

Germany

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LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

The relevant German statutes in the copyright area are:

- the Act on Copyright and Neighbouring Rights of 9 September 1965 (the Copyright Act), governing the requirements for the protection of works and contributions by performing artists and other contributions enjoying neighbouring rights protection, as well as the scope and infringement of such rights;
- the Act on Copyright for Works of Fine Arts and Photography of 9 January 1907; and
- the Act on the Management of Copyright and Related Rights by Collecting Societies, governing the legal framework for the operation of collection societies under German law.

Enforcement authorities

2 | Who enforces it?

German copyright law grants the author exclusive rights to exploit his or her work.

The exclusive rights protected by the German copyright law will be enforced by the responsible civil courts.

As far as the German copyright law also deals with criminal offences, the public prosecution department and the criminal courts are responsible for enforcement.

Online and digital regulation

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

The Copyright Act does not explicitly address the digital exploitation of works. However, it provides that the author has the exclusive right to exploit his or her work in any tangible form or to communicate his or her work to the public in any intangible form. For instance, the right of making works available to the public shall constitute the right to make the work available to the public, either by wire or wireless means, in such a manner that members of the public may access it from a place and at a time individually chosen by them.

Extraterritorial application

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

According to settled German case law, in the case of an alleged infringement of copyright or related rights by making a work available via a website, a copyright infringement in Germany was committed if the content of the website was addressed to German users. The criteria are whether the websites provide their content in German language, using a '.de' domain, or whether the entire appearance of the website is addressed to German users.

Agency

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

There is no centralised copyright agency or office available in Germany where works can be registered, as is the case in the United States.

Contrary to industrial property rights, copyright arises with the creation of the work. There are no formal requirements to be met. A registration in an official register is neither required nor possible in order to obtain copyright protection.

The German Patent and Trademark Office (DPMA) is responsible for the Register of Anonymous and Pseudonymous Works and the Register of Out-of-Commerce Works. The DPMA is also involved in tasks in connection with the European Orphan Works Database. The DPMA does not have any further duties in the field of copyright.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

Section 2 of the German Act on Copyright and Neighbouring Rights of 9 September 1965 (the Copyright Act) provides a catalogue of protectable types of works, including:

- literary works, such as written works, speeches and computer programs;
- musical works;
- pantomimic works, including works of dance;
- artistic works, including works of architecture and of applied art and drafts of such works;
- photographic works, including works produced by processes similar to photography;
- cinematographic works, including works produced by processes similar to cinematography; and
- illustrations of a scientific or technical nature, such as drawings, plans, maps, sketches, tables and three-dimensional representations.

The list is exemplary and non-exhaustive. All works meeting these criteria will be protected.

To be copyright protected, the works need to be personal intellectual creations. They need to be creative and individual, but need not be novel or unique.

Rights covered

7 | What types of rights are covered by copyright?

German copyright law grants the author exclusive rights to exploit his or her work which includes, in particular:

- the right of reproduction;
- the right of distribution;
- the right of exhibition;
- the right of public performance;
- the right to make a work available to the public;
- the right to broadcast; and
- the right to publish and exploit derivative works.

These exclusive rights specifically mentioned in the Copyright Act are examples only.

Apart from these exploitation rights, German copyright law also provides for moral rights for authors, which can also be the object of infringement proceedings. These include, in particular, the right of publication, the right to be credited as the author, and the right to prohibit distortions or other impairments of the author's work which could endanger his or her justified intellectual or personal interests with respect to the work.

Excluded works

8 | What may not be protected by copyright?

Mere ideas, events, motifs, and scientific theories and discoveries are not protectable under German copyright law.

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

German copyright law does not recognise a general 'fair use' doctrine. Rather the Copyright Act contains a chapter including several specific provisions limiting the scope of rights for the copyright owner with respect to lawfully permitted uses. For instance, such lawfully permitted uses refer to collections for religious use, newspaper articles and broadcast commentaries and, most importantly, the reproduction for private and other personal uses.

Architectural works

10 | Are architectural works protected by copyright? How?

Yes. Artistic works, including works of architecture and of applied art and drafts of such works, are explicitly mentioned in the Copyright Act.

Performance rights

11 | Are performance rights covered by copyright? How?

A performer, namely a person who performs, sings, acts or in another manner presents a work or an expression of popular art or who participates artistically in such a presentation, is also protected under German copyright law. The performer shall have the right in relation to his or her performance to be recognised as such and the performance can be separately exploited by television or radio broadcast among others.

Consequently, the Copyright Act provides for ample protection of performing artists and their moral rights. A performer shall have the right to prohibit any distortion or other derogatory treatment of his or her performance of such nature as to jeopardise his or her standing or reputation as a performer.

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

German copyright law protects neighbouring rights that concern artistic, entrepreneurial, scientific and other efforts. These neighbouring rights usually grant the holders similar exclusive rights to those of a copyright owner.

Moral rights

13 | Are moral rights recognised?

German copyright law provides for moral rights for authors. These include, in particular, the right of publication, the right to be credited as the author and the right to prohibit distortions or other impairments of the author's work that could endanger his or her justified intellectual or personal interests with respect to the work.

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement of copyright notice in Germany. The person designated as the author on the work, or copies of a released work, or on the original of an artistic work shall be regarded as the author of the work in the absence of proof to the contrary. The same shall apply to any designation that is known to be a pseudonym or stage name of the author.

15 | What are the consequences for failure to use a copyright notice?

Where the author has not been named, it shall be presumed that the person designated as the editor on the copies of the work is entitled to assert the rights of the author. Where no editor has been named, it shall be presumed that the publisher is entitled to assert such rights.

Deposit

16 | Is there a requirement of copyright deposit?

No. Under German copyright law, there are no formal requirements for copyright protection.

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

As there is no requirement for copyright deposit, there are no consequences for failure.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

No. There is no registration requirement for either copyright protection or to facilitate copyright enforcement.

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

In Germany, copyright registration is neither mandatory nor possible.

20 | What are the fees to apply for a copyright registration?

As there is no copyright registration system available in Germany, no fees occur.

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

As there is no copyright registration system available in Germany, no consequences for failure occur. In fact, copyright protection arises automatically with the mere creation of the work.

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

The creator – that is, the author, composer, architect or photographer – is the owner of the work.

In Germany, only individuals can be the owner of a copyrighted work – companies cannot.

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

German copyright law does not recognise the 'work made for hire' doctrine. Even when an employee creates a work in the course of his or her employment, the company will not become the owner of the copyright.

However, employers are privileged in the sense that where the author has created the work in the fulfilment of obligations resulting from an employment or service relationship, unless otherwise provided in accordance with the terms or nature of the employment or service relationship, the employer is entitled to rights in that work. For instance, the Act on Copyright and Neighbouring Rights of 9 September 1965 (the Copyright Act) provides that where a computer program is created by an employee in the execution of his or her duties or following the instructions of his or her employer, the employer shall be exclusively entitled to exercise all economic rights in the computer program, unless otherwise agreed.

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

An independent contractor will remain the owner of the copyright. However, the independent contractor can grant licences to other persons authorising the use of his or her works.

An agreement does not have to be in writing, but it is recommended as proof may be needed at a later date.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Where several persons have jointly created a work without it being possible to separately exploit their individual shares in the work, they are joint authors of the work.

The right of publication and of exploitation of the work accrues jointly to the joint authors; alterations to the work shall be permissible

only with the consent of the joint authors. However, a joint author may not refuse his or her consent to publication, exploitation or alteration contrary to the principles of good faith. Each joint author shall be entitled to assert claims arising from violations of the joint copyright; he or she may, however, demand performance only to all of the joint authors.

Where several authors have combined their works for the purpose of joint exploitation, each may require the consent of the others to the publication, exploitation or alteration of the compound works if the consent of the others may be reasonably expected in good faith.

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Unlike in some other countries, copyright as such cannot be transferred from the creator to a third party except by inheritance.

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes. The author can grant licences or rights to use to individuals or legal entities. Such rights can be exclusive or non-exclusive, limited or unlimited in time, content or territory.

28 | Are there compulsory licences? What are they?

The Copyright Act stipulates a compulsory licence for the production of audio recordings. That means that if a producer of audio recordings has been granted a right of use in a musical work entitling him or her to transfer the work onto audio-recording mediums and to reproduce and distribute these for commercial purposes, the author shall be required upon release of the work to also grant a right of use with the same content on reasonable conditions to any other producer of audio recordings whose main establishment or whose place of residence is located in the territory to which this Act applies.

29 | Are licences administered by performing rights societies? How?

Collective management organisations generally manage the rights of creative people collectively.

Collective management organisations are associations of creative people organised under private law. They grant licences for the works managed by them, monitor the use of these works, and collect royalties in order to subsequently distribute the revenues to the rights holders on the basis of distribution schemes.

At present, 13 collective management organisations have the authorisation to conduct business in Germany. Since collective management organisations often have a monopoly position and act in a fiduciary capacity, they are subject to government supervision, which is exercised by the German Patent and Trademark Office.

Termination

30 | Is there any provision for the termination of transfers of rights?

As the copyright itself is non-transferable, there is also no provision for the termination of rights.

In the event of death of the author, the copyright passes to their beneficiary.

Recordal

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

No. There is no government agency available where such documents can be recorded.

DURATION OF COPYRIGHT**Protection start date**

32 | When does copyright protection begin?

Copyright protection begins with the date of creation.

Duration

33 | How long does copyright protection last?

The term of protection in Germany is the life of the author and another 70 years after his or her death. If the copyright is shared by several co-authors, it will expire 70 years after the death of the longest surviving co-author.

With respect to cinematographic works, the term of protection is the life and 70 years after the death of the longest surviving of a group of authors consisting of the main director, the author of the film script, the author of the dialogue, and the composer of any music created for the film.

In the case of anonymous and pseudonymous works, the term of protection will generally end 70 years after publication, unless the author reveals his or her identity within this term or registers his or her true name with the register at the German Patent and Trademark Office.

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

No. The duration is always the life of the author and another 70 years after his or her death.

Renewal

35 | Do terms of copyright have to be renewed? How?

Terms of copyright may not be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

No.

COPYRIGHT INFRINGEMENT AND REMEDIES**Infringing acts**

37 | What constitutes copyright infringement?

German copyright law protects all rights holders defined in the Act on Copyright and Neighbouring Rights of 9 September 1965 (the Copyright Act) equally. It does not make a difference whether an infringer violates an exclusive right of an author, an author's moral right, or a neighbouring right protected under the Copyright Act.

Infringements of any of these protected rights could lead to civil law claims for injunctions, damages, unjust enrichment as well as destruction, recall or restitution of infringing goods.

Vicarious and contributory liability

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

Under German copyright law, the direct infringer is liable, as well as other persons involved in the infringement, such as instigator or assistants. Further, and according to settled case law, liability requires actual and specific knowledge of the respective infringing acts, the legal and factual possibility of preventing the direct infringement, as well as the violation of a reasonable duty of care to prevent such infringements. The resulting liability is limited to injunctive relief and not to damages. One of the main situations refers to platform operators. Once they have been informed about a specific infringement on their platform, they are required to remove the specific infringing content and to implement measures in order to prevent future violations.

Available remedies

39 | What remedies are available against a copyright infringer?

The rights holder is mainly entitled to the following relief against a copyright infringer:

- to order the infringer to eliminate the infringement or, where there is a risk of repeated infringement, to cease-and-desist from committing infringing acts (intent or negligence of the infringer is not required) – the entitlement to prohibit the infringer from future infringement shall also exist where the risk of infringement exists for the first time;
- to oblige any person who intentionally or negligently performs such an act to pay the injured party damages for the prejudice suffered as a result of the infringement;
- to destroy the unlawfully produced or distributed copies or copies that are intended for illegal distribution that are in the injuring party's possession or are his or her property;
- to recall unlawfully produced or distributed copies or copies intended for unlawful distribution or to definitively remove them from the channels of commerce or, as an alternative, the injured party may require that the copies that are the injuring party's property be released against payment of an equitable remuneration which may not exceed the production costs;
- to render information about the distribution chain of the infringing products, accounting for turnover and profits made with infringing acts; and
- to present documents and to permit inspection of an object in the possession of the infringer if this is necessary in order to substantiate the claims.

Limitation period

40 | Is there a time limit for seeking remedies?

The statutory limitation period for legal action against copyright infringements is three years from the end of the year in which the rights holder became aware of the infringing acts. If the rights holder does not learn about the infringing acts, the statutory limitation period will be 10 years starting from the date on which the rights holder first incurred damages based on the infringement. The absolute limitation period, that is, without knowledge of the infringement and regardless of damages incurred, is 30 years starting from the infringing act.

An application for a preliminary injunction must be filed within a certain time period, which is usually one month after having gained knowledge of the infringement and the infringer.

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes. The infringer is liable for actual damages sustained by the rights holder.

When setting the damages, any profit obtained by the infringer as a result of the infringement of the right may also be taken into account.

Entitlement to damages may also be assessed on the basis of the amount the infringer would have had to pay in equitable remuneration if the infringer had requested authorisation to use the rights infringed.

Authors, writers of scientific editions, photographers and performers may also demand monetary compensation for damage which is non-pecuniary in nature provided and to the extent that this is equitable.

This means that there are three different ways of calculating damages:

- lost profits due to the infringement;
- reasonable royalties in relation to the infringement (licence analogy); or
- surrender of the actual profits generated by the infringer.

In copyright infringement matters, the licence analogy seems to be the most commonly used way to calculate damages.

There is no basis for punitive damages in German law.

Attorneys' fees and costs

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

Yes. As a rule, the losing party has to reimburse the winning party for all court fees paid. Furthermore, the losing party has to reimburse the winning party's lawyer's fees. However, the amount of fees and costs that can be claimed is limited by the German Code of Lawyers' Fees.

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

Copyright infringements under German law also constitute criminal acts, which are punishable by fines or up to three years' imprisonment. If the infringement is done on a commercial basis, the maximum punishment is five years in prison.

According to German copyright law, unlawful exploitation of copyrighted works, unlawful affixing of the designation of an author and the infringement of related rights are subject to imprisonment of not more than three years or a fine. In addition, any attempt shall be punishable.

The unlawful exploitation of copyrighted works on a commercial scale is subject to imprisonment of not more than five years or a fine.

The infringement of technological measures and rights management information is subject to imprisonment of not more than one year or a fine.

Online infringement

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

No. The liabilities, remedies and defences for online copyright infringement are identical to the ones in the 'real world'.

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

Copyright may be prevented by establishing a digital rights management system, which is a set of access control technologies for restricting the use of proprietary hardware and copyrighted works.

Furthermore, copyright violations can be the basis for border seizure requests.

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Germany signed and is therefore a member of the following conventions:

- the Revised Berne Convention for the Protection of Literary and Artistic Works (1952);
- the Universal Copyright Convention (1952);
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961);
- the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (1994);
- the World Intellectual Property Organization Copyright Treaty (1996); and
- the World Intellectual Property Organization Performances and Phonograms Treaty (1996).

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

The membership of international copyright conventions implies the minimum standards of protection, which each signatory country then implements within the bounds of its own copyright law.

The established minimum standards relate to, for instance:

- the types of works protected;
- the duration of protection; and
- the scope of exceptions.

Germany grants and respects copyright of non-citizens.

UPDATE AND TRENDS

Key developments of the past year

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

One of the most controversial legislation issues is the German government's proposal for implementing Directive 2019/790/EU on copyright and related rights in the Digital Single Market. The aim of the directive is to harmonise further EU copyright law, taking into account digital and cross-border use of protected content. However, the draft Act on the Copyright Liability of Online Sharing Content Service Providers is still in the legislative procedure.

On 20 May 2021, the German parliament passed the bill containing the implementation of Directive 2019/790/EU into German law. The law is expected to come into force on 1 August 2021.

Coronavirus

49 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Covid-19 has affected all areas of life. The pandemic has led to a large variety of legislative measures in Germany, which were aimed at mitigating the impact of the pandemic on the economy. The German government has unlocked massive financial resources to mitigate any economic damage and to save as many businesses as possible. The pandemic has also affected court proceedings. The courts now conduct their proceedings in writing or by videoconference, wherever possible.

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