



Intellectual Property – Points of View

- **Moving Ahead: The Knowledge Industry
in the 21st Century**

Imprint

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Berlin, March 2007

Intellectual Property – Points of View

Moving Ahead:
The Knowledge Industry
in the 21st Century

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Introduction



In the 21st century, capital resides in our heads. In a high wage country like Germany especially, companies must be creative and innovative to survive international competition. Creativity, whether technical or artistic, can only really flourish if the law adequately protects the fruit of the inventor's (or the artist's) labours. The German government is therefore right to put protection for intellectual property very high on the agenda during its presidency of the Council of the European Union (EU) and of the G8.

However, in a legal framework for the future, the complex system of remunerating inventors and authors must be streamlined for the digital age. The sale of creative services on the Internet is gaining momentum. Their revenue comes not from flat copying levies fees but from individually tailored licensing models. What customers pay for works depends on the extent they actually use them.

This publication summarizes the chief issues in the ongoing debate on protecting intellectual property, ranging from rewards for inventors and authors

to crucial topics such as contemporary patent policy, digital rights management (DRM), and provider liability. Opinion leaders from the worlds of business and politics discuss the big issues from their respective points of view. We believe this publication is a valuable contribution to moving the debate toward addressing real protection for intellectual property in the 21st century information society.

A handwritten signature in black ink, appearing to read 'Willi Berchtold', written in a cursive style.

Willi Berchtold
President of BITKOM

Proposition 1

Intellectual property needs protection and public acceptance

- It is the commercial benefit to which the author or inventor alone is entitled; the knowledge remains free. Freedom of knowledge and intellectual property need not be incompatible – a fact that is often overlooked.
- Alongside the efforts made to provide protection, there is an urgent need to educate the public about the value of intellectual property. People will not accept the idea of intellectual property unless they are aware of why it is needed.



Bright ideas and innovations therefrom are our capital resource in Germany and the key to safeguarding jobs here. It is therefore right for the federal government to push for effective protection for intellectual property, both in Germany and on the international stage. Germany's present simultaneous presidency of both the EU and G8 is an excellent opportunity for doing so.

It is essential that the value of intellectual property is widely appreciated in society for protection to work effectively. Otherwise people will not understand the threat that infringement represents to artists, innovators, companies, consumers, and the economy. Politicians and business people have joined forces and must continue to work together on this.

Brigitte Zypries

German Federal Minister of Justice

Never before has Intellectual property been talked about so much. Even if it is still occasionally questioned in some circles, the fact is that intellectual property is now widely recognized. This is just as well, because in our digital world and our global economy the dangers of piracy and ideas theft are much greater than in days gone by.

Aside from an awareness of the value of intellectual property, we also need effective legal safeguards, of course. That is the task of the legislators. They have to come up with a fair balance between the often competing interests of authors and inventors, exploiter, industry, and users. That is no easy task, but we shall manage it because we work closely, and are in constant dialogue, with all of the stakeholders. The legislature must now make decisions about two important results of our work: We wish to get copyright into shape for the digital age with amendments to the German Copyright Act, the so called second basket. And we intend to introduce additional legislation to make it easier to enforce intellectual property rights. We will make it easier to fight infringements such as illegal copying and piracy.

Creativity and inventorship drive the innovative power of our economy. This driving force must continue to run at high speed in the future – the legislation and economy will achieve this only in close cooperation!

Proposition 2

Intellectual property is our most important stock for the future

- The protection of intellectual property is particularly relevant for Europe. The digital age is just beginning: Now is the time to set it on the right course.
- Industrial countries such as Germany can no longer rely on the use of material resources, such as raw materials, for their economic success. To a much greater extent, intangible assets – and creating the conditions for innovation – is the key to success: The brain is the capital of the 21st century.
- Innovation may require much higher investment. And investment must create a return, or it will not be made. However, here lies the distinctiveness of intellectual property. Without special protection it cannot be exploited, but it also has the function of placing a value on mental exertion.

Dr. Bernhard Rohleder

Director General of BITKOM

Is intellectual property a new phenomenon? What special challenge do you see for the digital age?

People were complaining about plagiarism 2000 years ago, so they must have had some concept of intellectual property even then. But in those days there was no very effective way to protect it. In later ages, trade involving immaterial goods grew, and with it the need for protection. In today's digital world, in theory anyone can make perfect copies of works and distribute them to countless people simultaneously on the Internet. This is a new challenge for many business models.

Do you have a real-life example?

In the summer of 2005, a German company launched a new computer game, the fruit of several years' work by a team of 45 developers, costing some €5 million. Just two days later you could get it on file swap sites. Within a month or two the company had sold 100,000 copies, but there were already 600,000 unauthorized copies in use. On the other hand, new technologies offer huge opportunities to market content online.



A recent EU survey predicts that in Europe this business will be generating revenues of €8.3 billion by 2010¹. Music downloads alone earned US\$1.1 billion in 2005. Also, new online business models help companies address customer needs much more precisely and conveniently.

¹ See European Commission press release IP/07/95, Brussels, January 25, 2007: "Over 400 % growth for creative content online, predicts Commission study – an opportunity for Europe".

If the law offered no protection, would art and innovation survive? Put another way: How important is intellectual property for our society?

It depends. Without adequate legal protection there just wouldn't be any technical innovation, or at least not on anything like the scale we need in high-wage economies like our own. New technologies and software require enormous investment in research. Companies wouldn't pay for it if they weren't assured of the protection they need in order to successfully market the fruits of that research.

I can't say whether that also applies to art. Great artists would doubtless still create great works even if there were no copyright law to protect them. But innovation that springs primarily from artistic creativity is every bit as entitled to protection as innovation that springs chiefly from the profit motive.

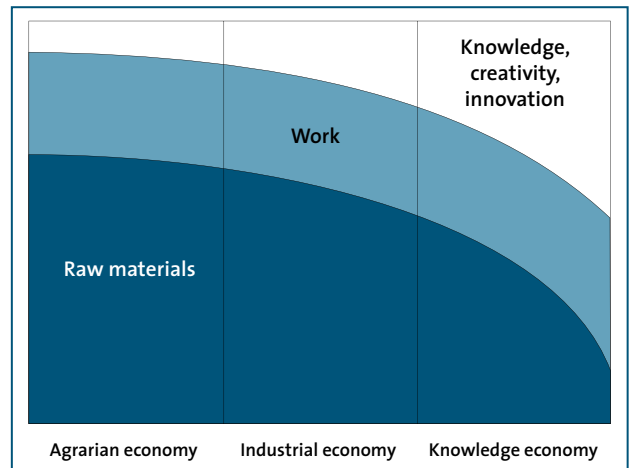
We should provide strong safeguards for innovative work and leave it to the innovator to decide whether to use it or to release work for free copying.

Intellectual property is very important for our society. And it is only right and proper that innovators, be they inventors, authors, or artists, should be entitled to benefit from their efforts.

How important is intellectual property in the information technology and communications industry?

Innovation and creative ideas are the very lifeblood of our industry. These intangibles are a crucial factor of success. The capital that makes the difference is the capital that resides in our heads. For the owner of such capital to be able to make money from it, the law must protect such capital properly. The ITC industry files one third of all patents applied for in the European Union. Patents are especially important for us, precisely because they protect so many technical innovations made by our industry.

Copyright is also of key importance. The ITC industry lives in symbiosis with writers and artists. Without their content there would not be so many technologies to utilize it, and vice versa. Interestingly, in the EU the copyright utilization industry generates well over €1 billion revenues².



It is sometimes said that intellectual property is focusing more and more on safeguarding investment and less on art and culture.

That is the opposite of my impression. The current discussions about the second basket of amendments to the German Copyright Act are all about the rights of originators of works in the artistic sense. Nonetheless, to encourage innovation it is necessary to safeguard companies' investment in research and development. Business innovation and art are from the same stable: They both draw on creativity. They must both be rewarded, they must both be encouraged. In fact the law affords different protection to different categories of work. Thus, rights in a poem are different from rights in a new kind of solar cell, and different rules again apply to a computer program.

But the technological aspect may seem to predominate because technology is advancing so rapidly and therefore commands a great deal of attention. Think for example of the controversy concerning patentability of computer programs and the whole discussion surrounding digital rights management.

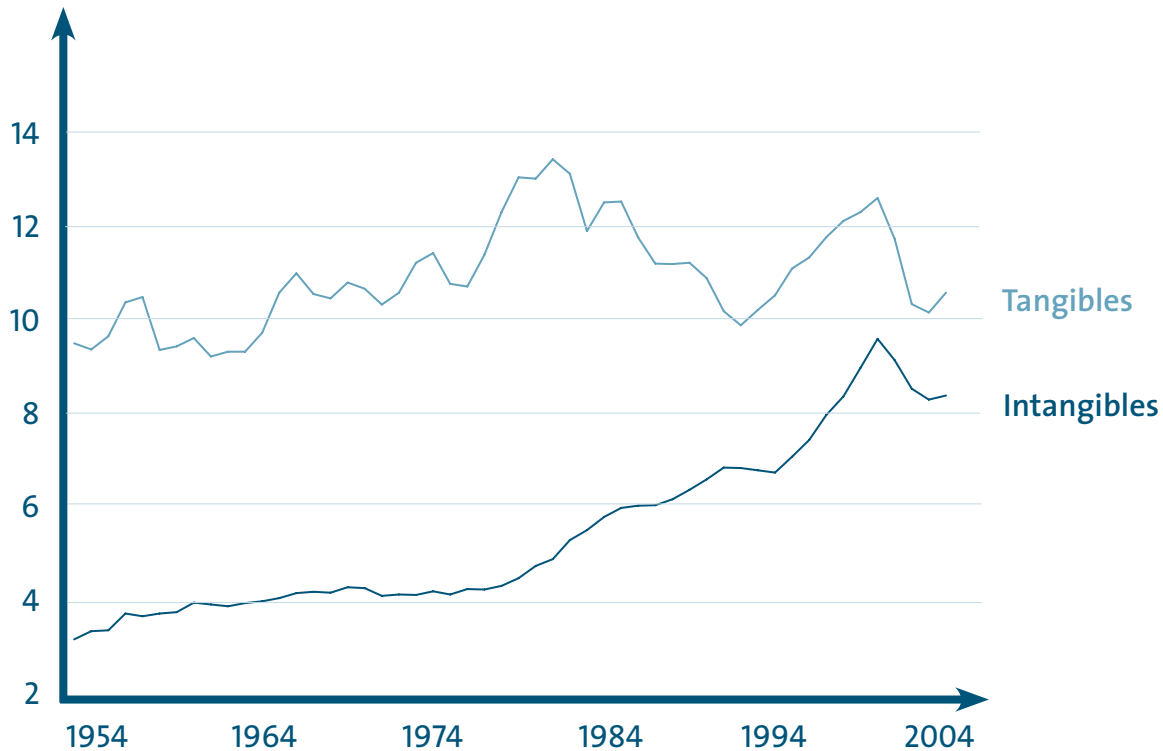
How can the politicians best help in the 21st century?

Intellectual property has plenty of legal protection in most western industrialized nations. It is on the international stage that most work is needed: Infringements do not stop at border posts. There are countries that have considerable ground to make up. The politicians can help by negotiating treaties and working toward international cooperation. For instance, the new collaboration between the EU and China on intellectual property rights is a good start. Better protection against international piracy

² Turku School of Economics and Business Administration, The Contribution of Copyright and Related Rights to the European Economy, Final Report, 20 October 2003, Executive Summary p.1.

The purpose of investments: intangibles

Investments in intangible* and tangible** assets in the USA, as a percentage of GDP



* Estimated; ** Private non-residential fixed investment

Source: L. Nakamura, Federal Reserve Bank of Philadelphia 2005

was also on the agenda of the G8 summits at Gleneagles and St. Petersburg. It was correct to focus on concerted action, especially within the ambit of international organizations such as the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD), the World Intellectual Property Organization (WIPO), Interpol, and the World Customs Organization (WCO).

One fact works in our favour on the international level, by the way: As a country and its econo-

my become more developed, its own potential for innovation grows – and with that also grows its need for legally enforceable protection for its intellectual property. Ultimately, by developing a legal framework for protecting intellectual property, we are defining ground rules not only for the digital economy, but for the digital world in its broadest sense – and that world knows no national boundaries. Everyone who carries political responsibility should be aware of that.

Proposition 3

Authors must be appropriately compensated

- Intellectual property also provides a legal framework for business commodities such as “knowledge” and “creativity”, although they are not physical goods. Future copyright must balance the interests of the author, the user and the general public.
- The author should be adequately paid for the licensing as well as for the work-related use.

Prof. Joerg Menno Harms

BITKOM Vice President,
Chairperson of the Supervisory Board of
Hewlett-Packard GmbH



Germany has one of the world’s most vibrant cultural scenes – from literature to theater to modern art. As a center for culture, Germany, the land of ideas, displays impressive vitality, imagination, and creativity. This is what we have to encourage, because, more than ever before, it gives us competitive edge. In technology and in art, innovations – good ideas – are valuable, and generate revenue. That is why intellectual property needs protection – especially in our digital age, in which information flies around the globe in seconds. One side of this is that the innovator must be suitably rewarded. To ensure this happens we need forward-looking, copyright law which takes particular account of the possibilities of the Internet. It must be safe and convenient for authors and publishers to seize the opportunities the digital age offers. That means, among other things, that the analog world’s bureaucratic regulations should not be applied to the new media.



Prof. Dr. Thomas Hoeren

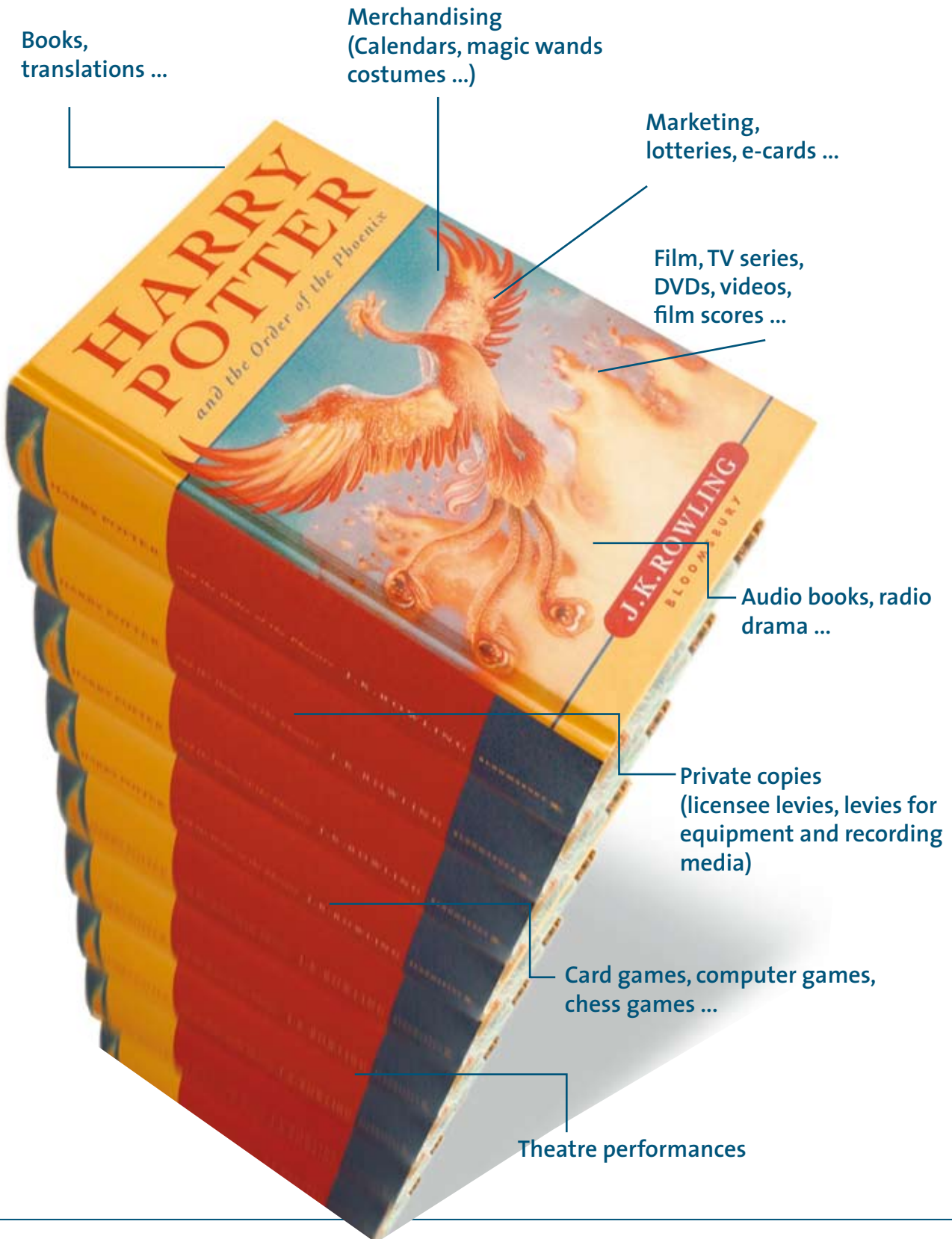
Institute for the Law of Information, Telecommunication,
and Media (ITM),
Westfälische Wilhelms-University, Münster, Germany

The question of royalties is complex, and anyone advocating simplistic answers is on the wrong track. The approach must depend on the technological development, and there will always be discussion about whether and how to compensate authors, so it cannot be rigidly fixed by the law. DRM and performance rights organizations or collecting societies are not mutually exclusive: Indeed they are complementary. The multimedia world needs a multilegal licensing strategy: collective rights awareness, private copying levies, DRM, and personal licenses.

We need quiet, a cautious, unhurried approach, without disturbance from quick-firing lobbyists, to allow us to feel our way towards equity in information and a fair and constitutional balance between the rights of the authors, the proprietor, and the user.

Analysis of literary works

Example – Harry Potter



Proposition 4

System change: As far as possible, private copying levies must be replaced by individual payments using DRM

- In Germany, copyright law allows private copying as an exception to the comprehensive rights of the author to the work. The author receives compensation through private copying levies that are collected from the manufacturers of copying equipment and recording media.
- The system of private copying levies is a relic from an analogue world that can no longer provide the necessary balance between all parties. DRM and individual licensing offer a more suitable alternative for the future. This change in the system is anticipated and supported in European law.
- Individual licensing is good for rights: It raises awareness. With private copying levies, many have the wrong impression that they may privately download without limit.
- Individual licensing is fairer: In contrast to private copying levies, only the actual user is charged, not the manufacturer and other customers. Payments to the rightholder reflect the rights actually granted for use and the actual extent of such use. With the current private copying levies every device user is charged regardless of the actual use of a work.
- Licensing is Internet compatible: In the digital environment, in particular on the Internet, DRM and protection technology must have pre-eminence, because they allow payment based on actual usage. Internet copying must be exempt from levies.
- Individual licensing would abolish geographical differences: In hardly any other EU country are equipment levies as widespread as in Germany – in the UK there are absolutely none, and in Poland a percentage levy has been introduced, but it remains at under 5%. Among the adverse consequences of the levy are a distortion of competition, the migration of companies, and job losses. Where consumers can switch their custom to levy-free neighbouring countries (by shopping on the Web, for example), levy collection fails.
- The economic conditions support change in the system: the market for online content (which is paid for individually) such as video on demand, music on demand, and online newspapers, is growing at an extraordinary rate, and this will mean it leaves the current system of levies far behind.

The levy situation in Europe

- No levies in Ireland, UK, and Norway
- Levies only on media (and permanent storage) in France, Sweden, Lithuania, Denmark, the Netherlands, and Switzerland
- Levies on media and reprography equipment in Portugal, Austria, and Hungary
- Levies on media and audio/video recording equipment in Finland, Estonia, Latvia, and Italy
- Levies on everything in Spain, Germany, the Czech Republic, Slovakia, Greece, and Poland*

* except on printers and fax machines



Source: BITKOM

Dr. Alexander R. Klett, LL.M. (Iowa)

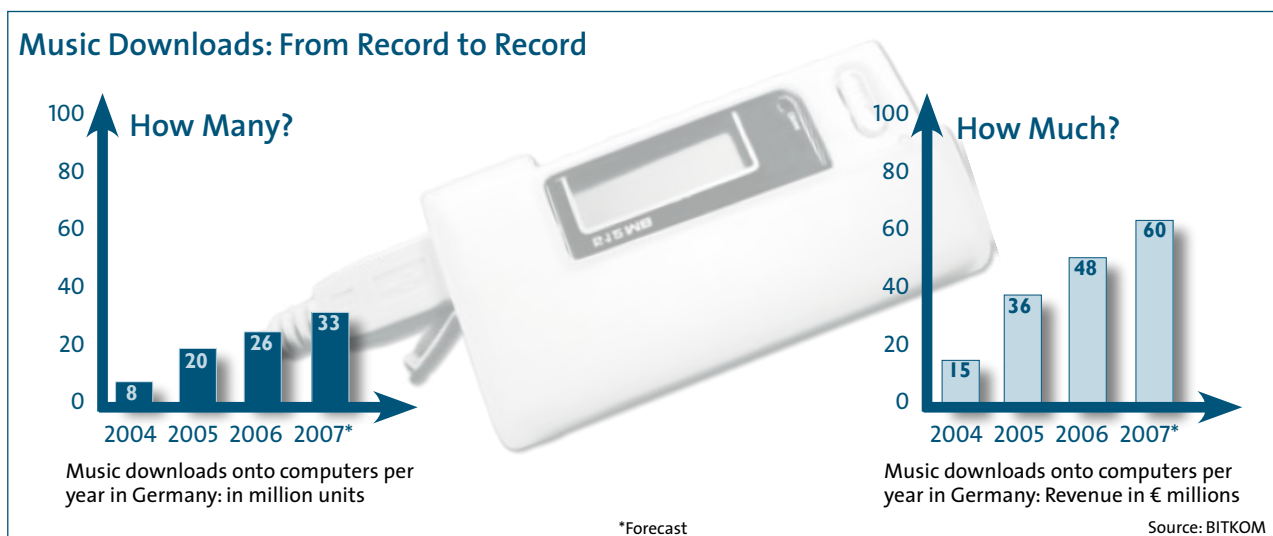
Attorney at Law,
Associate Partner of Gleiss Lutz, Munich



Collecting copyright fees by private copying levies on equipment and recording media is no longer appropriate in a digital world. Effective protection technologies and DRM are now available and make such levies unnecessary. This has long been recognized in European law. As early as May 22, 2001, Directive 2001/29/EC on copyright in the information society provided that national exceptions concerning private copying permitted in copyright law should not inhibit the use of technological measures or their enforcement against circumvention. Indeed, it goes a step further in providing that compensation to rightholders for permitted private copying should take account of any application of technical measures to the work in question. Thus, European law supports the use of protection technology – which should reduce the amount of compensation for the rightholder, and thus also the amounts collected. Unfortunately,

the German legislature has not yet implemented these provisions.

It is fairer to pay the rightholder for actual use of copyright material and charge the user accordingly. Then the compensation would reflect the legally relevant actual use of the material, and the actual extent of such use, instead of fictitious hypothetical use as set by the legislature more than twenty years ago in a different technological context. It would also mean the user pays, not the manufacturer, importer, or retailer of equipment and blank media. The royalty would reach the deserving party, the holder of the rights in the actual copyright material used. It would no longer be indiscriminately collected according to device type and distributed (only) to registered members of collecting societies using a formula.



Proposition 5

Levies are only justified in the analogue context

- Private copying levies should only be collected on analogue media, where individual licensing isn't an option.
- The German Federal Government's draft law foresees an upper limit of 5 %, which is advisable because it meets requirements of legal certainty and, for the manufacturers it would provide for, proportionality between the compensation they pay and the economic benefit they derive (a constitutional requirement). Competition and geographical disadvantages for the manufacturers, importers, and retailers must be avoided.
- The de minimis rule, by which equipment is subject to levy, only if it is used to make substantial numbers of relevant copies, must remain to ensure not every device is caught by the levy. German constitutional law demands limits to any such compromise of the manufacturer's rights.
- The online copying should be exempt from levy because individual licensing would be the best option.



Prof. Dr. Christoph Degenhart
Chair of Constitutional and Administrative Law,
Director of the Institute of Media Law
at the University of Leipzig,
Member of the media board of Saxony

Copyright is a protected title in the German constitution, tied to a specific social duty. It is the task of the legislature to create a reasonable balance between the interests of the author on the one hand and society's interest in unimpeded access to information on the other hand. Suitable compensation must be obtained for the author for the use of works. Instead of charging the user, the law collects a fixed levy from equipment manufacturers for authors as compensation for permission to make private copies. This is justifiable to the extent that it is difficult or impossible to collect details of the users who benefit from such permission, but the fixed levy for copyright use is a relic of the analogue age. In the digital world there are also reasons in constitutional law why a personal licensing system is preferable to device-related fixed levies.

Levies and broadcast license fees are a burden on private consumers



Levies and broadcast license fees per workplace since 2007 (in €)

PC	30,42**
DVD burner	9,21
Blank DVD disk	0,17
All-in-one	76,70*
MP3 player	2,56*
TOTAL	119,06
19 % VAT	22,62
Broadcast license fees	264,96***
TOTAL	406,64

Levies are also imposed on CD burners, copiers, and fax machines; the collecting societies want them for PCs and printers. For every function of a piece of equipment the levies multiply in value.

* Demanded by the collecting societies

** Proposed by the German Patent and Trade Mark Office, requested by the collecting societies

*** For four year's PC use

Source: BITKOM

Proposition 6

Inventions need patents, otherwise there would often be no return on the cost of innovation

- Patents are an incentive and reward for innovation and so encourage general progress. They make it possible for the invention to be shared with others and at the same time protect the value of the invention, for example via license agreements. This is particularly important, because inventors and their companies may not always have the resources to market the invention themselves.
- Patents create a “pause for breath” in competition, in order to amortize the costs of invention. Patents therefore represent significant assets that can serve as security for credit and thus open doors to business development.
- The demands on a patent system in a competitive environment are clear – it must offer the greatest possible legal certainty. The competence of the relevant authorities and the courts is important. Trivial inventions must not be granted patents. Obtaining a patent must not be an expensive process.

Prof. Dr.-Ing. Karlheinz Brandenburg

Director of the Fraunhofer Institute for Digital Media Technology IDMT in Ilmenau, Germany

Many people do not realize that patents were invented as a way of giving the public access to knowledge about new technologies. In the days before patents, new technology was kept secret to conserve the inventor’s competitive edge. The patent is a way of securing early publication of inventions. In return, the inventor is allowed a monopoly on exploitation of the invention for a certain time. From the outset it is thus a limited monopoly.

In today’s standardization environment, the monopoly is even more limited. The International Organization for Standardization (ISO) and other organiza-

tions standardize technologies only if the (actual and potential) patent holders agree to grant licenses on reasonable and nondiscriminatory (RAND) terms.

Without the prospect of a patent there would be no incentive to invest in costly research except for bodies that are wholly financed from the public purse and for major corporations that can market their proprietary technology themselves. Many companies can however afford to invest in new ideas with patents and under RAND terms. That means everyone has access to inventions and can transform ideas into products.

Dr. Walther Otremba

State Secretary at the German Federal Ministry of Economics and Technology, Berlin

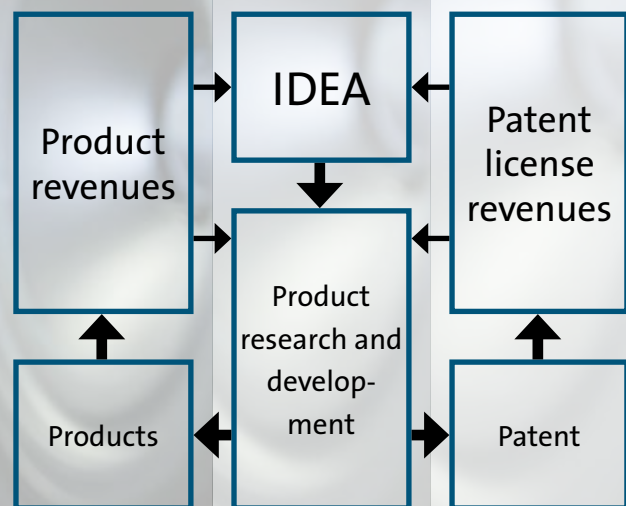
Effective protection for intellectual property is crucial to nurturing the innovative drive of our society as we compete globally. Works of the intellect contribute substantial value in our society. The monopoly rights afforded by industrial property rules provide protection for business investment in research and technology. Major companies make full use of that protection. Many small businesses and midsize companies have some catching up to do: only one-third of



them file patents and utility models. These numbers must grow if the small and midsize segment is to realize its full potential for innovation. Supporting small businesses and midsize companies more effectively in their management of intellectual property is therefore a cornerstone of our technology policy.



Interaction: from the idea through development to value



Proposition 7

We must continue to develop the European patent system

- Patent quality: Awarded patents should be as secure as possible. The examination should be stringent concerning the patentability criteria.
- Patent disputes and legal certainty: Certainty is crucial to maintaining patents. The European Commission and European Parliament's European Patent Litigation Agreement should be concluded to ensure a consistent interpretation of the law is available at last instance.
- Patent costs: The high costs of Europe-wide patent protection are a disadvantage for European business, which small and midsize companies feel most. The cost of patent applications and disputes should be kept as low as possible. Ratification of the London Protocol, and the associated easing of language expenses, would be an important contribution.
- Community patent: A Community patent based on the general political arrangement made in May 2003 should not be introduced, as in comparison with the present situation it offers no specific cost or procedural advantages.

Prof. Alain Pompidou

President of the European Patent Office, Munich



Why is it so critical to lower the cost for the patent application procedure and to create a harmonisation of this point throughout Europe? Or contains this risk for a decreasing quality of applications?

The initiative to lower the costs of patenting is not aimed at the application and grant processes but at the translations that have to be provided by the patentee post-grant. As you may know, European patent applications are examined on the basis of a centralised procedure in one of the three official languages of the EPO – English, French or German. Up to the moment of grant the procedure is very cost-efficient and accounts on average for about 14% of the total costs of a patent. However, matters get expensive for the patentee once the EPO has done its job and the granted patent needs to be validated at the several national patent offices. In each state where the patent should take effect the patentee needs to file a translation in the respective official language. Depending on the size of the patent and number of designated countries these costs can add up to nearly 40% of the total!

Under the proposed London Agreement, these translation requirements would be reduced to a

minimum. Only the patent claims would need to be translated into the national official languages, whereas the body text of the patent would need to be in one of the three official languages of the EPO. The states that don't have an EPO language as their own official language would have to designate one. The translation costs could be reduced by up to 40% per application, which would result in significant savings for European businesses and industry in the order of more than 100 million Euros per year!

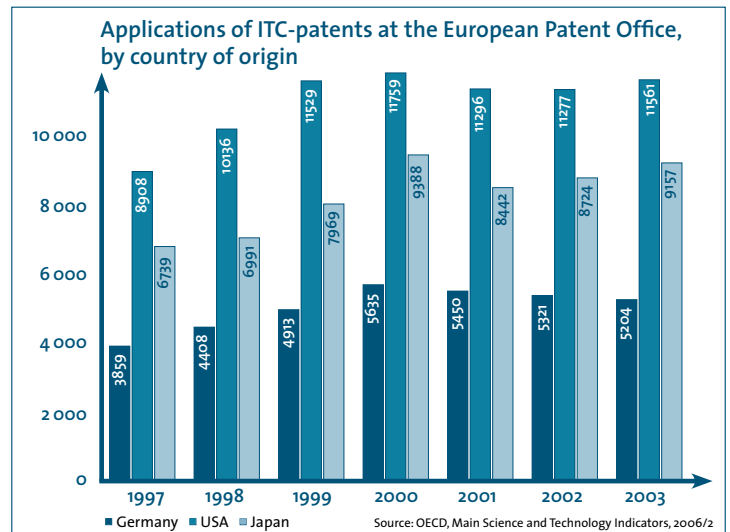
Moreover, the whole cost-saving process does not affect the quality of patents, as it is not linked to the drafting of the application and the grant procedure. It is designed to simplify life for the patent owner once they have gone through the patenting process.

The London Agreement can enter into force once eight states, including France, Germany and the UK, have ratified it. Today, eleven states already have approved the agreement, but we are still waiting for France to undertake that step.

For a pan-European reform of the patent system the guarantee of a continuing high quality level of applications and admittance procedure is key. What possibilities are there to avoid patent applications for inventions that are based on other patents but are modified only by minimal changes?

Quality is clearly one of the decisive issues for the well-functioning of our patent system. On the one hand, poorly drafted patent applications, or applications with non-patentable content, are clogging the system and unnecessarily slowing down the patenting process in general, as dealing with them binds important resources. The national patent offices and the EPO are very aware of this situation and have agreed on a number of steps within the so-called European Patent Network to tackle this issue with appropriate strategies. That network will be based on a European quality standard and also addresses the workload challenge.

On the other hand, we have to increase information to the applicants and control mechanisms in the procedure to safeguard the quality of patents. A significant step in that direction is early information



of the applicant on his chances of obtaining a patent for his invention. Two years ago the EPO successfully introduced the so-called Extended European Search Report. This means that today our applicants receive together with their search report a first non-binding opinion of the patent examiner on the patentability of their invention. This prompts facilitates the decision whether or not to carry on with the procedure. Moreover, we also check at a very early stage whether an application filed with the EPO concerns non-patentable subject matter, such as ideas, business methods and the like. If we find this to be the case we notify the applicant accordingly and encourage him to withdraw the application.

The third measure lies in the rigour of the procedure. Our annual grant rate is just over 50%, meaning that a large number of applications are either rejected by the Office or withdrawn by the applicant following unfavourable examination reports.

It is a fact: Fuzzy patents pose a risk to the innovation and technology market in that they prolong the period of legal uncertainty through litigation. It is our task to avoid such unnecessary risks.

Proposition 8

We must find more effective measures to limit product piracy

- Product piracy continues to grow fast and represents a danger for Germany as a location for business. Considerable problems with the application of some regulations show that there is a need for action on this.
- Weak points in the law and its implementation must be identified before appropriate steps can be taken.
- Industry, politicians, and law enforcers must work together to fight piracy effectively.



„Trademark piracy or product piracy has become a bigger issue in recent years.“

The figures from the German customs service speak for themselves:

- The customs service had an infringement caseload of just 344 in 2002, but this had grown to 628 in 2006.
- The total number of customs seizures rose more than 1400% from 506 in 1995 to 7217 in 2005.

Karl-Heinz Matthias

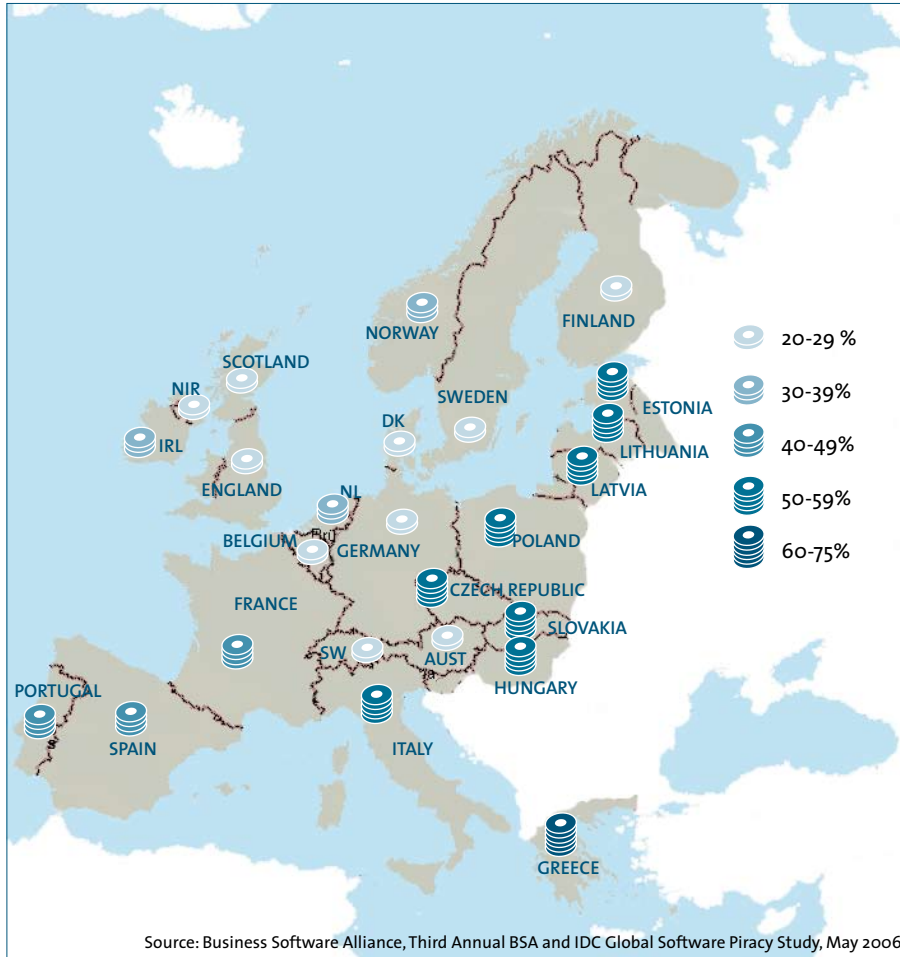
President of the German Customs Investigation Bureau, Cologne

From the perspective of the customs service, combating piracy works best with the close and trusting cooperation of the rightholders. Applications to the customs' Central Office for the Protection of Intellectual Property in Munich for border seizures increased steadily from 68 in 1995 to 352 in 2005. This is a sign that rightholders are increasingly aware of the issues and that together, business and the authorities are on the right track.

We have had some spectacular successes in the recent past, but all parties concerned need to do more. The evidence indicates that this is an area of crime in which international operators are increasingly involved – and the Customs Investigation Bureau must prioritize combating them.

EU 2005 Software piracy rate

The number of units of pirated software in use in 2006 divided by the total units of software installed.



More than ever before, customs investigators are working with other German and international agencies to ratchet up the risk factor for the offenders. This cooperation includes not only the continuous circulation of information via the Customs Investigation Bureau, the hub of customs investigation efforts, but also targeted operations based on collaboratively produced risk profiles. I am sure our operational ideas will be of interest to companies that have suffered the impact of counterfeiting. I therefore take this opportunity to invite all interested trademark proprietors to work closely with the customs service and the customs' Central Office for the Protection of Intellectual Property in Munich.

Such cooperation can range from individual telephone inquiries to working together on creating risk

profiles to training customs officers to collaborative operations.

The German Federal Ministry of Finance publishes an annual report (*Gewerblicher Rechtsschutz*) at www.zoll.de on the protection of intellectual property, which gives more detail on what the customs service is doing to combat piracy. If you have questions concerning combating the infringement of intellectual property in the context of the import, export, or transit of goods, please contact your local customs investigation office (http://www.zoll.de/english_version/index.html) or the Customs Investigation Bureau.

Proposition 9

The balanced responsibility regulations in the E-Commerce Directive must not be overextended, much less disregarded in practice

- The Internet is provided by multiple parties assuming different responsibilities (for access, platforms, and content), and the responsibilities need to be clearly defined for those involved. The E-Commerce Directive provides a balanced legal framework in this area.
- Its implementation, however, varies at the national level. German courts interpret responsibility very broadly in some cases. This leads to overly extensive supervisory obligations that can no longer be met in practice.
- Legislators are responsible for correcting such deviations and bringing the law's real-world implementation back into line with the directive.
- Because of the enormous daily traffic, monitoring the legality of external content is impossible for purely practical reasons. For this reason, constant monitoring of external content should not be made mandatory.
- Providers are also caught between litigant parties in actions for injunctive relief. They typically lack the information needed to fully evaluate the legal position. Implementing a notice and take-down procedure enabling providers to remove content based on certain formal criteria without being drawn into disputes between rightholders and infringers would make sense in such cases.

How the notice and take-down process works, in six steps

Notice

1. Rightholder serves notice on host provider:
Requests removal/blocking and/or disclosure of information.
(formal notice from rightholder to host provider confirming legal infringement)
 2. Host provider removes/blocks content XY and/or discloses information.
(no duty on host provider to check the content)
- Blocking/deletion of content XY!**
3. Host provider informs content provider about the measures and the identity of rightholder.

6b. Rightholder refrains from taking legal action in the specified timeframe and host provider can therefore safely allow access to the content again.

6a. Rightholder brings court action against content provider and informs host provider of the timeframe. Content remains blocked.

5. Host provider informs rightholder about content provider's protest and the timeframe for issuing of further legal orders

4. Content provider protests removal of XY.

Opposition process

One possibility for freeing the service provider from the role of judge they play in the current accountability process would be the notice and take-down system, which BITKOM has been suggesting for a long while.

- The process is simple: The rightholder discovers content which infringes his rights and sends the host provider a notice describing, among other things, the rights involved and how they are being infringed.

- The host provider enjoys a privileged position with respect of liability toward the rightholder (with regard to the now removed content) and toward the content provider (with regard to the removal of the content).

- Such a legal solution already exists for copyright in, for example, the United States, Finland, and Iceland.

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The law on responsibility has proved valuable for the most part, but problems still exist fitting it in with the more conventional provisions of the law. This often results in attempts to limit responsibility regulations and extend liability. The right balance must be found between protecting rightholders and efficiently pursuing their claims on the one hand and, on the other, promoting new technologies and the innovative potential of electronic communication networks.

In this regard, the difficulties rightholders have in both tracking down and penalizing those infringing their rights and monitoring automated content must be taken into account. Provisions on liability and responsibility should provide more powerful incentives for the affected parties to improve how they monitor illegal content. Otherwise, regulations that are conditional on actual awareness alone can even harm service providers who in fact strive to collaborate with rightholders; only those with their figurative heads in the sand benefit. Notice-and-take-down-procedures present a possible solution. That said, they must also contain incentives for further development of monitoring practices. Moving forward, the law must also address hyperlinks, search engines, and newer forms of communication. The task of the pending review of the E-Commerce Directive will be to submit sustainable proposals. Information disclosure claims against providers are closely related to

general liability and responsibility law. Without such information, rightholders cannot assert their rights against those who infringe them. Notice-and-take-down-procedures also depend essentially on whether the provider has the right to disclose information on infringers. On the other hand, the demands of data protection must be considered; a provider cannot divulge an alleged infringer's personal information at the rightholder's request alone. In any case, heavy reliance on criminal proceedings (and subsequent access to inquiry files) is not a sensible option. We should much rather consider legislation empowering providers to release relevant data in John Doe proceedings involving valid patents. For this, however, the European data protection regulations must also be modified.

* The author was commissioned to produce a comparative law report on the implementation of the E-Commerce Directive and possible consequences. The views expressed here are all his personal views.

Proposition 10

The right to information in Internet cases must pay equal consideration to the interests of rightholders and providers

- Intellectual property infringement, particularly on the Internet, causes great damage and presents a danger to Germany as a business location. On the Internet, however, infringers can typically only be tracked with the help of Internet service providers. Rightholders' access to information is thus an important part of law enforcement.
- Prompt implementation of the Enforcement Directive (Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the Enforcement of Intellectual Property Rights) would be a welcome step in legislating for a duty of disclosure. However, this duty must be appropriately defined. Providers are caught between the litigant parties and must thus not be burdened with costs and legal uncertainty.
- Providers also want their services to be used for legal purposes. Providers themselves, however, have no way of verifying entitlement in claims for information. If they consent to unwarranted demands for information, they run the risk of being sued for damages by the users whose data they have illegally passed on. The process of information disclosure must thus be defined using purely formal criteria that providers can follow to free themselves of liability.
- The cost of providing the information should be borne by the infringer if found liable on the infringement issue. As in every case of law enforcement, the rightholder must initially finance this cost.
- According to the costs-by-cause principle, the costs of inquiries should be borne by the infringer. As in every legal proceeding, the rights owner has to prefinance these costs.



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When a rightholder wants to deal with typically anonymous online offenders, claiming the right to information from Internet providers is the critical hurdle. The rightholder understandably wants access to the provider's data; after all, the provider's customer has (allegedly!) infringed the rightholder's rights. To accommodate the rightholder, however, the provider faces a legal minefield: Whether and to whom it can release data that is in part highly sensitive is currently a hotly contested issue. Appel-

late court judgments and decisions handed down by public authorities contradict each other in this area. This unacceptable situation culminated in the following actual case: In 2004, a district court found against an Internet service provider for withholding information, surprisingly citing the analogy of the German Copyright Act, section 101a, while at the same time the data protection authorities threatened the provider with regulatory offence proceedings should it pass on any information. This means that providers may as well flip a coin to decide whether they are required and allowed to divulge information, since not even an attorney can tell them for sure. The implementation of the Enforcement Directive will create a duty of disclosure, but providers will continue to face the difficult question of whether the user has committed any infringement warranting the disclosure of information. We see a fundamental problem in many German court decisions concerning provider liability: The monitoring tasks required of providers force them to act as judges – a role they cannot possibly fulfill properly.

For instance: Should a provider be required to make rapid decisions in individual cases as to whether a quote is protected under the freedom to cite sources? Whether a statement of criticism is defamatory? Whether a known trademark is being used in a way that unfairly diminishes its value? This would force every provider to employ a growing legion of lawyers to examine cases of possible infringement – under time constraints, no less. Due to the limited opportunities to examine the circumstances and complicated points of law at hand (particularly in copyright and trademark law), providers can only make uncertain and risky decisions. Generally speaking, it is important that providers are not required to act as judges with regard to external content. When information is requested, the sensitivity and perceptibility of the data must be taken into account. For example, Internet service providers often deal with highly sensitive data (subject to telecommunications secrecy requirements); in such cases, a court order should be required before any information is disclosed.

Claims for information disclosure from rightholders with regard to Internet providers and the user's data privacy interests.

1. Permission to save data:

Provider must be able to recognize which data about user it is allowed to save (and for what reasons).

2. Infringement of the user's rights:

Often not clear at the time of the breach. As a non-participant, provider is often not in a position to judge.

3. Claims for disclosure:

Rightholder considers legal claim against provider. Provider must be able to recognize whether it is required to disclose data, and which data.

4. Authorization to disclose data:

If user has not given permission, provider must have statutory backing for disclosure.

Glossary

■ Collecting societies

In Germany, collecting societies are entities that act in a fiduciary capacity for a large number of authors and other rightholders to exploit their rights for their shared benefit. The best known are Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), which is a leading musical performance rights society, and Verwertungsgesellschaft Wort (VG Wort), which (among other things) collects royalties for performances of literary works.

■ Computer-implemented invention

A computer-implemented invention is an invention whose implementation involves the use of a computer, computer network, or other programmable apparatus, the invention having one or more features that are realized wholly or partly by means of a computer program. In Europe, it is patentable only if it is new and nonobvious and achieves a technical effect. Computer programs as such are not patentable in Europe.

■ Copyright

German “copyright” is a right of authorship protecting an individual intellectual or artistic creation in the form expressed by the author or other originator. It covers traditional categories of works such as literature and music as well as multimedia works and other new categories. It protects only the form of expression, not the idea or function of the work. It arises automatically when the author creates the work and ends 70 years after the death of the author.

■ DRM

Digital rights management; technology to control the distribution of digitalized content. Essentially, DRM provides rightholders with new modes of charging fees for license rights in, and means to control the use of, material in digital form, such as video and audio recordings, software, electronic documents, and electronic books.

■ European patent

A European patent is a patent granted by the European Patent Office (EPO) under the terms of the European Patent Convention (EPC). The EPO has a harmonized procedure for granting European patents that apply in the EPC contracting states. Anyone can give opposition notice to the EPO within nine months from the publication of the mention of grant, and successful opposition can lead to amendment or revocation of the patent. A European patent corresponds and is equivalent to a bundle

of national patents. Questions of infringement and annulment are therefore subject to local jurisdiction.

■ Intellectual property

Intellectual property is an umbrella term for certain intangible protected assets such as patents, copyright and authorship rights, trademarks, registered industrial designs, trade secrets, the law in Germany relating to the use of personal names, etc.

■ License fee

A fee paid by a licensee to a licensor in consideration of a license to use the licensor’s intellectual property. A license fee may be fixed or it may represent a percentage of the revenue from the end product.

■ License swap

Sometimes companies have to buy licenses in their competitors’ intellectual property in order to continue their business. Their own patents may represent valuable currency, so the companies cross-license their patents, with or without some relatively minor payment, in what is known as a license swap.

■ Mark

A mark (trademark, service mark) is a legally protected sign identifying a maker’s, seller’s, or provider’s goods or services. The mark may, for example, be a word or phrase, a symbol or image, or a sound. Unless they are especially familiar, to be protected in Germany, marks are registered with the German Patent and Trade Mark Office. Registration provides protection for as long as the mark remains in use.

■ Novelty

Novelty is a requirement for patentability. Anything that was already available, in writing or otherwise, when the patent application is filed, does not count as new, or “novel.”

■ Open source software (OSS)

Open source software differs from proprietary software in the terms under which it is licensed for use as copyright work. Anyone can freely use open source software; the source code is freely available and may be altered. However, amendments and additions should also be made generally available. In patent law (issues such as patentability, the protection afforded by patents, and infringement) there is no distinction from proprietary software. In contrast, freeware and shareware can be used in any way.

■ Patent

Patents are granted by an official patent office upon registration. A patent protects a new invention and its functions and underlying principle.

■ Patent application

A patent application or filing is an official application for registration of a patent for an invention. The application must disclose the invention in full detail. A patent is granted if, after a full examination, the patent office finds the invention patentable.

■ Patent examination

The patent office examines the invention to determine whether (in European patent law terms) it is sufficiently novel, inventive, and capable of industrial application.

■ Patent grant

A formal act of state giving a patent as a protected monopoly. The process leading up to grant can take years. After a patent grant has been published by the German Patent and Trade Mark Office, other persons have three months in which to oppose the patent.

■ Patent protection

The grant of a patent by the patent office gives the patent owner exclusive rights in the invention for the term of the patent. That means the owner can prevent others from using the patented invention for gain. The owner can use the invention so far as such use does not infringe any rights of others. If there is an infringement, German law gives the patent owner remedies for damages and illegitimate use for profit, and for information and destruction of infringing matter. The term is 20 years, subject to payment of annual renewal fees.

■ Piracy

Piracy is infringing another's trademark, patent, copyright, rights of authorship or similar intellectual property right to imitate or counterfeit the other's product.

■ Private copy

In German law, making a legitimate copy of a copyright work by the possessor of that legitimate copy for personal use and use by his or her friends is a permitted fair use if it is not for gain or public use.

■ Private copying levy

Private copying levies are payable to collecting societies by manufacturers of devices such as scanners, photocopiers, CD burners that can be used to make private copies, and of blank media (such as CDs and DVDs), toward compensation in lieu of license fees for rightholders.

■ Registered industrial design

Registered industrial designs protect the form, as distinct from the function, of products. The term is 25 years.

■ Utility model

A utility model is an alternate German intellectual property right for inventions. It is available only for new inventions, but the requirements are less stringent than for patents. It has an initial term of three years, extensible to not more than 10 years. Applications are filed with the German Patent and Trade Mark Office. Utility models are registered if the formalities are correct, without examination of the invention as such.

The German Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 1,000 businesses, 800 of which are members with total annual revenues of about € 120 billion and 700,000 employees. They include equipment manufacturers, software vendors, and providers of IT and telecommunications services and content. BITKOM aims to optimize the political and economical framework for the ICT industry. It campaigns for modernization in education and for economic policy that supports innovation.



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