* (MR-Int) 97.

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to "3-strikes" laws?

Apparently there are no private agreements among copyright owners and internet service providers similar to *Three-Strikes-regulations*. Such agreements would hardly seem compatible with applicable laws of data protection and the privacy of telecommunications (see 6.1).

7. Private Agreements and UGC

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of "best practices" regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

Does not apply.

7.2 How is the filtering to be accomplished?

Does not apply.

7.3 Have there been any cases concerning such agreements or "best practices"?

Does not apply.

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?

Such remedies have apparently not been granted so far. However, in cases involving

websites with user generated content the right holders can solely claim for injunctive relief and removal according to the principle of *Störerhaftung* (breach of duty of care) as secondary liability, provided that the website operator has violated his duty of care with regard to the prevention of copyright infringements (a primary liability of the website operator arises if he represents external content *as his own*, e.g. places his logo on illegally uploaded photos and thereby asserts control over the content[79]). Generally the duty of care does not exist preventively, but arises as soon as the provider gains knowledge of the copyright infringing content of third parties, which he usually obtains through notice and take-down letters by the copyright holders. In cases where the provider receives some form of benefit from the transactions occurring on his internet platform (i.e. a financial interest of the provider), he is obliged not only to remove the infringing content but also to take reasonable controlling measures *to prevent* the repetition of the specific and also of merely similar infringements.

The commonly used terminology of "reasonable" controlling measures (reasonable duty of care) by the Federal Court of Justice in the rulings *Internetversteigerung I* to *III*[80] and *Jugendgefährdende Medien bei eBay*[81] stresses, that the due diligence obligation incorporates an element of reasonableness[82]. The due diligence obligation has been approved in the context of infringements of trade mark rights and the law for the protection of minors on the internet platform eBay. These cases involved auctions of writings containing youth-endangering content and plagiarisms of Rolex watches. Generally, the underlying principles can be transposed to copyright law. However, the existing cases have in common that certain violations could most likely have been detected by using appropriate filter tools. The due diligence obligation for similar *prospective* infringements does not arise if such automated detection is not feasible. So the duty becomes unreasonable if there are no common criteria to the infringing content that could be used as search inquiries for *filtering tools*. In case of violation of the reasonable due diligence obligation the provider is liable for injunction and removal of the infringing content.

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[79] Federal Court of Justice, 2010 GRUR 616 – *marions-kochbuch.de*.
[80] Federal Court of Justice, 2004 GRUR 860 – *Internet-Versteigerung I*; Federal Court of Justice, 2007 GRUR 708 – *Internet-Versteigerung II*; Federal Court of Justice, 2008 GRUR 702– *Internetversteigerung III*.
[81] Federal Court of Justice, 2007 GRUR 890 – *Jugendgefährdende Medien bei eBay*.
[82] *See* on secondary liability for copyright infringement on the internet in German law (and comparing German law to European, U.K. and French law in the field) *Leistner*, Common Principles of Secondary Liability?, in: Ohly et al. (eds.), Common Principles of European Intellectual Property Law (2011) (forthcoming); *cf.* comprehensively *Leistner*, Störerhaftung und mittelbare Schutzrechtsverletzung, 1/2010 GRUR-Beil. 1.