



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

ALAI
2021
Madrid



ALAI CONGRESS 2021, 29 Sept. – 1st Oct. 2021, Madrid

COPYRIGHT, COMPETITION AND INNOVATION

QUESTIONNAIRE – NATIONAL REPORT OF GERMANY

Notes: This questionnaire aims at collecting information of law, caselaw and practices available in each country.

Please refer to the ALAI2021 program for further explanation on the Sessions and Panels.

Please, keep your answers short and factual.

Please send national report to rxalabarder@uoc.edu.

Deadline: 15 August 2021.

1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

Identify and explain any specific instances where market competition and innovation concerns haven't been specifically addressed by copyright law or caselaw in your country. This may include by means of:

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

There is not such instance in Germany where exclusive rights would be defined restrictively in order to take into account competition or innovation concerns.

1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

The new § 44b Author's Rights Act (ARA), which implements Art. 4 of the EU's DSM Directive on text and data mining in general, has been introduced to serve innovation, according to a recital in that Directive, following lobbying of the interested Tech Companies; except for this case, promotion of innovation is not and has not been considered a reason for introducing exceptions.

Even the exception for decompilation of computer programs, implementing the relevant provision of the Software Directive 2009/24/EC, only serves the obtaining of interoperability between programs, but not the production of competing programs and thus not competition between different programmers.

1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or "joint-tariffs", "one-stop-shops" ... and explain their impact in the market

§ 42a ARA provides for a compulsory licence after a voluntary, mechanical licence (recording of musical work on a phonogram and its distribution) has been granted to a phonogram producer, to be granted thereafter also to other phonogram producers (to allow competition of such other producers),



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under further conditions, following Art. 13 Berne Convention. However, since these rights are exercised through the relevant CMO, this provision does not apply (see § 42a (1) phr. 1 ARA).

The only other compulsory licence may be found in § 5(3) ARA, which obliges authors of private normative works (such as DIN norms) to give a licence to publishers to reproduce and distribute these works where they are referred to in laws, etc. Accordingly, this has to be seen in the context of official works rather than innovation or competition.

There are cases of exceptions combined with statutory remuneration rights, such as for private copying, that might be called statutory licensing, but they do not address competition or innovation. The same applies to mandatory collective management, which mostly refers to remuneration rights (except for the exclusive cable retransmission right, which was harmonized to allow free movement of services within the EC/EU). Similarly, the ECL introduced in context with the out-of-commerce works in line with the DSM Directive (see § 52 Law on CMOs) does not address competition or innovation.

Generally, the law on CMOs has always reflected competition concerns, where it has established an obligation of CMOs (that are regularly monopolies) to conclude contracts with relevant authors or other right owners (today see § 9 Law on CMOs), and with relevant users or associations of users (§§ 34, 35 Law on CMOs). This serves to avoid an abuse of the regularly dominant position of a CMO. One-stop-shops have mainly emerged as a consequence of Arts. 23 ff. CMO Directive and aim at licensing online rights in musical works beyond national borders of EU Member States.

1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)

1.5.- By any other means?

2. A STUDY CASE: DATA ECONOMY

Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)

Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc) available either online, in digital form or in analogue form.

2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

Machine reading regularly (except arguably in case of web crawling) necessitates a reproduction of works or other material and has been licensed, e.g. by STM publishers. In implementing Arts. 3 and 4 DSM Directive, Germany now provides an exception for TDM for scientific purposes and one general exception, which however only applies if right holders have not reserved their exclusive rights in an appropriate way.



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2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

Germany has implemented the EU's Public Sector Information Directive, including its latest version of 2019, by law of 16 July 2021 (Gesetz für die Nutzung von Daten des öffentlichen Sektors (Datennutzungsgesetz - DNG) (BGBl. I S. 2941, 2942,, 4114)), see <https://www.gesetze-im-internet.de/dng/DNG.pdf> It has stayed quite closely to the Directive and not changed the provision on official works in the Author's Rights Act. The Directive excludes from its application protected works and subject matter by third persons. In practice, the use of sui generis-protected databases rather than author's works is mostly at stake, though so far, it seems that the state has avoided litigation, even where some of its information has been used by third persons or organisations.

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

It is difficult to ascertain the causality between the law and any concrete development; no such evidence is known to us. Here are two studies on open data used in Germany (in German):

https://www.digitale-technologien.de/DT/Redaktion/DE/Downloads/Publikation/SSW/2020/SSW_Open_Public_Data_in_Deutschland.pdf?__blob=publicationFile&v=9 and

https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/studie-hochwertige-datensaetze-in-deutschland.pdf?__blob=publicationFile&v=16

3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:

3.1.- "Essential facilities" doctrines to foster the development of downstream markets

The "Essential facilities" doctrine is not applied in German author's rights law.

3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?

In general, it is mainly Arts. 101, 102 TFEU (EU competition law) that has to be applied in Germany. For ex., following the ECJ's Maize Seed case, closed exclusive licenses are prohibited; see also the ECJ's case Football Association Premier League/Murphy (on obligation of licensee not to offer decoders outside of agreed broadcasting area). Also, two cases indirectly and directly coming from Germany and finally solved at EU level concerned (1) an exclusive agreement regarding online making available of audio books between Audible (a subsidiary of Amazon) and Apple's iTunes, see https://ec.europa.eu/commission/presscorner/detail/en/IP_17_97 and https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_01_2017_a



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3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...

It is mainly EU competition law rather than German law (§§ 1, 19 and 20 GWB (Act against restraints of competition) on interdiction of restrictive agreements and on abuse of a dominant position) that is applicable and has been applied by the ECJ to CMOs' licensing.

German law indicates certain general criteria to be taken into account when CMOs set tariffs (§ 39 VGG/Law on CMOs).

4. ONLINE MARKETS: "VALUE GAPS" (ONLINE PLATFORMS)

Notice that complete and valuable information resulting from the stakeholders' dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591

<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>

Please include only information that is specific to your country.

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

If you are an EU country, have you addressed the transposition of Art. 17 CDSM Directive?

Germany has implemented Art. 17 DSM Directive by a separate Act, see <http://www.gesetze-im-internet.de/urhdag/index.html> (so far only in German)

4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?

If you are an EU country, have you addressed the transposition of Art. 15 CDSM Directive?

Germany has implemented Art. 15 DSM Directive quite closely to the provision of the Directive; it had a similar related right before harmonization.

4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

For instance, regarding cloud storage and compensation for private copying



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So far, cloud storage is not explicitly covered by the private copy exception and remuneration, but EU Member states are awaiting a pending decision of the ECJ on that topic, based on Art. 5 InfoSoc Directive (case coming from Austria).