

Germany

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1 Introduction

During the twentieth century copyright law has largely been ignored by legal scholars and the judicature. However, with the beginning of the digital revolution, copyright became more and more important. Today, questions of copyright are ubiquitous: Pictures are shared on social media platforms, streaming begins to displace classic broadcast media like TVs or radios, scientists share their latest results via internet and online research platforms. Against that backdrop, the crucial question is whether or not the applicable copyright law meets the requirements of the developing information society. Exceptions to copyright are an important factor in this regard. They have to fairly balance the copyright proprietors' interest in a comprehensive protection of his work on the one hand and the increasing common interest in the free use of works on the other hand.

The first part of this article aims at giving the reader an overview of exclusions and limitations to copyright as codified in the current German Act on Copyright and Related Rights (Urheberrechtsgesetz; hereafter UrhG).¹ Presenting each and every limitation and exclusion to copyright is certainly beyond the scope of this article so that only some can be closely examined after that. The article focusses on those being crucial to works in the digital society and economy.

2 Rights of the copyright proprietor

The German UrhG grants the author of a work certain rights. The law differentiates between moral rights and exploitation rights. The moral rights are laid down in §§ 12 – 14 UrhG. The author has the right to determine whether and how his work is initially published (§ 12 UrhG), to be identified as the author of the work (§ 13 UrhG) and to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work (§ 14 UrhG). Following the continental European tradition², the German Copyright Act thus emphasises the special relationship between the author and his work that arises from the fact that his personal feelings and experiences are made perceptible.³

The exploitation rights by contrast aim at providing the author the possibility to economically benefit from his or her work. According to § 15 (1) UrhG, the author has the *exclusive right* to exploit his or her work in material form. § 15 (2) UrhG grants the author the *exclusive right* to communicate the work to the public in non-material form. Both provisions contain a non-exhaustive (“*in particular*”) list of sub-forms of material and non-material exploitation which are further specified in §§ 16 – 22 UrhG. Thus, the German law generally guarantees a broad protection for copyright proprietors. As a consequence, authors are also protected against new forms of

¹ An official English translation can be found here: https://www.gesetze-im-internet.de/englisch_urhg/index.html. Accessed 16 May 2017.

² G. Schulze. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, preface to §§ 12 ff. para. 1.

³ W. Bullinger. In: Wandtke/Bullinger (eds), Praxiskommentar zum Urheberrecht, 4th ed, C.H. Beck 2014, preface to §§ 12 ff. para. 1.

exploitation which come up due to technological developments.⁴ It is upon the legislator to nevertheless ensure a fair balance between the author's economic interest and the public interest in the free use of the work by codifying new limitations and exceptions to the general rule of protection.⁵ Consequently, the copyright proprietor profits from a time advantage.

3 Limitations and exceptions to the protection

The German Copyright Act contains numerous limitations and exceptions to the general rule of extensive protection. Some sub-forms of exploitation limitations are laid down in §§ 16 – 22 UrhG. Special exceptions are made in §§ 44a – 63a UrhG (Section VI: Limitations to copyright).

3.1 System of exceptions

The rules laid down in Section VI of the Copyright Act mainly set limits to exploitation rights, whereas the moral rights are unaffected.⁶ This again follows the continental European understanding of copyright which focusses on the author's special relationship to his work. Nonetheless, there is no risk that authors' moral rights can be misused to block the exceptions provided for by the lawmaker. Some legal provisions even restrict the author's right of publication (§ 12 UrhG): § 44a (temporary acts of reproduction), § 45 (administration of justice and public safety), § 53 (1) (private copies) and § 57 (incidental works) UrhG are also applicable to unpublished works.

In contrast to other copyright systems, the German law does not provide for a fair-use-exception but makes use of narrowly defined exceptions. The vast majority of exceptions expressly refers to one or more sub-forms of exploitation. For example, § 52a (1) UrhG is only applicable for *making a work available* to the public within the meaning of § 19a UrhG. § 52a (3) UrhG then allows to *reproduce* (§ 16 UrhG) the work needed for that purpose. Due to their exceptional nature, the provisions are subject to a restrictive interpretation by practitioners.⁷ The exceptions codified in the German Copyright Act are exhaustive (see Section 2 above).⁸ However, in some special cases a broader interpretation of written exceptions can be necessary to ensure conformity with the Basic Law for the Federal Republic of Germany (Grundgesetz; hereafter: GG).⁹

Although the exceptions are narrowly drawn, some leave room for flexibility. Formulations like “*to the extent that is necessary* for the respective purpose” (§ 52a, cf. § 51, cf. § 53, cf. § 58, § 62 (4) UrhG) or “*justified* for the pursuit of non-commercial aims” (§ 52a UrhG) open the possibility for courts to decide on a case-by-case basis and to take constitutional considerations (see Section 3.2. below) into account.¹⁰ In regard to § 52a UrhG

⁴ H. Schack, *Urheber- und Urhebervertragsrecht*, 7th ed, Mohr Siebeck 2015, para. 410.

⁵ Cf. H. Schack, *Urheber- und Urhebervertragsrecht*, 7th ed, Mohr Siebeck 2015, para. 411.

⁶ A. Dustmann. In: Fromm/Nordemann (eds), *Urheberrecht*, 11th ed, Verlag W. Kohlhammer 2014, preface to §§ 44a ff. para. 7; T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 19; H. Schack, *Urheber- und Urhebervertragsrecht*, 7th ed, Mohr Siebeck 2015, para. 513.

⁷ Federal Court of Justice, Decision of 3 April 1986, Case No. I ZR 83/66, GRUR 1968, pp. 607–612; Federal Court of Justice, Decision of 11 July 2002, Case No. I ZR 255/00, GRUR 2002, pp. 963–967; A. Dustmann. In: Fromm/Nordemann (eds), *Urheberrecht*, 11th ed, Verlag W. Kohlhammer 2014, preface to §§ 44a ff. para. 6; S. Lüft. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, preface to §§ 44a ff. para. 1.

⁸ Federal Court of Justice, Decision of 20 March 2003, Case No. I ZR 117/00, NJW 2003, pp. 3633–3636.

⁹ Federal Court of Justice, Decision of 20 March 2003, Case No. I ZR 117/00, NJW 2003, pp. 3633–3636.

¹⁰ W. Schulz/S. Hagemeier. In: Ahlberg/Göttig (eds), *Beck'scher Online-Kommentar Urheberrecht*, 15th ed, C.H. Beck 2017, § 52a UrhG, para. 19; A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 52a UrhG para. 3.

(making works available to the public for instruction and research) for instance, courts granted teachers and lecturers a margin of discretion in respect to what is necessary to reach the educational goals.¹¹

3.1.1 Colliding interests

With each exception the legislator tries to fairly balance the colliding interests of the author in profiting from his work and the public interest in freely using the work. The colliding interests acknowledged by the exceptions to copyright are manifold, as the following chart shows.¹²

§ 45 UrhG	administration of justice and public safety
§ 45a UrhG	persons with disabilities
§§ 46, 47, 53 (3) UrhG	usage in public schools
§§ 48 – 50 UrhG	freedom of information and freedom of press
§ 51 UrhG	quotations
§ 52 UrhG	communication of works to the public for non-profit purposes
§ 52a UrhG	making works available to the public for instruction and research
§ 52b UrhG	communication of works at terminals in public libraries, museums and archives
§§ 53 ff. UrhG	private use
§§ 55, 56 UrhG	interventions due to necessary technical procedures
§§ 44a, 57 UrhG	minor interventions
§ 58 UrhG	promotion-exception for Works in exhibitions, on public sale and in institutions accessible to the public
§ 59 UrhG	panorama-exception
§ 61 – 61c UrhG	use of orphan works (cultural heritage)

One can also see that the lawmaker sometimes distinguishes between commercial and non-commercial interests in using the work. By way of example, § 53 (1) UrhG only allows reproductions for private usage “insofar as they neither directly nor indirectly serve commercial purposes”.¹³ On the other hand the panorama-exception (§ 59 UrhG) also includes commercial use like the reproduction and distribution of postcards.¹⁴ The Copyright Act also differentiates between usage by individuals (e.g. § 53 (1) UrhG) and other either private or public entities (e.g. § 45 (2) UrhG for public entities, § 61 UrhG for private and public entities).

3.1.2 Compensation

One can distinguish between exceptions which grant compensation (e.g. § 54 UrhG for private use within the meaning of § 53 UrhG) and those which do not (e.g. § 55 UrhG). If compensation is provided, the law often

¹¹ Cf. Higher Regional Court Frankfurt a.M., Decision of 24 November 2009, Case No. 11 U 40/09, GRUR 2010, pp. 1–4; Regional Court Stuttgart, Decision of 27 September 2011, Case No. 17 O 671/10, GRUR-RR 2011, pp. 419–423

¹² Chart based on T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 3.

¹³ For more examples see §§ 45a, 46, 52, 52a, 52b UrhG.

¹⁴ T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, § 59 para. 7; for more examples see §§ 48, 49, 50, 51, 55, 56, 57, 58, 61 UrhG.

claims that remuneration may only be asserted by collecting societies (e.g. § 54h (1) UrhG, § 52a UrhG). These provisions ensure that works can be effectively used while the copyright proprietor adequately benefits from the exploitation of his or her work. Authors are then paid by the collecting societies according to the society's allocation key.¹⁵

3.1.3 Enforcement of exceptions

In order to prevent copyright proprietors from circumventing the restrictions to copyright through technical measures, § 95b UrhG entitles beneficiaries to demand access to the work. The provision only applies to some exceptions that are specified therein. The listed exceptions are mostly designed to protect state interests,¹⁶ though parts of the private use-exception are also mentioned.

It has to be criticized that the list is rather short. Particularly, neither digital private copies¹⁷ nor exceptions being important to the media and the shaping of public opinion (§§ 48 – 51 UrhG)¹⁸ are included. § 95b UrhG has to be examined against the backdrop of § 95a UrhG which legally protects effective technical protection measures taken by copyright proprietors. Consequently, beneficiaries are not allowed to crack the protection themselves with the aim of benefitting from an exception.¹⁹ Thus, even for the limitations listed in § 95b UrhG, there is a risk that individuals and small entities may fear fighting a lawsuit and are thereby hindered from obtaining the benefit of an exception to copyright protection. A self-help right for beneficiaries would be more effective in this regard.

3.1.4 Impact of contractual agreements

The question whether or not exceptions to copyright law can be ruled out by contract is crucial for examining to what extent the public interest in freely using the work was adequately regarded by the legislator. Yet the lawmaker did not finally regulate in this regard. Some provisions explicitly state that exceptions do not apply to cases where a contractual agreement between the proprietor and the user has been reached or a fair agreement is at least possible.²⁰ On the contrary, the legislator explicitly declares some other exceptions to be mandatory.²¹ However, as the latter provisions aim at implementing EU directives into national law, one cannot conclude by *argumentum e contrario* that other exceptions are not mandatory.²²

Copyright law is part of the civil law. Consequently, private autonomy and freedom of contract, as guaranteed by Art. 2 (1) GG²³ are leading principles for copyright law as well.²⁴ Therefore, some legal scholars conclude that

¹⁵ Some allocation keys have been subject to legal discussions and court decisions recently; e.g. Federal Court of Justice, Decision of 21 April 2016, Case No. I ZR 198/13, GRUR 2016, pp. 596–606.

¹⁶ H. Lindhorst. In: Ahlberg/Göttig (eds), Beck'scher Online-Kommentar Urheberrecht, 15th ed, C.H. Beck 2017, § 95b UrhG, para. 3.

¹⁷ H. Schack, Urheber- und Urhebervertragsrecht, 7th ed, Mohr Siebeck 2015, para. 837.

¹⁸ H. Lindhorst. In: Ahlberg/Göttig (eds), Beck'scher Online-Kommentar Urheberrecht, 15th ed, C.H. Beck 2017, § 95b UrhG, para. 3; H. Schack, Urheber- und Urhebervertragsrecht, 7th ed, Mohr Siebeck 2015, para. 837.

¹⁹ G. Spindler. In: Spindler/Schuster (eds), Recht der elektronischen Medien, 3rd ed, C.H. Beck 2015, § 95b UrhG para. 10.

²⁰ E.g. §§ 52b, 53a (1) UrhG.

²¹ E.g. §§ 55a, 69g UrhG.

²² A. Dustmann. In: Fromm/Nordemann (eds), Urheberrecht, 11th ed, Verlag W. Kohlhammer 2014, preface to §§ 44a ff. para. 14; J. Gräbig, Abdingbarkeit urheberrechtlicher Schranken, GRUR 2012, pp. 331–337.

²³ E.g. Federal Constitutional Court, Decision of 27 July 2005, Case No. 1 BvR 2501/04, GRUR 2005, pp. 880–882.

²⁴ Federal Court of Justice, Decision of 18 February 1982, Case No. I ZR 81/80, GRUR 1984, pp. 45–52; J. Gräbig, Abdingbarkeit urheberrechtlicher Schranken, GRUR 2012, pp. 331–337.

each and every exception can be restricted by contract.²⁵ This approach would of course pull the carpet from under the exceptions which are the result of a careful balance of colliding interests by the lawmaker.²⁶ Instead, the answer to the question has to be found on a case-by-case basis.²⁷ Focus has to be laid especially on the spirit and the purpose of the exception: Exceptions aiming at (above all) protecting interests of the public or third parties have to be considered as mandatory.²⁸ Consequently, at least the exceptions laid down in §§ 45, 45a, 46, 47, 50, 51 UrhG are mandatory. Moreover, one can cast an eye on the exceptions listed in § 95b UrhG.²⁹ For these exceptions, the legislator provided a legal means for beneficiaries to enforce them and thus made clear that the listed exceptions are of high relevance.

Furthermore, contractual restrictions of non-mandatory exceptions in general terms and conditions have to be in line with Sec. 307 – 309 of the German Civil Code (BGB) as well.³⁰

§ 52b UrhG allows the communication of works at terminals in public libraries, museums and archives as long as, among other criteria, “*there are no contractual provisions to the contrary*”. The German Federal Court of Justice pointed out in this regard that a fair and reasonable contractual offer of the copyright proprietor was sufficient to rule out the exception, because otherwise beneficiaries could even reject fair offers in order to profit from the legal exception and thus misuse the law.³¹ As § 52b UrhG is based on Art. 5 (3) lit. n of the directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereafter InfoSoc-directive) it was upon the Court of Justice of the European Union to clarify the legal situation. The court ruled that a mere contractual offer could not be understood as “purchase and licensing terms” within the meaning of the InfoSoc-directive, but that a contract was necessary.³²

Special regard has to be given to the exception laid down in § 52a UrhG which allows making works available to the public for instruction and research as long as this use is “*justified for the pursuit of non-commercial aims*”. The German Federal Court of Justice ruled that a fair, reasonable and easily detectable offer for a contractual agreement leads to the result that the usage was not justified within the meaning of the provision.³³ This of course only shifts the problem on to the question what fair and reasonable means in the specific case and thereby hinders beneficiaries from relying on the exception.³⁴ Yet, after the afore-mentioned judgment of the Court of Justice of the European Union, it is likely that courts will apply the same standard to § 52a UrhG so that mere

²⁵ G. Dreyer. In: Dreyer/Kotthoff/Meckel (eds), *Urheberrecht*, 3rd ed, C.F. Müller 2013, preface to §§ 44a ff. para. 17; M. Vogel. In: Schricker/Loewenheim (eds), *Urheberrecht*, 5th ed, C.H. Beck 2017, § 60 para. 5.

²⁶ J. Gräbig, *Abdingbarkeit urheberrechtlicher Schranken*, GRUR 2012, pp. 331–337.

²⁷ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 9; H. Schack, *Schutz digitaler Werke vor privater Vervielfältigung – zu den Auswirkungen der Digitalisierung auf § 53 UrhG*, ZUM 2002, pp. 497–511.

²⁸ A. Dustmann. In: Fromm/Nordemann (eds), *Urheberrecht*, 11th ed, Verlag W. Kohlhammer 2014, preface to §§ 44a ff. para. 14; cf. T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 9; J. Gräbig, *Abdingbarkeit urheberrechtlicher Schranken*, GRUR 2012, pp. 331–337.

²⁹ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 9; H. Schack, *Urheberrechtliche Schranken für Bildung und Wissenschaft*, ZUM 2016, pp. 266–283.

³⁰ See A. Dustmann. In: Fromm/Nordemann (eds), *Urheberrecht*, 11th ed, Verlag W. Kohlhammer 2014, preface to §§ 44a ff. para. 15; see J. Gräbig, *Abdingbarkeit urheberrechtlicher Schranken*, GRUR 2012, pp. 331–337.

³¹ Federal Court of Justice, Decision of 20 September 2012, Case No. I ZR 69/11, GRUR 2013, pp. 503–507.

³² CJEU, case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG* (not yet published); Federal Court of Justice, Decision of 16 April 2015, Case No. I ZR 69/11, NJW 2015, pp. 3511–3517.

³³ Federal Court of Justice, Decision of 28 November 2013, Case No. I ZR 76/12, GRUR 2014, pp. 549–556.

³⁴ Regional Court Stuttgart, Decision of 27 September 2011, Case No. 17 O 671/10, GRUR-RR 2011, pp. 416–423; A. Dustmann. In: Fromm/Nordemann (eds), *Urheberrecht*, 11th ed, Verlag W. Kohlhammer 2014, § 52a para. 15; T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 52a para. 12.

offers for an agreement will not suffice to make the usage unjustified.³⁵

In contrast to this, a contractual offer is sufficient to suppress the exception of § 53a (1) UrhG.³⁶ The provision allows public libraries to reproduce and to transmit works in electronic form in response to an individual order in cases where, among other criteria, “it is not made manifestly possible, *upon agreed contractual terms*, for members of the public to access the contributions or small parts of a work from a place and at a time individually chosen by them and on terms which are equitable”.

3.2 Triple test (and colliding interests)

3.2.1 The triple test and legislative power

According to Art. 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Art. 10 (1) and (2) of the WIPO Copyright Treaty (WCT) and Art. 16 (2) of the WIPO Performances and Phonograms Treaty (WPPT) national legislators of the contracting parties shall only provide for limitations and exceptions in (i.) special cases and as long as they (ii.) do not conflict with the normal exploitation of the work and (iii.) do not prejudice the author’s legitimate interest in an unreasonable way. This means that the lawmaker is asked to develop a fair balance between the colliding interests of the right holders on the one and the public on the other hand.³⁷ However, the German legislator cannot be forced to acknowledge the triple test when passing laws on exceptions to copyright law. According to Art. 20 (3) GG, the legislator’s power is only limited by the constitution itself. International law is therefore not binding for the lawmaker.³⁸

Anyhow, the fundamental rights codified in the German constitution set limits to the legislator’s power to pass laws stating exceptions to the proprietors’ rights. According to Art. 14 (1) GG, property shall be guaranteed. Property within the meaning of this provision also includes an author’s copyright.³⁹ At the same time it is laid down in Art. 14 (2) of the constitution that the use of property shall serve the public good. It is upon the legislator to fairly balance these constitutional goals.⁴⁰ Each curtailment of proprietors’ rights has to be justified by a public interest and has to be proportionate against that backdrop in order to be constitutional. As a result, the German constitution itself states that protection of an author’s work must be the general rule.⁴¹

For those exploitation rights deriving from the InfoSoc-directive, Art. 5 (5) of the directive repeats that exceptions have to be in line with the same triple test. In contrast to other international treaties, European law is subject to an examination by the Court of Justice of the European Union (CJEU)⁴² and any violation can be sanctioned by the means of the EU Treaties.

³⁵ M. Grünberger, Vergütungspflicht und Lizenzvorrang in der neuen EU-Bildungsschranke, GRUR 2017, pp. 1–11.

³⁶ T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, § 53a para. 15; O. Jani. In: Wandtke/Bullinger (eds), Praxiskommentar zum Urheberrecht, 4th ed, C.H. Beck 2014, § 53a para. 30.

³⁷ P. Runge, Die Vereinbarkeit einer Content-Flatrate mit dem Drei-Stufen-Test, GRUR Int. 2007, pp. 130–137; M. Senftleben, Grundprobleme des urheberrechtlichen Dreistufentests, GRUR Int. 2004, pp. 200–211.

³⁸ Federal Constitutional Court, Decision of 15 December 2015, Case No. 2 BvL 1/12, NJW 2016, pp. 1295–1307; Federal Court of Justice, Decision of 25 February 1999, Case No. I ZR 118/96, NJW 1999, pp. 1953–1959.

³⁹ Federal Constitutional Court, Decision of 15 December 2011, Case No. 1 BvR 1248/11, GRUR 2012, pp. 390–392.

⁴⁰ Federal Constitutional Court, Decision of 31 May 2016, Case No. 1 BvR 1585/13, GRUR 2016, pp. 690–697.

⁴¹ H. Schack, Urheber- und Urhebervertragsrecht, 7th ed, Mohr Siebeck 2015, para. 93.

⁴² T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 21.

3.2.2 The triple test and judicial power

The triple test is, however, binding for the German courts when interpreting exceptions to copyright law. For exceptions mentioned in Art. 5 (5) InfoSoc-directive, this follows from the fact that, according to Art. 4 (3) of the Treaty on the European Union, national courts must construe national law in a way that the goals of the EU law are put into effect optimally.⁴³ For the above-mentioned international treaties, this follows from the constitutional rule that national law has to be construed in conformity with international law.⁴⁴

Given the great number of cases dealing with exceptions to copyright protection, the number of cases in which courts denied to apply an exception on the account of the triple test is very low.⁴⁵ In the most recent case, the *Higher Regional Court Stuttgart* had to decide on a case concerning the exception of § 52a UrhG which allows making works available to the public for purposes of instruction and research. The usage is i.a. allowed for illustration in teaching at universities as long as only “small, limited parts of a work” are affected and to an “extent that is necessary for the respective purpose and [that] is justified for the pursuit of non-commercial aims”. In that case, a distance university made available 91 of 476 pages (19,12%) of a textbook for psychology-students. The court pointed out that the decision whether or not the published part still is small and limited within the meaning of the law had to be made on a case-by-case basis taking into account the economic value of the published parts and the proprietor’s corresponding interest in economically benefitting from the work.⁴⁶ In order to determine whether the publication’s extent was “necessary”, the court explicitly applied the triple test and stated that, as the publication covered each part of the book being relevant to the students’ final exam, the publication was not necessary.⁴⁷ The university’s usage of the work conflicted with the normal exploitation of the work, as there was no need for the students to purchase the book. For the same reason the author’s legitimate interests were prejudiced in an unreasonable way. As a consequence, the judges ruled in favour of the plaintiff. The German Federal Court of Justice later overruled the decision but also pointed out that the triple test is decisive for the application of exceptions to copyright.⁴⁸ The federal judges decided that the normal exploitation is only endangered when the usage is in direct competition with it. As the textbook was not only created for university use, this was not the case.

3.3 Examples

3.3.1 Exhaustion of the right of distribution with special regard to digital works

The German Copyright Act provides the author with the right to determine whether or not his work is distributed (§ 17 (1) UrhG). If this right was unlimited, the proprietor could control the distribution of the work even if it was sold with his consent and he thus economically benefited from the work. In order to protect the freedom of

⁴³ A. von Bogdany/S. Schill. In: Nettesheim (ed), *Das Recht der Europäischen Union*, supplement 51, September 2013, Art. 4 EUV para. 99.

⁴⁴ Federal Constitutional Court, Decision of 8 December 2014, Case No. 2 BvR 450/11, NVwZ 2015, pp. 361–367; Federal Constitutional Court, Decision of 4 May 2011, Case No. 2 BvR 2333/08, NJW 2011, pp. 1931–1946; Federal Court of Justice, Decision of 25 February 1999, Case No. I ZR 118/96, NJW 1999, pp. 1953–1959.

⁴⁵ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, preface to §§ 44a ff. para. 21; the following decision can serve as another example: Federal Court of Justice, Decision of 20 September 2012, Case No. I ZR 69/11, GRUR 2013, pp. 503–507.

⁴⁶ Higher Regional Court Stuttgart, Decision of 4 April 2012, Case No. 4 U 171/11, GRUR 2012, pp. 718–727.

⁴⁷ Higher Regional Court Stuttgart, Decision of 4 April 2012, Case No. 4 U 171/11, GRUR 2012, pp. 718–727.

⁴⁸ Federal Court of Justice, Decision of 28 November 2013, Case No. I ZR 76/12, GRUR 2014, pp. 549–556.

trade,⁴⁹ § 17 (2) UrhG therefore determines that “Where the original or copies of the work have been brought to the market by sale with the consent of the person entitled to distribute them within *the territory of the European Union or another state party to the Agreement on the European Economic Area*, their dissemination shall be permissible, except by means of rental”.

In regard to Art. 4 (2) of the directive of the European Union and of the Council of 23 April 2009 on the legal protection of computer programs (hereafter Computer Programs Directive), which § 69c No. 3 UrhG implements into national law, the Court of Justice of the European Union decided that the right of distribution for software also exhausts when computer programmes have not been sold on data storage devices but the “buyer” downloaded a copy of the programme in order to install the software (UsedSoft-judgment).⁵⁰

Considering the proliferation of digital distribution channels (e.g. downloads of music files, video files or e-books), the question whether or not the principle of exhaustion also applies to these situations becomes crucial when examining if the German Copyright Act adequately regards the challenges of the digital society. Generally, the right of distribution (§ 17 (1) UrhG) applies to physical works like statues, paintings or CDs/DVDs, whereas the right of making works available to the public (§ 19a UrhG) is affected when works are distributed in a non-material form.⁵¹ Consequently, § 17 (2) UrhG does not directly apply to online-distribution of works.⁵² The controversial question therefore is whether § 17 (2) UrhG can be applied by analogy to cases dealing with digital works (“online-exhaustion”). Analogous application is possible where two requirements are met: Firstly, there has to be a regulatory gap that was unintended by the lawmaker. Secondly, the situations and affected interests in the not-regulated case have to be comparable to the one regulated.

German Courts⁵³ and some legal scholars⁵⁴ are of the opinion that these criteria are not fulfilled in cases of digital distribution. They argue that § 19a UrhG (making works available to the public) finally regulates the topic and contains no provision comparable to § 17 (2) UrhG.⁵⁵ Furthermore, they point out that the CJEU’s UsedSoft-judgment cannot be transferred to other digital works, because the InfoSoc-directive and not the Computer Programs Directive governs these cases. Additionally, it is argued that recital 29 of the InfoSoc-directive explicitly states that “the question of exhaustion does not arise in the case of services and on-line services in particular”.⁵⁶ Finally the opponents point out that from an economic point of view embodied and digital works are not comparable: Whereas traditional storage devices like CDs are subject to deterioration, this is not true for files so that works on the primary and secondary market directly compete with each other without qualitative

⁴⁹ Federal Court of Justice, Decision of 6 March 1986, Case No. I ZR 208/83, GRUR 1986, pp. 736–739.

⁵⁰ CJEU, case C-128/11, *UsedSoft GmbH v Oracle International Corp.*, ECR 2012 I-0000, pt 43.

⁵¹ A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 17 UrhG para. 2.

⁵² Higher Regional Court Hamm, Decision of 15 May 2014, Case No. 22 U 60/13, MMR 2014, pp. 689–694; D. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 17 para. 26; T. Hoeren/S. Jakopp, *Der Erschöpfungsgrundsatz im digitalen Umfeld*, MMR 2014, pp. 646–649.

⁵³ Higher Regional Court Hamburg, Decision of 24 March 2015, Case No. 10 U 5/11, ZUM 2015, pp. 503–504; Higher Regional Court Hamm, Decision of 15 May 2014, Case No. 22 U 60/13, NJW 2014, pp. 3659–3667; Higher Regional Court Stuttgart, Decision of 3 November 2011, Case No. 2 U 49/11; GRUR-RR 2012, pp. 243–246; Regional Court Berlin, Decision of 11 March 2014, Case No. 16 O 73/13, GRUR-RR 2014, pp. 490–491.

⁵⁴ A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 17 UrhG para. 8; H. Schack, *Urheber- und Urhebervertragsrecht*, 7th ed, Mohr Siebeck 2015, para. 463 f.; S. Apel, *Keine Anwendung der „UsedSoft“-Rechtsprechung des EuGH jenseits von Computerprogrammen*, ZUM 2015, pp. 640–648; M. Becker, *Zur Dogmatik des Erschöpfungsgrundsatzes im digitalen Umfeld*, UFITA 2015, pp. 687–708; R. Hauck, *Gebrauchthandel mit digitalen Gütern*, NJW 2014, pp. 3616–3619.

⁵⁵ Higher Regional Court Hamm, Decision of 15 May 2014, Case No. 22 U 60/13, NJW 2014, pp. 3659–3667.

⁵⁶ Higher Regional Court Hamburg, Decision of 24 March 2015, Case No. 10 U 5/11, ZUM 2015, pp. 503–504; Higher Regional Court Hamm, Decision of 15 May 2014, Case No. 22 U 60/13, NJW 2014, pp. 3659–3667;

differences.⁵⁷ Furthermore, files could be reproduced without loss and any number of times.⁵⁸

However, each and every argument can be opposed. First of all, recitals of directives are not binding so that they can only influence the construction of the law.⁵⁹ As the InfoSoc-directive dates back more than 15 years it is obvious that the European lawmaker did not imagine how the online-distribution of works would develop. The same holds true for the national lawmaker. As the *UsedSoft*-judgment and the current legal discussion show, the question of exhaustion does arise in cases of online services. Consequently, the obviously outdated recital cannot serve as an argument in this legal discussion.⁶⁰ This also leads to the conclusion that there in fact is an unintended regulatory gap.⁶¹

The opponents also forget that although the CJEU's judgment cannot be transferred directly, it is possible to draw conclusion for other cases. The CJEU laid emphasis on the purpose of the exhaustion-principle and pointed out that the author economically benefited from his work once and that he therefore should not be able to control the secondary market with regard to this work.⁶² In line with this, it is not understandable why the traditional book buyer should be able to resell the book whereas e-book buyers do not have that possibility.⁶³ The slightly lower price for e-books cannot justify that difference. The CJEU's conclusions can thus be transferred to the question at hand. Any other result would provide copyright proprietors with the possibility to circumvent the principle of exhaustion by only relying on online-distribution.⁶⁴ At the same time, it is the copyright proprietor's very own risk that digital works do not deteriorate when he decides to open up to the online-distribution market.⁶⁵ Additionally, the possibility of innumerable reproductions is irrelevant for the right of distribution and the question of exhaustion. The right of reproduction never exhausts so that each and every reproduction has to be covered by another exception to copyright.⁶⁶ Finally, any other result would eliminate a functioning digital single market within the European Union.⁶⁷

However, as long as the legal discussion goes on and judgments of the highest courts do not clarify the legal situation, one cannot say that the current copyright law sufficiently acknowledges the challenges of the digital society. The lawmaker is consequently asked to explicitly extend the principle of exhaustion to cases of online-distribution.

3.3.2 Freedom of expression and freedom of press

The German Copyright Act contains a number of provisions relating to the freedom of expression and the freedom of press.

⁵⁷ R. Hauck, *Gebrauchthandel mit digitalen Gütern*, NJW 2014, pp. 3616–3619; G. Schulze, *Werkgenuss und Werknutzung in Zeiten des Internets*, NJW 2014, pp. 721–726.

⁵⁸ K.-I. Wöhrn. In: Wandtke (ed), *Urheberrecht*, 5th ed, De Gruyter 2012, ch. 3 para. 97.

⁵⁹ T. Hartmann, *Weiterverkauf und „Verleih“ online vertriebener Inhalte*, GRUR Int 2012, pp. 980–989.

⁶⁰ J. Druschel, *Die Regelung digitaler Inhalte im Gemeinsamen Europäischen Kaufrecht*, GRUR Int 2015, pp. 125–137; T. Hoeren/S. Jakopp, *Der Erschöpfungsgrundsatz im digitalen Umfeld*, MMR 2014, pp. 646–649.

⁶¹ T. Hoeren/S. Jakopp, *Der Erschöpfungsgrundsatz im digitalen Umfeld*, MMR 2014, pp. 646–649.

⁶² CJEU, case C-128/11, *UsedSoft GmbH v Oracle International Corp.*, ECR 2012 I-0000, pt 43.

⁶³ T. Hoeren/S. Jakopp, *Der Erschöpfungsgrundsatz im digitalen Umfeld*, MMR 2014, pp. 646–649.

⁶⁴ D. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 17 para. 29; T. Hoeren/S. Jakopp, *Der Erschöpfungsgrundsatz im digitalen Umfeld*, MMR 2014, pp. 646–649.

⁶⁵ D. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 17 para. 29.

⁶⁶ D. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 17 para. 28.

⁶⁷ T. Hoeren/S. Jakopp, *Der Erschöpfungsgrundsatz im digitalen Umfeld*, MMR 2014, pp. 646–649.

§ 50 UrhG e.g. allows the usage (i.e. the reproduction, distribution and communication to the public) of works which become perceivable in the course of current events. Newspapers, periodicals as well as other data carriers mainly devoted to current events and TV stations can rely on this exception when reporting about current events. The exception is limited to the extent justified by the purpose of the report which opens the possibility to acknowledge colliding interests – above all the freedom of press as laid down in Art. 5 GG. The provision does not only include traditional newspapers but also digital online media.⁶⁸ In these cases, however, the content has to be deleted as soon as a report is outdated.⁶⁹ It is thus not allowed to create online news archives under § 50 UrhG.⁷⁰

§ 48 (1) UrhG further allows the press to reproduce and distribute speeches relating to current affairs as long as the speeches were made in public or were published by means of communication to the public.

Moreover, § 49 UrhG even permits the reproduction and distribution of individual broadcast commentaries and individual articles, as well as illustrations published in connection therewith if they concern current political, economic or religious issues and do not contain a statement reserving rights. In these cases, however, the author must be paid equitable remuneration for the reproduction unless the new article only contains short extracts of several commentaries or articles in the form of an overview.

§ 51 s. 1 UrhG allows everyone, not just press representatives, to reproduce and distribute a published work for the purpose of quotation so far as such exploitation is justified by the particular purpose. § 51 s. 2 UrhG then contains model examples: scientific works, works of language and musical works. Other works like videos can also be covered by § 51 s. 1 UrhG.⁷¹ The purpose of quotation is only met if there is a connection between the user's work and the quoted work.⁷² This is for example the case, if the reproduction aims at illustrating the new content, at critically analysing the quoted work⁷³ or at supporting one's own position.⁷⁴ The reproduction of a work without any or with only insignificant "intellectual" debate is not sufficient.⁷⁵

Besides, it is permissible under § 52 UrhG to communicate a published work to the public if the communication serves a non-profit-making purpose for the organiser, participants are admitted free of charge and, in the case of a lecture or performance of a work, if none of the performers (§ 73 UrhG) is paid a special remuneration. The copyright proprietor must be reimbursed adequately for the communication of his work in these cases if none of the exceptions mentioned is applicable (e.g. events organised by the youth welfare service). The exception in § 52 UrhG does not extend to the right of making works available to the public in the sense of § 19a UrhG.⁷⁶ Therefore, publishing protected works on a private website does not fall within the scope of § 52 UrhG.

⁶⁸ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 50 para. 3.

⁶⁹ Federal Court of Justice, Decision of 5 October 2010, Case No. I ZR 127/09, NJW 2011, pp. 544–545.

⁷⁰ S. Lüft. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 50 para. 3.

⁷¹ S. Lüft. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 51 para. 17.

⁷² Federal Court of Justice, Decision of 20 December 2007, Case No. I ZR 42/05, GRUR 2008, pp. 693–697; G. Spindler. In: Schricker/Loewenheim (eds), *Urheberrecht*, 5th ed, C.H. Beck 2017, § 51 UrhG para. 16.

⁷³ Higher Regional Court Munich, Decision of 14 June 2012, Case No. 29 U 1204/12, ZUM-RD 2012, pp. 479–485.

⁷⁴ Federal Court of Justice, Decision of 30 November 2011, Case No. I ZR 212/10, GRUR 2012, pp. 819–822.

⁷⁵ Federal Court of Justice, Decision of 20 December 2007, Case No. I ZR 42/05, GRUR 2008, pp. 693–697.

⁷⁶ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 52 para. 18.

3.3.3 Science and Education

The current Copyright Act contains several exceptions to copyright in order to meet the demands of scientific and educational facilities.⁷⁷

§ 52a *UrhG* is applicable if works are made available to the public for instruction and research. According to § 52a (1) No. 1 *UrhG*, it is “permissible for published small, limited parts of a work, small scale works, as well as individual articles from newspapers or periodicals for illustration in teaching at schools, universities, non-commercial institutions of education and further education, and at vocational training institutions, exclusively for the specifically limited circle of those taking part in the instruction to be made available to the public, to the extent that this is necessary for the respective purpose and is justified for the pursuit of non-commercial aims.” One of the main problems with this provision is to determine how large “small, limited parts of a work” may be. The Federal Court of Justice is of the opinion that not more than 12% of the work or 100 of its pages may be made available to the public to meet that criterion.⁷⁸ Other courts and legal scholars suggest different limits.⁷⁹ On the one hand, it has to be criticised that each and every of those lines is drawn at random and cannot substitute a case-by-case analysis taking into account the colliding interests.⁸⁰ On the other hand, precise numbers of course improve legal certainty. Distance universities also belong to the beneficiaries.⁸¹ “For illustration in teaching” means that the usage of the work has to be linked to the educational content. It is sufficient that it deepens or complements the content.⁸² Furthermore, teachers and lecturers profit from a margin of discretion in respect to what is necessary to reach the educational goals.⁸³ To profit from the exception, the beneficiary has to make use of technical protection measures (e.g. passwords for online-platforms) in order to make sure that the work is only made accessible to the participants of the instructed group.⁸⁴ The provision does not contain an absolute limit in regard to the number of participants so that – in the case of a distance university – the Federal Court of Justice found that 4000 participants can still be “a limited circle” within the meaning of § 52a (1) *UrhG*.⁸⁵ The usage has to be “justified for the pursuit of non-commercial aims”. That opens the doors to a case-by-case examination taking into account the colliding interests. According to the Federal Court of Justice, a fair, reasonable and easily detectable offer for a contractual agreement leads to the result that the usage is not justified within the meaning of the provision (also see Section 3.1.4 above).⁸⁶

§ 52a (2) *UrhG* excludes works intended for use in instruction in schools from the exception and sets special rules for cinematographic works. § 52a (3) *UrhG* states that also the reproduction of works is allowed as long as the copies are necessary to make the work available (e.g. scans and/or storages on hard drives). According to § 52a (4) *UrhG*, equitable remuneration has to be paid to a collecting society.

⁷⁷ §§ 46, 47, 52a, 52b, 53 (3), 53a *UrhG*.

⁷⁸ Federal Court of Justice, Decision of 28 November 2013, Case No. I ZR 76/12, GRUR 2014, pp. 549–556.

⁷⁹ E.g. more than 10 but less than 20%: U. Loewenheim. In: Schricker/Loewenheim (eds), *Urheberrecht*, 5th ed, C.H. Beck 2017, § 52a para. 4.

⁸⁰ U. Loewenheim. In: Schricker/Loewenheim (eds), *Urheberrecht*, 5th ed, C.H. Beck 2017, § 52a para. 4.; T. Hoeren, *Kleine Werke? – Zur Reichweite von § 52a UrhG*, ZUM 2011, pp. 369–375.

⁸¹ Federal Court of Justice, Decision of 28 November 2013, Case No. I ZR 76/12, GRUR 2014, pp. 549–556.

⁸² U. Loewenheim. In: Schricker/Loewenheim (eds), *Urheberrecht*, 5th ed, C.H. Beck 2017, § 52a para. 11.

⁸³ Cf. Higher Regional Court Frankfurt a.M., Decision of 24 November 2009, Case No. 11 U 40/09, GRUR 2010, pp. 1–4; Regional Court Stuttgart, Decision of 27 September 2011, Case No. 17 O 671/10, GRUR-RR 2011, pp. 419–423

⁸⁴ S. Lüft. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 52a para. 9.

⁸⁵ Federal Court of Justice, Decision of 28 November 2013, Case No. I ZR 76/12, GRUR 2014, pp. 549–556.

⁸⁶ Federal Court of Justice, Decision of 28 November 2013, Case No. I ZR 76/12, GRUR 2014, pp. 549–556.

§ 52b *UrhG* covers acts of communication of works at terminals in publicly accessible libraries, museums and archives, if the institution neither directly nor indirectly serves an economic or commercial purpose (e.g. university libraries). The exception is limited to the stocks (permanent non-lending collection) of the privileged institution. Reproductions of a work in excess of the number stocked by the institution shall not be made available simultaneously at such terminals. Each and every electronic copy has thus to be ascribed to an analogue one.⁸⁷ Consequently, the number of available exemplars can maximally be doubled.

Works may only be made available under § 52b *UrhG* if the terminals are specially dedicated to the purpose of research and private study. Thus, it is not covered by the exception if works are made available in a way that library users are able to download the work to their private laptops.⁸⁸ Similarly, it is not allowed to provide computers that can also be used for other purposes (e.g. text processing or internet research).⁸⁹ The terminals have to be located on the premises of the privileged institution. That hinders the institutions from offering their users the possibility to access the works from outside the institution, e.g. via VPN-access.⁹⁰

In April 2015, the Federal Court of Justice decided that a university library also profits from the exception if it offers its users the possibility to print the works or to store them on external storage media like USB-sticks.⁹¹ The court rightly argued that one has to differentiate between the university's usage (making the work available) that is covered by § 52b *UrhG* and the usage of the library users (reproduction) that is often covered by § 53 *UrhG* (see Section 3.3.6 below).

The provision explicitly states that the exception can be ruled out by contract. The Federal Court of Justice pointed out that only existing contractual agreements hinder the beneficiary from profiting from the exception whereas mere offers do not suffice.⁹² The author is granted equitable remuneration.

Against the backdrop of a developing information society, the foregoing provisions are an important step to adjust the German Copyright Act to the needs of the science and education sector. However, there still is pent-up demand in that regard as the wording of the exceptions is often kept very broad which necessarily leads to legal uncertainty. In order to eliminate the uncertainties, a government draft bill was published in April 2017.⁹³ The government plans to reorganize and to extend the exceptions for science and education. Therefore, a new subsection shall be introduced (§§ 60a ff. *UrhG*). The following text gives a short overview of the most important legal changes suggested in the draft (referred to as § X *UrhG*-draft).

The provision of § 52a *UrhG* is basically transferred to § 60a *UrhG*-draft. The government suggests to legally define how large a work's part may be (15%). Besides, the draft explicitly states that the use for preparation and

⁸⁷ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 52b para. 9.

⁸⁸ G. Dreyer. In: Dreyer/Kotthoff/Meckel (eds), *Urheberrecht*, 2nd ed, C.F. Müller 2013, § 52b para. 8; J. Heckmann. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 52b *UrhG* para. 18.

⁸⁹ G. Dreyer. In: Dreyer/Kotthoff/Meckel (eds), *Urheberrecht*, 2nd ed, C.F. Müller 2013, § 52b para. 8; U. Lowenheim. In: Schricker/Loewenheim (eds), *Urheberrecht*, 5th ed, C.H. Beck 2017, § 52b para. 8.

⁹⁰ J. Heckmann. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 52b *UrhG* para. 20.

⁹¹ Federal Court of Justice, Decision of 16 April 2015, Case No. I ZR 69/11, NJW 2015, pp. 3511–3517.

⁹² Federal Court of Justice, Decision of 16 April 2015, Case No. I ZR 69/11, NJW 2015, pp. 3511–3517.

⁹³ https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Urheber-Wissensgesellschafts-Gesetz.pdf;jsessionid=0A0BA9EF8DE1A18DCEB6104980A80EAA.1_cid324?_blob=publicationFile&v=1.

Accessed 16 May 2017; an excerpt of the new core provisions in English language can be found here:

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_UrhWissG_draft.pdf;jsessionid=0A0BA9EF8DE1A18DCEB6104980A80EAA.1_cid324?_blob=publicationFile&v=2

Accessed 16 May 2017.

follow-up work is also covered by the exception. § 60a UrhG-draft also regards that new technologies may be developed as it refers to “other forms of communication to the public”.

The current § 52b UrhG is transferred to § 60e UrhG-draft. The government, however, suggests a significant change: The exception would no longer require that each electronic exemplar has to be ascribed to an analogue one so that it would suffice that the privileged institution is in possession of one analogue copy of the work. The draft also answers the question how terminal users may use the work. It explicitly allows inter alia the reproduction of 10% of a work per session.

It is further suggested to introduce a new exception for scientific use in § 60c UrhG-draft. § 60c (1) UrhG-draft would allow to reproduce, distribute and to make available to the public 15% of a protected work for a clearly defined circle of persons. According to § 60c (2) UrhG-draft, up to 75% of a work may be reproduced for one’s own scientific use.

§ 60g (1) UrhG-draft explicitly states that the exceptions provided in this new section are mandatory and that contradictory contractual agreements are void. According to § 60g (2) UrhG-draft, this shall not be the case for the exception for terminals in public libraries and for the exception for orders for dispatch of copies.

The suggested changes would create a milestone on the way to a copyright law that sufficiently acknowledges the needs of the science and education sector. The changes would make it significantly easier for laymen to understand and follow the law. However, it is uncertain if the bill will be passed during the current legislative term that will end in September 2017.

3.3.4 Exception for Big Data and Data Mining?

The German Copyright Act does currently not provide for an exception that allows data or text mining.⁹⁴

In the above-mentioned draft bill (see Section 3.3.3 above) the government however suggests to implement a text and data mining exception in regard to research and science. The proposed provision (§ 60d UrhG-draft) allows to reproduce works even if the reproduction is made automatically and systematically in order to gain evaluable datasets. Furthermore, the provision allows to make works available to a limited circle of persons for joint scientific projects and to third parties in order to make it possible for them to verify the scientific quality. The exceptions will only apply if the user pursues non-commercial purposes. After the scientific purpose is fulfilled, the datasets have to be deleted. It is however possible to transfer the datasets to public libraries, archives museums and other educational facilities who then store the datasets as long as these institutions do not pursue a direct or indirect commercial goal. § 60d UrhG-draft does not allow to access protected works but assumes that the used work is already accessible for the scientists.

3.3.5 Temporary copies with special regard to streaming

§ 44a UrhG provides an exception to copyright in regard to temporary acts of reproduction:

“Those temporary acts of reproduction shall be permissible which are transient or incidental and constitute an integral and essential part of a technical process and whose sole purpose is to enable

1. a transmission in a network between third parties by an intermediary, or
2. a lawful use of a work or other protected subject-matter to be made and which have no independent economic significance.”

⁹⁴ Cf. S. Ott, Die Google Buchsuche – Eine massive Urheberrechtsverletzung?, GRUR Int 2007, pp. 562–569.

The provision implements Art. 5 (1) InfoSoc-directive into national law⁹⁵ and is not mandatory (see Section 3.1.4 above). The main question in regard to § 44a No. 2 UrhG is whether or not the provision is applicable to streaming situations. While courts have not dealt with the problem in detail yet⁹⁶, it is extremely controversial amongst legal scholars.

In order to understand the legal debate, it is first necessary to be versed with the technical process of streaming. One has to distinguish between the so-called *true-streaming-method* and *progressive downloads*. In the first case, single data packages containing work-pieces are downloaded to the RAM or the hard drive. These data packages are deleted immediately after the part has been played so that the next data package can be saved.⁹⁷ The technically well versed user has the possibility to choose the size of the storage (so-called buffer size) and can thus influence how long the stored movie or audio pieces are.⁹⁸ The work as a whole is never stored when using this method.⁹⁹ In case of the progressive-download-method, the work is completely downloaded to the RAM or the hard drive.¹⁰⁰ Normally, the copy gets deleted automatically after some time (e.g. when the play has ended, the browser is closed or the computer is shut down),¹⁰¹ but it is also possible to change these settings or to simply prevent the deletion by not causing the deletion point. For an average user it is hardly possible to find the data on the hard drive and to replay it.¹⁰² The user often has no influence on the streaming method as for example streaming via “flash player” always makes use of the true-streaming-method whereas a progressive download runs every time the “Divx”-format is used.¹⁰³

The vast majority of legal scholars are of the opinion that a reproduction of the work is only given in cases where the reproduced part itself is a protected work within the meaning of § 2 (2) UrhG.¹⁰⁴ Others argue from a more

⁹⁵ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 44a para. 1; C. Galetzka/E. Stamer, *Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co.*, MMR 2014, pp. 292–298.

⁹⁶ Hitherto decisions: Regional Court Cologne, Decision of 24 January 2014, Case No. 209 O 188/13, MMR 2014, pp. 193–194; Regional Court Hamburg, Decision of 19 December 2013, Case No. 310 O 460/13, ZUM 2014, pp. 434–435; Local Court Hanover, Decision of 27 May 2014, Case No. 550 C 13749/13, ZUM-RD 2014, pp. 667–669.

⁹⁷ T. Busch, *Zur urheberrechtlichen Einordnung der Nutzung von Streamingangeboten*, GRUR 2011, pp. 496–503.

⁹⁸ A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 44a UrhG para. 8; T. Busch, *Zur urheberrechtlichen Einordnung der Nutzung von Streamingangeboten*, GRUR 2011, pp. 496–503.

⁹⁹ J. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 16 para. 22.

¹⁰⁰ T. Busch, *Zur urheberrechtlichen Einordnung der Nutzung von Streamingangeboten*, GRUR 2011, pp. 496–503.

¹⁰¹ A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 44a UrhG para. 8; P. Hilgert/S. Hilgert, *Nutzung von Streaming-Portalen – Urheberrechtliche Fragen am Beispiel von Redtube*, MMR 2014, pp. 85–88.

¹⁰² J. Ensthaler, *Streaming und Urheberrechtsverletzung*, NJW 2014, pp. 1553–1558.

¹⁰³ C. Galetzka/E. Stamer, *Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co.*, MMR 2014, pp. 292–298.

¹⁰⁴ Cf. CJEU, case C-403/08, *Football Association Premier League Ltd and Others v Leisure and Others* (not yet published); T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 44a para. 4; J. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 16 para. 6; C. Galetzka/E. Stamer, *Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co.*, MMR 2014, pp. 292–298; M. Stieper, *Rezeptiver Werkgenuss als rechtmäßige Nutzung*, MMR 2012, pp. 12–17.

economic point of view that, although parts of the work are often deleted immediately after they have been played, the whole work is eventually reproduced.¹⁰⁵

§ 44a is only applicable to temporary reproductions. The vast majority of legal scholars – for good reasons – are of the opinion that in the case of progressive downloads, the copies are not temporary¹⁰⁶ because the data is not deleted immediately after the work has been played.¹⁰⁷ This opinion is also in line with case law of the CJEU.¹⁰⁸ Others point out that the user is not aware of the fact that the data may be stored on the computer even after the work's play¹⁰⁹ and ignore that no subjective criterion can be found in § 44a UrhG.

Concerning the true-streaming-method it is to say that copies are temporary within the meaning of § 44a UrhG as long as the user does not choose a big buffer size.¹¹⁰

The question whether or not a reproduction has *independent economic significance* can be answered analogously: If the data is stored for a longer period, there is also an independent economic significance.¹¹¹

A reproduction of a work is only in line with § 44a No. 2 UrhG if its purpose is to enable *lawful use*. If that meant any kind of use that is made legal by copyright law,¹¹² § 44a UrhG would be useless.¹¹³ Rightly, the sole receptive usage of a work is lawful within the meaning of § 44a UrhG because it is not part of the proprietors exclusive rights.¹¹⁴ During the streaming process, temporary copies are necessary to enjoy the work so they are a

¹⁰⁵ J. Heerma. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 16 para. 22; A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 44a UrhG para. 7; T. Busch, *Zur urheberrechtlichen Einordnung der Nutzung von Streamingangeboten*, GRUR 2011, pp. 496–503; J. Ensthaler, *Streaming und Urheberrechtsverletzung*, NJW 2014, pp. 1553–1558.

¹⁰⁶ T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 44a para. 4; C. Galetzka/E. Stamer, *Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co.*, MMR 2014, pp. 292–298.

¹⁰⁷ A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 44a UrhG para. 9.

¹⁰⁸ Cf. CJEU, case C-558/07, *The Queen, on the application of S.P.C.M. SA, C.H. Erbslöh KG, Lake Chemicals and Minerals Ltd and Hercules Inc. v Secretary of State for the Environment, Food and Rural Affairs*, ECR 2009 I-05783.

¹⁰⁹ T. Busch, *Zur urheberrechtlichen Einordnung der Nutzung von Streamingangeboten*, GRUR 2011, pp. 496–503.

¹¹⁰ C. Galetzka/E. Stamer, *Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co.*, MMR 2014, pp. 292–298.

¹¹¹ A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 44a UrhG para. 9; M. Stieper, *Rezeptiver Werkgenuss als rechtmäßige Nutzung*, MMR 2012, pp. 12–17.

¹¹² T. Dreier. In: Dreier/Schulze (eds), *Urheberrechtsgesetz*, 5th ed, C.H. Beck 2015, § 44a para. 8; M. v. Welser. In: Wandtke/Bullinger (eds), *Praxiskommentar zum Urheberrecht*, 4th ed, C.H. Beck 2014, § 44a paras. 16 ff.

¹¹³ Higher Regional Court Berlin, Decision of 30 April 2004, Case No. 5 U 98/02, GRUR-RR 2004, pp. 228–236; A. Wiebe. In: Spindler/Schuster (eds), *Recht der elektronischen Medien*, 3rd ed, C.H. Beck 2015, § 44a UrhG para. 10; J. Ensthaler, *Streaming und Urheberrechtsverletzung*, NJW 2014, pp. 1553–1558; K. Fangerow/D. Schulz, *Die Nutzung von Angeboten auf kino.to – Eine urheberrechtliche Analyse des Film-Streamings im Internet*, GRUR 2010, pp. 677–682; C. Galetzka/E. Stamer, *Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co.*, MMR 2014, pp. 292–298.

¹¹⁴ Cf. CJEU, case C-403/08, *Football Association Premier League Ltd and Others v Leisure and Others* (not yet published); G. Dreier. In: Dreyer/Kotthoff/Meckel (eds), *Urheberrecht*, 2nd ed, C.F. Müller 2013, § 44a para. 12; W. Schulz. In: Ahlberg/Göttig (eds), *Beck'scher Online-Kommentar Urheberrecht*, 15th ed, C.H. Beck 2017, § 44a para. 13; K. Fangerow/D. Schulz, *Die Nutzung von Angeboten auf kino.to – Eine urheberrechtliche Analyse des Film-Streamings im Internet*, GRUR 2010, pp. 677–682; A. Stolz, *Rezipient = Rechtsverletzer...? – Keine Urheberrechtsverletzung durch die Nutzung illegaler Streaming-Angebote*, MMR 2013, pp. 353–358.

dependent process within the scope of the work's utilisation.¹¹⁵ This interpretation is also in line with the legislator's intention.¹¹⁶

The most crucial question is whether the streaming-source itself has to be legal to justify the users' reproductions. By uploading the file, the source's provider infringes the proprietor's right of making the work available to the public within the meaning of § 19a UrhG. Therefore, consent is generally necessary to justify such usage. Some argue that streaming is not in line with § 44a UrhG if the source is evidently illegal and thus draw a comparison to § 53 (1) UrhG.¹¹⁷ Others take the view that even those sources can be streamed in accordance with § 44a UrhG and compare the streaming situation to the reception of other communication channels like pirate radio stations or illegally copied books.¹¹⁸ In these cases, the reception of the work is never restricted by copyright although the source is illegal. Rightly, the same has to apply in the online context because otherwise, copyright infringements would be dependent from technical coincidences.¹¹⁹

On 26 April 2017, the CJEU came to a long-awaited decision in a case concerning the use of illegal streaming platforms.¹²⁰ The court ruled that users of those platforms can at least not rely on the exception of Art. 5 (1) InfoSoc-directive if they know that the works were made available illegally. The court first referred to former case law¹²¹ and pointed out that the pure reception of a work that was made available illegally generally has to be considered as lawful use. The case at hand, however, had to be judged differently as it was obvious for the user that the streamed content had been made available without the proprietor's consent. To justify that result, the court made use of the triple test laid down in Art. 5 (5) InfoSoc-directive (see Section 3.2 above). In the CJEU's view, the normal exploitation of the work would have been endangered and authors' rights would have been unreasonably prejudiced if the usage was covered by the exception for temporary reproductions.

Before the judgment of the CJEU, it was hard – even for legal experts – to keep the overview in this matter. Even after the long-awaited judgment, important questions stay unanswered. The CJEU did for example not deal with the question whether the copy was temporary and did not differentiate between true-streaming and progressive downloads. Furthermore, the court very much referred to the specific case the Dutch national court had to decide. In that case, due to explicit advertising, it was very clear that the users knew that the source was illegal. The decision thus shifts the problem on to the question which criteria determine if a source is obviously illegal. It is very questionable if the judgment can be transferred to less obvious illegal streaming portals.

One also has to criticize that the question whether or not a copy is temporary, is dependent from the program used by the internet user who often does not understand the technical background of streaming and thus does not

¹¹⁵ K. Fangerow/D. Schulz, Die Nutzung von Angeboten auf kino.to – Eine urheberrechtliche Analyse des Film-Streamings im Internet, GRUR 2010, pp. 677–682; C. Galetzka/E. Stamer, Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co., MMR 2014, pp. 292–298.

¹¹⁶ Bundestag Drucksache 4/270, p. 28.

¹¹⁷ Regional Court Hamburg, Decision of 19 December 2013, Case No. 310 O 460/13, ZUM 2014, pp. 434–435; W. Schulz. In: Ahlberg/Göttig (eds), Beck'scher Online-Kommentar Urheberrecht, 15th ed, C.H. Beck 2017, § 44a para. 13; A.-A. Wandtke/F.-T. v. Gerlach, Die urheberrechtliche Rechtmäßigkeit von Audio-Video Streaminginhalten im Internet, GRUR 2013, pp. 676–683.

¹¹⁸ C. Galetzka/E. Stamer, Streaming – aktuelle Entwicklungen in Recht und Praxis – Redtube, kinox.to & Co., MMR 2014, pp. 292–298; A. Stolz, Rezipient = Rechtsverletzer...? – Keine Urheberrechtsverletzung durch die Nutzung illegaler Streaming-Angebote, MMR 2013, pp. 353–358.

¹¹⁹ A. Stolz, Rezipient = Rechtsverletzer...? – Keine Urheberrechtsverletzung durch die Nutzung illegaler Streaming-Angebote, MMR 2013, pp. 353–358.

¹²⁰ CJEU, case C-527/15, *Stichting Brein v Jack Frederik Wullems* (not yet published).

¹²¹ CJEU, case C-403/08, *Football Association Premier League Ltd and Others v Leisure and Others* (not yet published).

see any difference. Against that backdrop, the legal situation in Germany and Europe cannot be considered sufficient and is likely to cause chilling effects for the development of an information society. If the reproductions during the streaming-procedure are not in line with § 44a UrhG, they can still be covered by § 53 UrhG on the condition that the source is not evidently illegal (see Section 3.3.6 below).

3.3.6 Private use

§ 53 UrhG provides for exceptions to copyright law in regard to the private use of works. § 53 (1) UrhG allows natural persons to reproduce works for private use and *on any medium*, as long as the copy neither directly nor indirectly serves commercial purposes and no obviously unlawfully-produced model or a model which has been unlawfully made available to the public is used for the reproduction. The question whether the copy indirectly serves a commercial purpose is of course a crucial point when applying the provision in practice. For example, copies made for the purpose of professional education (university students) are not covered.¹²²

In line with the legislator's intention, the vast majority of legal scholars are of the opinion that a model is obviously unlawful if the specific user could reckon that the source was illegal.¹²³ The opposing view argues for an objective understanding of the provision and thus examines whether an average user could reckon that the source was illegal.¹²⁴

§ 53 (1) UrhG also covers reproductions made by others as long as no payment is received therefore or the reproductions are on paper or a similar medium and have been made by the use of any kind of photomechanical technique or by some other process having similar effects. Consequently, both the template and the reproduction have to be in physical form; digitals are not covered by the exception.¹²⁵ However, this does not cover the distribution of the work. Therefore, § 53a UrhG (order for dispatch of copies) was created.¹²⁶ This provision applies to reproductions of individual contributions released in newspapers and periodicals and small parts of a released work made by public libraries that are transmitted by post or facsimile as long as the orderer's usage is covered by § 53 UrhG. For the reproduction and transmission of works in other electronic form further criteria have to be fulfilled according to § 53a (1) S. 2 f. (also see Section 3.1.4). Equitable remuneration has to be paid according to § 53a (2) UrhG.

As opposed to this, § 53 (2) UrhG is applicable to "one's own use" in certain legally defined cases. The difference between these two sections of the provision is that one's own use can also serve professional and commercial purposes as long as the copies are not passed on to external third parties.¹²⁷ Juristic persons can also profit from these exceptions.¹²⁸ § 53 (2) UrhG is also applicable to reproductions made by others for the privileged purpose. § 53 (3) – (7) UrhG cover further specific cases.

The user does not have to pay compensation to the copyright proprietor for the usage covered by § 53 (1) – (3) UrhG. An indirect compensation is however ensured by §§ 54 ff. UrhG. For example, manufacturers of appliances and of storage mediums that are used for reproduction of works (e.g. copying machines or hard drives) have to pay remuneration to a collecting society according to § 54 (1) UrhG.

Parts of the provision have to be considered mandatory as § 95b UrhG refers to them (see Section 3.1.4 above).

¹²² Federal Court of Justice, Decision of 9 June 1983, Case No. I ZR 70/81, GRUR 1984, pp. 54–56.

¹²³ T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, § 53 para. 12b; U. Loewenheim. In: Schricker/Loewenheim (eds), Urheberrecht, 5th ed, C.H. Beck 2017, § 53 para. 19.

¹²⁴ M. Witz. In: Fromm/Nordemann (eds), Urheberrecht, 11th ed, Verlag W. Kohlhammer 2014, § 53 para. 20.

¹²⁵ Federal Court of Justice, Decision of 2 October 2008, Case No. I ZR 18/09, GRUR 2009, pp. 53–55.

¹²⁶ Cf. U. Loewenheim. In: Schricker/Loewenheim (eds), Urheberrecht, 5th ed, C.H. Beck 2017, § 53a para. 3.

¹²⁷ Federal Court of Justice, Decision of 14 April 1978, Case No. I ZR 111/76, GRUR 1987, pp. 474–477.

¹²⁸ T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, § 53 para. 18.

3.3.7 Panorama-exception

Another exception to German copyright is stipulated in § 59 UrhG.

§ 59 UrhG:

(1) It shall be permissible to reproduce, by painting, drawing, photography or cinematography, works which are permanently located on public ways, streets or places and to distribute and publicly communicate such copies. For works of architecture, this provision shall be applicable only to the external appearance.

(2) Reproductions may not be carried out on a work of architecture.

This so called panorama-exception has been part of the German copyright law since the end of the 19th century and is of major importance in the field of architecture. Nonetheless, it is also applicable to artistic works, works of applied art and other types of works listed in § 2 (1) UrhG.¹²⁹ According to the provision, it is permitted to reproduce works that are permanently located in public places and distribute such copies or make them available to the public. The reproduction is, however, only allowed in two-dimensional ways, e.g. in form of a photo or a video.¹³⁰ The replication of a whole building, no matter in which size, is not permitted under § 59 UrhG.

In order to minimise the infringement of the proprietor's rights, the exception does also not encompass works that are not located in the public permanently. This is particularly relevant for artists who only present their work (e.g. a sculpture) in public for a limited period of time. In these cases, a reproduction of the work is not permissible without the consent of the artist.¹³¹ Similarly, a reliance on the exception is not possible when the reproduction shows parts of a work which are not visible from public places. Therefore, a photo of a building which was taken e.g. from a private apartment across the street does not fall under the exception of § 59 UrhG.¹³² No compensation is granted for the usage in line with § 59 UrhG.

In 2015, when a harmonisation of the panorama-exception was discussed in the European Parliament, the topic became part of a heated discussion in the media and the legal world. French delegates in the European Parliament proposed to adopt the French panorama-exception which does not encompass reproductions for commercial purposes. This approach would, however, not only create legal uncertainty for photographers and documentary filmmakers. Problems would also arise when pictures or videos are shared in social media since many platforms require users to agree to a commercial usage of their content. In light of these problems and the

¹²⁹ T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, § 59 para. 2; A. Wiebe. In: Spindler/Schuster (eds), Recht der elektronischen Medien, 3rd ed, C.H. Beck 2015, § 59 UrhG para. 2.

¹³⁰ U. Gruebler. In: Ahlberg/Göttig (eds), Beck'scher Online-Kommentar Urheberrecht, 15th ed, C.H. Beck 2017, § 59 para. 8.

¹³¹ Federal Court of Justice, Decision of 24 January 2002, Case No. I ZR 102/99, GRUR 2002, pp. 605–607; T. Dreier. In: Dreier/Schulze (eds), Urheberrechtsgesetz, 5th ed, C.H. Beck 2015, § 59 para. 5; U. Gruebler. In: Ahlberg/Göttig (eds), Beck'scher Online-Kommentar Urheberrecht, 15th ed, C.H. Beck 2017, § 59 para. 5.

¹³² Federal Court of Justice, Decision of 5 June 2003, Case No. I ZR 192/00, GRUR 2003, pp. 1035–1037; A. Wiebe. In: Spindler/Schuster (eds), Recht der elektronischen Medien, 3rd ed, C.H. Beck 2015, § 59 UrhG para. 2.

harsh criticism, the parliament eventually decided to postpone the harmonisation of the panorama-exceptions in the European Union.¹³³

4 Conclusion

As shown above, the question whether the German Copyright Act strikes a fair balance between the right of proprietors and the interests of the public to freely use a work is not easy to answer.

German copyright law lays focus on the protection of the work and its author and consequently regards copyright protection as the core principle. A fair balance can thus only be reached by the exceptions. In an overall assessment, German copyright law does fairly balance these goals.

The exceptions adequately give regard to the freedom of expression and the freedom of press which are the most important factors for a lively and stable democracy.

In regard to the exceptions for science and education the hitherto steps taken by the lawmaker are a step in the right direction. The provisions, however, contain many criteria that are openly formulated and thus cause legal uncertainty. The government draft bill of January 2017 would solve these problems and would introduce further exceptions for the scientific and educational sector. It is yet uncertain if the lawmaker will pass the law during the current legislative term.

Besides, the German copyright law lags behind technical developments. As the German law relies on specific exceptions, it is upon the lawmaker to again and again pass new exceptions to copyright. The most important factor for an undisturbed development of an information society of course is legal certainty. The foregoing examination has shown that German copyright law often does not meet that requirement.

Especially in regard to the exhaustion of the right of distribution for digital works, users are confronted with legal problems that are incomprehensible for legal laymen. This legal uncertainty causes chilling effects for the sale of these goods. The same is true for the usage of works via streaming. The long-awaited judgment of the CJEU is not likely to clear the situation. It will take further court decisions or – even better – a legal initiative to dispel legal uncertainty in that regard.

¹³³ N. Rauer/L. Kaase, „Reda-Bericht“: Ansätze für eine Reform des europäischen Urheberrechts, GRUR-Prax 2015, pp. 364–366.