Questions

The purpose of Q216A is to explore exceptions to copyright protection resulting not from issues of eligibility/qualification for protection but from various exceptions, permitted uses or defences. As stated above, this purpose is of itself extremely broad ranging. As such, the work will be limited to a small number of the potential exceptions, permitted uses or defences.

Questions about specific exceptions or permitted uses existing in your country/region

1. What exceptions or permitted uses apply in relation to the activities of an ISP or other intermediaries? Are there any limitations on those exceptions/uses, for example when the ISP is put on notice of unlawful content? Which types of service provider may benefit from such exceptions: would they, for example, apply to UGC sites such as YouTube or social networking sites such as Facebook?

German law does indeed provide for such exceptions for activities of ISPs. A distinction must be drawn between exceptions for liability for damages and criminal liability on the one side (part a) below) and liability for injunctive relief and removal on the other (part b) below). Furthermore, one must examine various special cases, in particular the application of the exceptions to hosting providers, access providers and cache providers (part c) below).

a) Liability for Damages and Criminal Liability

services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') stipulates that the German legislator must provide liability relief for certain types of Internet provider. The implementation in Germany is currently in Sections 8 to 10 TMG (Telemediengesetz, German Telemedia Act). The liability privileges of the TMG also cover claims for copyright infringements (now commonly held view, c.f. only Dreier / Schulze /Dreier, Copyright Law, 3rd ed. 2008, § 97 para. 36 with further refs.; Fromm / Nordemann /Jan Bernd Nordemann, Copyright Law, 10th ed. 2008, § 97 para. 185, also with further references).

The liability privilege according to the German Telemedia Act, on the basis of Articles 12 to 14 E-Commerce Directive only applies, however, to liability for damages and criminal liability. It does not apply to claims for injunctive relief (BGH GRUR 2007, 708, 710 para. 19 - Internet-Versteigerung II). In the German Telemedia Act, this is expressed in Section 7, subsec. 2, sentence 2, in that obligations to remove or block the use of information remain unaffected under general law even in the case of non-responsibility of the service provider as per Sections 8 to 10 German Telemedia Act. Therefore, the liability privileges of Sections 8 to 10 German Telemedia Act also do not apply for claims for removal (c.f. Fromm / Nordemann / Jan Bernd Nordemann, ibid., § 97 para. 185). According to prevailing opinion, however, ISPs and other intermediaries may cite the liability privileges in Sections 8 to 10 German Telemedia Act in defence against claims of unjustified profiting from copyright infringements (Fromm / Nordemann /Jan Bernd Nordemann, ibid., § 97 para. 185 with further refs).

The liability privileges in Sections 8 to 10 German Telemedia Act apply - roughly speaking - to all technical procedures involved in operating a communications network, providing access to it or storing information and data thereby made available by third parties (RegE TDG, BT DS 14/6098, p. 22 et seq.). It is justified by the fact that these are usually automated processes where the operator exercises no control of content and indeed cannot under normal circumstances exercise control without being informed of specific rights infringements. In particular, no general monitoring of content may be required of them (Section 7, subsec. 2 sentence 1 German Telemedia Act). A duty to remedy an unlawful situation fundamentally only arises at the point of awareness of the rights infringement; in addition, the removal must be technically possible and reasonable even if the German legislator refrained from expressing this general legal principle in the law (RegE TDG, BT DS 14/6098, p. 23). It is only in respect of own content that the intermediary does not have recourse to the liability privileges in Sections 8 to 10 German Telemedia Act (Section 7 subsec. 1 German Telemedia Act).

The liability privileges in Sections 8 to 10 German Telemedia Act differentiate, in respect of requirements for the liability privilege, just as Art. 12 to 14 E-Commerce Directive, between Internet access providers, cache providers and hosting providers:

(1) A liability privilege is firstly due to Internet access providers as per Section 8 German Telemedia Act. They are legally privileged if they only transfer third-party information in a communication network or provide only access to the use. They are not responsible provided they have not initiated the transfer, selected the receiver of the information or selected or modified the transferred information (Section 8 subsec. 1 German Telemedia Act).
This privilege includes the automatic, intermediate and transient storage of the information transmitted, provided this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission (Section 8 subsec. 2 German Telemedia Act). The grounds for the privilege are that the Internet access provider, whilst transferring data automatically, does not usually obtain knowledge of the data, cannot exercise general control and therefore does not make any own decisions (RegE TDG, BT DS 14/6098, p. 24). The liability privilege of Section 8 German Telemedia Act is not applicable, if service provider and user collaborate in committing unlawful acts (Section 8 subsec. 1 sentence 2 German Telemedia Act).

(2) For cache providers very similar requirements apply in respect of the liability privileges (Section 9 German Telemedia Act). Cache providers are providers which store data temporarily by way of caching in order to increase transmission speed. The liability privilege against claims for damages and criminal liability applies to them provided they do not modify the information (Section 9 subsec. 1 No. 1 German Telemedia Act), comply with the conditions on access to the information (Section 9, sentence 1, no. 2 German Telemedia Act), comply with rules regarding the updating of the information, specified in a manner widely recognised and used by industry (Section 9 sentence 1 No. 3 German Telemedia Act) and do not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information (Section 9, sentence 1, No. 4 German Telemedia Act). Furthermore they must act expeditiously to remove or to disable access to the information they have stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement (Section 9, sentence 1 No. 5 German Telemedia Act). Like Internet access providers, cache providers may also not collaborate with the user in order to commit unlawful acts (Section 9 sentence 2 German Telemedia Act in conjunction with Section 8 subsec.1 sentence 2 German Telemedia Act).

(3) The hosting provider is liable pursuant to Section 10 German Telemedia Act for own content without privilege, for third-party content only if it has knowledge or awareness thereof. The privilege also does not apply if the hosting provider is aware of facts or circumstances which make such unlawful acts or information obvious, if the hosting provider does not act expeditiously to remove the content. The hosting provider must be afforded this opportunity before full responsibility applies (RegE TDG, BT DS 14/6098, p. 25). According to Section 10 sentence 2 German Telemedia Act, the privilege does not apply if the user is acting under the authority or control of the hosting provider. Section 10 TMG does not apply to the placing of hyperlinks as these do not constitute a hosting service. Instead, general liability rules (perpetration and participation) for damages and criminal liability apply (BGH GRUR 2008, 534, 536 para. 20 - ueber18.de; BGH GRUR 2004, 693, 694 et seq. - Schoener Wetten). Search engines - such as Google - can be hosting providers. However, one has to examine - particularly in the case of lists of paid links - whether it is own content or content known to the search engine (ECJ, Judgement of 23 March 2010, Case C-236/08 to C-238/08, part no. 106 et seq. - Google).
b) Liability for Injunctive Relief and Removal

The liability for injunctive relief and for removal of ISPs and other intermediaries is not regulated in the German Telemedia Act (c.f. above and again BGH GRUR 2007, 708, 710 para. 19 - Internet-Versteigerung II). According to Section 7 subsec. 2 sentence 2 German Telemedia Act, obligations to remove or block the use of information without prejudice to general legislation for Internet access providers, cache providers and hosting providers remain unaffected. According to this, the liability privileges of Sections 8 to 10 German Telemedia Act do not apply in respect of claims for injunctive relief or removal. This is in accordance with Art. 12. par. 3, 13 par. 2 and 14 para. 2 E-Commerce Directive (see also recital 45 of the Directive). Art. 12 to 14 E-Commerce Directive expressly do not affect the possibility that a court or administrative authority has ordered the service provider, according to the legal system of the respective member state, to terminate or prevent the rights infringement or (in the case of hosting providers) that member states can set procedures for the removal of information or blocking of access to it.

The applicable general principles under German law produce very similar outcomes in respect of the liability of ISPs and other intermediaries to the liability privileges of Sections 8 to 10 German Telemedia Act and Art. 12 to 14 E-Commerce Directive. In this case also, a differentiation must first be drawn between own and third party content. For its own content, the ISP or other intermediary is obligated as perpetrator to cease and desist and remove the infringement, even without negligence. As far as third party content is concerned, a differentiated liability regime for liability to injunction or removal applies.

aa) „Stoererhaftung“ (Breach of Duty of Care)

In the case of transmitting third party content, ISPs are usually merely auxiliary persons to the perpetrator of the copyright infringement and not liable for a direct infringement. Even if the ISPs in these cases are the indirect causer or contributor to the copyright infringement, their duty is limited to cease and desist and removal. In that regard, the principles of „Stoererhaftung“ (Breach of Duty of Care) ("Breach of Duty of Care") apply. They have three requirements:

(1) The „Stoerer“ ("Stoerer") must in some way contribute willingly and adequately causally to the infringement of a protected legal interest. It does not depend on culpability.

(2) Furthermore, the „Stoerer“ must have the legal possibility to have prevented the predicated offence (BGH GRUR 1999, 518, 519 - Möbelklassiker). This should usually apply to ISPs and other intermediaries because they normally have the possibility to prevent the unlawful act by simply no longer making their service available to the infringer.

(3) In order to prevent the „Stoererhaftung“ (Breach of Duty of Care) becoming excessive, case law has introduced a third requirement as a corrective. The „Stoerer“ must have violated due diligence obligations. The determination of such a violation of due diligence
obligations requires an overall balancing of interests and a judgemental allocation of risk as to whether the compliance with due diligence was reasonable. This usually requires the copyright violation to have been apparent to the „Stoerer“; it must, therefore, either be an easily recognisable infringement or the „Stoerer“ must be made aware of the infringement by the infringed party (BGH GRUR 1999, 418, 419 - Möbelklassiker; BGH GRUR 1984, 54, 55 - Kopiertäden). The „Stoerer“ not only has a duty of care in the second degree, should action against direct infringer not be possible (BGH GRUR 2007, 890, 894 para. 40 - Jugendgefährdende Medien bei eBay). Whoever wishes to ensure that „Stoererhaftung“ (Breach of Duty of Care) will apply according to German law, must first inform the ISP of the other intermediary, who is only liable as „Stoerer“ of the infringement in order to effect the due diligence obligations and thus the duty of care). In detail, this can mean that not only does a due diligence obligation exist to prevent the specific rights infringement but also a due diligence obligation to avoid further obvious infringements of the same type (BGH GRUR 2004, 860, 864 - Internet-Versteigerung I). For example, after becoming aware of a trademark infringing offer of ROLEX watches, eBay had not only to block the specific offer for the future but also to "take steps to prevent further clear rights infringements in offers of ROLEX watches" (BGH GRUR 2007, 708, 712 para. 47 - Internet-Versteigerung II). In that regard, there may be a due diligence obligation and the associated duty to cease and desist even without knowledge of the specific violation. In this way, the due diligence obligations and the associated duty for injunctive relief can supersede the privileges in Sections 8 to 10 German Telemedia Act for liability for damages and criminal liability, as in these cases liability depends fundamentally on knowledge or awareness of the specific infringement. This is further illustrated with examples below, in particular for the case of hosting providers.

Furthermore, on the question as to when compliance with a due diligence obligation can be reasonably expected of the party subject to a claim for breach of duty of care, the German Federal Court of Justice has considerably eased the right holder's burden of proof. In principle, the burden of proof fundamentally lies with the claimant (and thus the right holder). However, there is a secondary burden of proof and stating the case for the party claimed against, as this party must usually be in possession of relevant knowledge of its technical infrastructure. The party subject to the claim is thus obligated to argue in detail which protection measures it is able to take and why it is unreasonable to expect them of it (BGH GRUR 2008, 1097 para. 19 et seq. - Namensklau im Internet, as Fromm / Nordemann / Jan Bernd Nordemann cited above, § 97 para. 162 at the end).

**bb) Liability for Breaches of Traffic Duties**

In the area of general unacceptable behaviour, e.g. infringement of fair competition principles, the German Federal Court of Justice recently had doubts as to an application of the „Stoererhaftung" (Breach of Duty of Care) (BGH GRUR 2007, 708, 711 para. 40 - Internet-Versteigerung II with further refs) so that it relies on an examination of the liability for a breach of duty of traffic duties (BGH GRUR 2007, 890, 894
paragraph 36 et seq. - Jugendgefährdende Medien bei eBay). In the case of an infringement of absolute rights - such as copyright - the German Federal Court of Justice has maintained (for now) an application of „Stoererhaftung“ (Breach of Duty of Care) (BGH GRUR 2007, 708, 711 para. 40 - Internet-Versteigerung II with further refs). In the case of injunctive relief and for removal, a shift to the liability to breach of traffic duties would likely be of no consequence, as the traffic duty is parallel to the duty of care oblige as relevant to the principle of „Stoererhaftung“ (Breach of Duty of Care) (BGH GRUR 2007, 890, 894 para. 38 - Jugendgefährdende Medien bei eBay). Liability in the case of breaches of traffic duty would, however, no longer be limited - as „Stoererhaftung“ (Breach of Duty of Care) is - to liability to cease and desist and removal, but could trigger claims for damages; in relation to the Internet, this would, however, have only limited effect as in such cases the liability privileges of Sections 8 to 10 TMG would apply (see under a) above).

cc) **Further "general grounds for attribution".**

In addition to the „Stoererhaftung“ (Breach of Duty of Care) based on copyright and the liability - although not yet recognised in copyright law by the Federal Court of Justice - for breaches of traffic duty, according to the Federal Court of Justice, further "general grounds for attribution" can exist. The "Halzband" case (BGH GRUR 2009, 597 para. 16) was concerned with the liability of the owner of a member account at eBay; his wife had used this eBay account for the distribution via eBay of pieces of jewellery in contravention of copyright law. The Federal Court of Justice used the following justification for the husband's liability for such copyright infringement:

"If a third party uses another's member account on eBay after obtaining the login data of this member account because the owner has not sufficiently protected the details from becoming known to a third party, the owner of the member account has to be treated as if he himself acted."

According to the Federal Court of Justice, no further infringement of due diligence obligations is required - unlike for „Stoererhaftung“ (Breach of Duty of Care). In particular, no specific knowledge of the owner of the eBay account of the violations which were committed through the account is required. This therefore constitutes perpetrator liability, hence the account holder is liable not only to injunctive relief and removal but also to damages (BGH GRUR 2009, 597 para. 20 - Halzband). However, the liability privileges under Sections 8 to 10 TMG (see a) above) apply for access providers, cache providers and hosting providers.

dd) **Conflict with Patent Law Jurisprudence of the German Federal Court of Justice**

The above copyright and trademark decisions and the First Civil Senate differ from the more stringent law of the Xa. Civil Senate of the German Federal Court of Justice (BGH), which is responsible for
patent law. The Patent Division of the Federal Court of Justice tends to a more aggressive assumption of delinquent liability, as the First Civil Division for copyright and trademark law already recognised in Halzband (BGH (Xa. Civil Senate) GRUR 2009, 1142 para. 30 et seq. - MP3-Player-Import c.f. in particular reference to Halzband decision of First Civil Senate in para. 34 and para. 38 very clearly on the differences in the senate jurisprudence).

c) Individual Cases

In the case of liability of ISPs and other intermediaries, the focus is on the duty for injunctive relief under the principles of „Stoererhaftung“ (Breach of Duty of Care) (see b) aa) above). This is mainly due to the fact that the Federal Court of Justice yet did not extend the application of "general grounds for attribution" as per the Halzband decision (see b) cc) above) to include ISPs and other intermediaries; the liability for breaches of duty of care has not yet been generally extended by the Federal Court of Justice to include copyright law (see b) bb) above). The liability privileges of Sections 8 - 10 TMG lead to the fact that usually no claims for damages can be asserted against ISPs and other intermediaries but only claims for injunctive relief and removal. The „Stoererhaftung“ (Breach of Duty of Care) affords ISPs and other intermediaries privileges in respect of injunction and removal claims; however, the privilege does not go as far as for claims for damages as per Sections 8 - 10 TMG (see b) aa) above). The following individual cases may be cited from recent case law:
aa) Hosting Providers

Hosting Providers (sometimes also Content Providers) provide storage space for content. Examples are so-called web hosts who rent their servers to customers for storing any content (e.g. 1&1) or who are financed by advertising make such space available free of charge (e.g. Rapidshare), Internet auction platforms (e.g. eBay), discussion forums, social network portals (e.g. Facebook), platforms for videos (e.g. YouTube) and for photographs (e.g. Flickr) (c.f. Fromm / Nordemann / Jan Bernd Nordemann, ibid., § 97 para. 160). Accordingly, all operators of user generated content („UGC“) sites constitute hosting providers insofar as the content is from third parties and not the hosting provider. Search engines (Google, etc.) may also be hosting providers (ECJ, Judgement of 23 March 2010, Case C-236/08 to C-238/08, par. 106 et seq. - Google).

According to the principles of „Stoererhaftung“ (Breach of Duty of Care), hosting providers are usually only have a duty to prevent copyright infringing third party content on their platforms after they have gained knowledge thereof as the rights infringement would usually only then become apparent to the hosting provider (BGH GRUR 2007, 708, 712 para. 45 et seq. - Internet-Versteigerung II; OLG Köln GRUR-RR 2008, 35, 37 - Rapidshare). The hosting provider usually obtains such knowledge in writing through a so-called notice and take-down letter from the copyright holder. Strict requirements should not be placed on the obtaining of knowledge. The information must, however, explain the own right to sue and the act of infringement; evidence must not be submitted (Fromm / Nordemann / Jan Bernd Nordemann, ibid., § 97 para. 161). After becoming aware of the alleged infringement, the hosting provider is obligated to take reasonable controlling measures to prevent not only a repetition of the specific infringement but also the committing of merely similar but just as apparent infringements (BGH GRUR 2007, 708 para. 32 and 45 - Internet-Versteigerung II). Thus, the liability for injunctive relief of the hosting provider goes beyond the liability for damages which only relates to the repetition of the specific infringement (see b) aa) above).

Case law has not yet finally clarified what constitutes similar but just as apparent infringements under copyright law. In any case, it concerns "more" than mere takedown of the asserted infringement. The principle certainly covers other equally obvious infringements of the same work.

German case law has dealt extensively with the filter tools which hosting providers have at their disposal for the purpose of fulfilling their due diligence obligations. The Higher Regional Court of Hamburg thereby considered terms of use which prohibit copyright infringements to be sensible but not sufficient. The same was true for hash filters (for example, MD-5 filters); these are not efficient enough because the hash value changes with every modification of the file. Even making a deletion interface available to right holders is not sufficient in itself as it is not capable of preventing the infringement rather is merely a means of reacting (OLG Hamburg, MMR 2010, 51, quoted by Juris marg. no. 82 et seq. - Rapidshare II; OLG Hamburg ZUM-RD 2008, 527 -
Rapidshare I). In contrast, keyword filters for text-based filters can be effective, if the particular infringement and other similar, just as obvious infringements can be found using this keyword filter. That applies in particular where users are able to locate content using text-based searches. In the case of UGC sites, distinctive search words such as "Culcha" for filtering out illegal uploads of the title "Hey DJ" by the band "Culcha Candela" would usually be suitable (LG Berlin, Judgement of 10 June 2008, file ref. 15 O 144/08, p. 11) whereas a search term such as simply "DJ" may not work. In any event, automatic filter systems, if they are not 100% efficient, must be checked manually (BGH GRUR 2007, 708 para. 47 - Internet-Versteigerung II), if necessary by extending the monitoring staff (OLG Köln GRUR-RR 2008, 35, 37 - Rapidshare; more strict OLG Düsseldorf ZUM 2008, 866, 868 - eDonkey-Server, according to which it would be unreasonable to expect the hosting provider to check 300 hits by hand for 17 titles requiring filtering). Concerning the "repeat offender" argument (it can be assumed that an infringer will infringe again in the future, see also BGH GRUR 2007, 850 para. 44 - Jugendgefährdende Medien bei eBay), case law also challenges in part the anonymizing of the infringing user, such that this - suspicious - user can be specially filtered in order to fulfil the due diligence obligations of the hosting provider. It has not yet, however, been clarified in case law as to whether this necessarily requires registration under real names or whether other measures such as logging IP addresses may also be sufficient (OLG Hamburg, MMR 2010, 51 cited by Juris marg. no. 91 et seq. - Rapidshare II; see also OLG Hamburg ZUM-RD 2008, 527, 543 - Rapidshare I; LG Düsseldorf ZUM 2008, 338, 341 - Rapidshare).

Specifically concerning Rapidshare, the Higher Regional Court of Hamburg ruled that the business model of Rapidshare, as long as it leads to massive copyright infringements and ensures a completely anonymous upload, is not approved by the legal system (OLG Hamburg, MMR 2010, 51 cited by Juris marg. no. 109 - Rapidshare II).

In the case of hosting providers the question has repeatedly been raised as to the differentiation between own content and external content. The privileges under Section 8 - 10 TMG and the somewhat less far-reaching privileges according to "Stoererhaftung" (Breach of Duty of Care) only apply in respect of content from parties other than the hosting provider. According to the decision Gitarrist im Nebel of the OLG Hamburg (ZUM 2009, 642, 644), content constitutes own content of an Internet portal if the Internet portal allows photographs to be uploaded by users and then affords other users the possibility of printing these photographs in return for a fee. It is then irrelevant if the content is marked as "external content". According to a decision of the Federal Court of Justice, previously published only as a press release, (dated 12 November 2009, file ref. I ZR 166/07 - Chefkoch.de) the following constellation also constitutes an own content of the hosting provider: an internet portal places a logo on photographs (illegally) uploaded by users referring to its own control over content. Furthermore, the Internet portal obtains the consent of the user who uploaded the photographs, allowing the Internet portal to use the content itself. In the opinion of the District Court of Hamburg (ZUM 2009, 315, 320, also LG Hamburg, part judgement of 26 September 2008, file ref. 308 O 247/07, available on Juris) the thumbnails from Google constitute own content of Google, because Google itself reduces the size of the photographs to thumbnails in the image search;
such an action constitutes a non-free use adaptation as per Section 23 German Copyright Act ("GCA"). Thus, Google is liable for the creation of thumbnails in particular if the photographs it has rescaled have been unlawfully placed on the Internet (this is different for photographs and thumbnails which are on the Internet lawfully OLG Jena MMR 2008, 408, appeal pending before Federal Court of Justice, promulgation on 29 April 2010.

bb) Internet Access Providers

Internet access providers can have a duty to prevent for copyright infringements under the principle of "Stoererhaftung" (breach of duty of care) after they become aware of the infringement. This applies in particular to copyright violations of their customers (OLG Hamburg ZUM-RD 2009, 246, 257 - Usenet I; OLG Frankfurt GRUR-RR 2005, 147, 148; LG Hamburg ZUM 2009, 587, 589, see also further evidence in Fromm / Nordemann / Jan Bernd Nordemann, ibid., § 97 para. 170). They are obligated to block access which is equated with a cease and desist. Article 8 para 3 Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive") expressly provides for blocking claims against "intermediaries"; such "intermediaries" are also considered Internet access providers (ECJ GRUR 2009, 579 - Tele 2 with comment Jan Bernd Nordemann / Martin Schaefer GRUR 2009, 583 et seq.). The German legislator did not expressly implement Article 8 paragraph 3 InfoSoc Directive; however, the legislator assumed that the liability of Internet providers under Article 8 para 3 InfoSoc Directive arises from the general principles of „Stoererhaftung“ (Breach of Duty of Care) (counter-statement of the Federal Government to the statement of the Bundesrat, Copyright in the Information Society, p. 2, quoted in Fromm / Nordemann / Jan Bernd Nordemann, ibid., § 97 para. 170). The Regional Court of Hamburg (ZUM 2009, 587, 590) rejected a „Stoererhaftung“ (Breach of Duty of Care) of Internet access providers as currently, "virtually unenforceable" as the German legislator did not implement Art. 8, par. 3 InfoSoc Directive. In particular, the court was of the opinion that the DNS blocking of websites comprising almost entirely illegal content as demanded in the proceedings was unreasonable.

There have been various decisions, on the „Stoererhaftung“ (Breach of Duty of Care) of Usenet providers. The Usenet is a worldwide network of discussion forums ("Newsgroups") which are used, in part, for exchanging copyright infringing files. Usenet providers provide their users, depending on their offer (sometimes for a charge) with access, storage space, software ("Useclient") including an index function. The user makes the files available to the other users via "his" Usenet provider (so-called "initial" or "original" Usenet providers). According to the jurisprudence of the Higher Regional Court of Hamburg, the "original" Usenet provider has the same duty as a hosting provider. After a "Cancel Request" from the rights holder, the Usenet provider is responsible for ensuring that the rights infringing file is deleted across the entire Usenet (via Usenet rules which apply between the providers, so-called "kill command"). Furthermore, the original Usenet provider must implement a filter so that these and similar infringements do not
occur in the future, in particular through means of text filters and audio-
visual filters (OLG Hamburg ZUM-RD 2009, 246 - Usenet I; OLG
Hamburg ZUM-RD 2009, 439 - Usenet II). The "non-original" Usenet
provider has a duty on the other hand as an Internet access provider;
this provider only has a duty to provide "low" monitoring requirements,
but it remained technically open, however, as to what a "non-original"
Usenet provider would be able to do (OLG Hamburg, ibid. - Usenet I;
OLG Hamburg, ibid. - Usenet II). This applies unless the non-original
Usenet provider advertises the illegal use of his services. Then it has a
duty as an "original" Usenet provider, also (more harshly) as a hosting

cc) Cache Provider

In contrast, the Higher Regional Court of Düsseldorf (ZUM 2008, 332,
334) has classified the Usenet providers as so-called cache providers
without differentiating between "original" and "non-original" Usenet
providers. The court was of the opinion that filtering is technically
demanding for Usenet providers because each request for data has to
be transferred to the cache memory on the Usenet. It is therefore
unreasonable to expect Usenet providers to constantly check the
cache memory whether a specific infringement has been repeated
using filter software. The court stated that it would be possible for the
right holder, to place a "Cancel Request" in the Usenet. In addition, the
Higher Regional Court of Düsseldorf did not recognise any inspection
obligations.

2. Do service or access providers have any obligation (in co-operation with
intellectual property right owners or otherwise) to identify, notify or take
remedial steps (including termination of access) in relation to their customers
who infringe? Is the position different depending on whether the customer has
only infringed once or has repeatedly carried out infringing activities? Do any
such obligations influence the scope of the exceptions or permitted uses that
apply to those services or access providers?

In answering the first question, the obligation to identify (in a) below), the obligation to
inform (in b) below) and the obligation to block (in c) below) must be separated. In this
context, the other two questions can be answered together.

a) Obligation to Identify

aa) Towards Right Holders to Prosecute

German copyright law provides for claims for information for affected
right holders from Internet access providers in Section 101 subsec. 2
GCA. With these information claims, the identification of a customer of
the Internet access provider may, in particular, be demanded. Section
101 subsec. 2 GCA is based on Article 10 Directive 2004/48/EC of the
European Parliament and of the Council of 29 April 2004 on the
enforcement of Intellectual Property Rights ("Enforcement Directive").

Section 101 subsec. 2 Copyright Act allows information claims of the
right holder against the Internet access provider to identify infringing
customers if there is an obvious rights infringement, or in cases where
the infringed party has already instituted proceedings against the
infringer. Furthermore, the infringement of the customer of the Internet
access provider must be "on a commercial scale". Section 101 subsec.
9 GCA compels Internet access providers to provide information also
where it allocates dynamic IP addresses for the access of its
customers, i.e. in cases where IP addresses are not constantly
allocated to the same customer but the Internet access provider
allocates a new IP address for each of the customer's new Internet
sessions. In that regard, a special judicial procedure can be found in
Section 101 subsec. 9 GCA which must be undertaken before the
Internet access provider may identify the customer using a dynamic IP
address to the right holder. The reasons for this lie in the fact that the
German legislator feared that in the absence of this "court decision
requirement" there could be a violation of the constitutionally
guaranteed privacy of telecommunications (RegE implementation

Since the introduction of this right to information as of 1 September
2008, it has been extensively used (with thousands of cases every
month) by right holders from the music industry and some from the film
industry against Internet access providers to force these to identify their
rights infringing customers. This particularly applies to customers who
illegally make copyrighted works available to the public ("upload") in
so-called Internet file sharing networks (peer-to-peer networks). The
practice developed by the German courts on this is still unclear. The
requirement of a "commercial scale" of the act of infringement is found
by the vast majority of cases whereby e.g. a music album being
available on a file sharing network shortly after its release suffices
(OLG Köln, 21 October 2008, file ref.6 WX 2 / 08; OLG Oldenburg
December 1, 2008, file ref.1 W 76/08; OLG Zweibrücken, 27 October
2008, file ref. 3 W 184/08, see also the other evidence in Czychowski /
Jan Bernd Nordemann, NJW 2010, 735, 742).

Some courts conclude from the regulations in Section 101 GCA that an
access provider may be prohibited from deleting the relevant data
(OLG Köln, 21 October 2008, file ref. 6 WX 2/08; OLG Karlsruhe CR
2009, 806, see also Landgericht Hamburg, MMR 2009, 570). Problems
can also arise, in principle, from the fact that the provision of
information by the Internet access provider may only draw on the
invoice data stored by the access provider but not data, based on the
implementation of Directive 2006/24/EC of the European Parliament
and of the Council of 15 March 2006 on the retention of data generated
or processed in connection with the provision of publicly available
electronic communications services or of public communications
networks and amending Directive 2002/58/EC ("Data Retention
Directive"); Section 101, subsec. 9 GCA only provides for permission to
use invoicing data (OLG Frankfurt MMR 2009, 542; so far apparently
with the approval of the German Constitutional Court of 2 March, 2010,
file ref. 1 BvR 256/08, 236/08 and 286/08, para. 46). In this regard, the
claim to information of rights holders against access providers fails in
many cases because Internet access providers no longer have the
data needed for the information. The resulting conflict between
copyright law and data protection law has to be brought to a fair
resolution in German law. A decision of the ECJ should be seen in this
context, according to which the obligation of an Internet access provider to provide personal traffic data is compliant with EU law; the ECJ stresses, however, in its decision that the rights affected - in particular copyrights and data protection rights - should be fairly balanced against one another (ECJ GRUR 2008, 241 - Promusicae; as ECJ GRUR 2009, 579 - Tele2; see also Czychowski/Nordemann Jan Bernd, NJW 2008, 3095, 3098).

The costs for the court proceedings required for the identification of the infringing customer are born by the infringed party and not the Internet access provider (Section 101, subsec. 9, sentence 5 GCA), the right holder can, however claim the costs as compensation for the infringing customer provided the customer is able to pay.

In the case of hosting providers, the right to information to identify the infringing user causes fewer problems; in particular, such a comprehensive conflict with data protection law or the constitutionally guaranteed privacy of telecommunications does not exist. However, the identification of customers of the infringing hosting provider often fails due to the hosting provider not even knowing the identity (including the address) of its customer at all.

bb) To prevent further infringements (duty of care)

Obligations to identify their infringing customers can also affect ISPs from another aspect. In particular, it has been recognised in the context of „Stoererhaftung“ (Breach of Duty of Care) for hosting providers that they are obliged according to their duties of care, upon gaining knowledge of rights infringements to "de-anonymise" the user so that he cannot repeat his unlawful use of the hosting provider’s services. Those who do not make sufficient arrangements for the de-anonymising of their user breach their duty, in the opinion of various German courts, as a „Stoerer“(OLG Hamburg, MMR 2010, 51, quoted in juris para. 91 et seq. - Rapidshare II, see also OLG Hamburg ZUM-RD 2008 , 527, 543 - Rapidshare I; LG Düsseldorf ZUM 2008, 338, 341 - Rapidshare). We refer to the explanation above on the de-anonymizing obligations of host providers in the scope of „Stoererhaftung“ (Breach of Duty of Care) (point 1 c) aa) above). This jurisprudence is especially relevant for hosting providers against whom right holders do not make any claims for information as such providers do not know the identity of their users (c.f. end of point 2 a) aa) above).

With regard to Internet access providers, there is currently no case practice on the question of whether Internet access providers, who are not able to identify their customers (e.g. because the relevant data is lacking, see point 2 a) aa) above), breach duties of care and thus expose themselves upon knowledge of rights infringements to „Stoererhaftung“ (Breach of Duty of Care) as an Internet access provider.

b) Obligation to Notify
It is as yet unclear to what extent an obligation of Internet service providers to inform their customers about copyright infringements arises from the principles of „Stoererhaftung“ (Breach of Duty of Care). It has long been the subject of debate in German case law as to whether contributors must give the direct rights infringers warning notices of copyright infringements in order to avoid being liable under „Stoererhaftung“. For example, the German Federal Court of Justice demanded a warning notice for the distribution of the, at the time newly emerged, magnetic tape recorders as the use of such devices in accordance with their intended purpose could be contrary to copyright law (BGH GRUR 1960, 340, 343 - Magnettonbandgeräte). Later, the Federal Court referred to this principle in respect of copy shops, which made copying equipment available and which were partly used by customers for copyright infringing reproductions (BGH GRUR 1984, 54, 55 - Kopierläden). The basis for the extent of such warning notices is the obligation to institute measures through which a risk to copyrights can be excluded or substantially reduced and which can be reasonably expected in terms of type and scope (see BGH GRUR 1984, 54, 55 - Kopierläden). It is predominantly concluded from this judgement that a fundamental duty to inform exists, certainly in the case of such activities which do not insubstantially increase the risk of copyright infringements (a duty to provide warning notices in the above mentioned decisions from German Constitutional Court GRUR 1997, 124, 125 - Kopierläden II; Fromm / Nordemann / Jan Bernd Nordemann, ibid., § 97 para. 173; Spindler MMR 2006, 403, 404, Leistner GRUR 2006, 801, 810; however, relativised by Dreier / Schulze / Dreier, ibid., § 97 para. 33, warning notices may be suitable in some cases; also similar Ehlers / Jib / Hartlfinger / Horstmann / Jaekel / König / Lunze / Pitz / Schober / Schohe GRUR. Int. 2008, 935, which mention warning notices as an example). One must also consider, in addition to the tendency to risks of copyright infringements, the effectiveness of warning notices in preventing copyright infringements (BGH GRUR 1984, 54, 56 - Kopierläden, where the German Federal Court of Justice justified the effectiveness of warning notices with the fact that the warning notice in the form of visibly displayed terms and conditions can lead in certain circumstances to a liability for damages against the operator of the business which the user of the work would be aware of). Hence, it is possible that an obligation could arise for ISPs, according to the principles of „Stoererhaftung“ (Breach of Duty of Care), to give warning notices to their customers. The above mentioned jurisprudence of the German Federal Court of Justice on warning notices only dealt with whether the user has to be given warning notices before the first copyright infringement. However, the obligation on warning notices must especially exist where the customer has already infringed copyright as it is then likely that he will infringe such rights again in the future (see above on "repeat offenders" - argument BGH GRUR 2007, 890 para. 44 - Jugendgefährdende Medien bei eBay; OLG Hamburg ZUM-RD 2008, 527, 543 - Rapidshare I, both decisions assume that other equally obvious infringements by "repeat offenders" among users are evident).

However, such an obligation in the scope of „Stoererhaftung“ (Breach of Duty of Care) comes into conflict with data protection laws and the privacy of telecommunications. This applies in particular where an Internet service provider has to rely on traffic data in order to identify the customer who he has allocated a dynamic IP address. In this respect, the same conflict exists as in the question as to whether the access provider may identify his customers to right holders in the scope of claims for information (c.f. point 2. a) aa) above). The problem has not yet been finally resolved in German law, and has not even begun to be discussed by the courts. In particular, the question must be answered as to whether an identification of the customer for the purpose of an
own notification by the access provider represents a “less” in comparison to an identification of the customer for the purpose of enabling legal prosecution by the right holder under Section 101 GCA. A mere notification by the access provider possibly exposes the customer to lower penalties. Thus it needs to be discussed whether the authorisation of Section 101 GCA to identify the customer to forward this to the right holder also includes an identification of the customer for the purpose of mere information by the Internet access provider himself.

c) Obligation to Block

The Higher Regional Court of Hamburg has accepted, at least for hosting providers - such as Rapidshare - that hosting providers must pay particular attention to those persons who have already uploaded rights infringing content. Those who fail to monitor these people carefully are in breach of their due diligence obligations thus making themselves liable under „Stoererhaftung“ (OLG Hamburg, MMR 2010, 51 cited by Juris marg. no. 91 et seq. - Rapidshare II; OLG Hamburg ZUM-RD 2008, 527, 543 - Rapidshare I; see also BGH 2007, 890 para. 44 - Jugendgefährdende Medien bei eBay according to which experience has shown that the repetition of similar violations is likely). Therefore, users who have once committed infringing acts must be de-anonymised (c.f. 1. c) aa) above with further details), so that their activities can be carefully monitored. This also logically includes that such users, when they repeat their infringing act, must also be blocked by hosting providers when they upload new content, if there is no other effective method of preventing such further rights infringements by repeat offenders. Such blocking obligations may be considered, in particular, as far as multiple repeat offenders are concerned; the more often such infringements are repeated, the more reasonable it is to expect the hosting provider to implement a respective block.

However, there is as yet no case law for Internet access providers clarifying whether the above "repeat offender" argument may be cited in respect of Internet access providers as it can be in respect of hosting providers as justification for duties of care under “Stoererhaftung”.

3. What exceptions exist for "digitisation" or to allow for format shifting of sound recordings, films, broadcasts or other works?

a) Digitisation and Exceptions

In German copyright law, the process of digitisation, i.e. the conversion from an analogue to a digital format, is not regulated as a distinct form of exploitation. Accordingly, there is no explicit exception which relates specifically to the technical process of digitisation. However, insofar as it leads to even a temporary fixation on a data carrier, digitisation constitutes an act of reproduction and where offers are made available online, also an act of making available to the public. Hence, digital reproductions and online uses normally require the consent of the copyright holder (Schricker /Loewenheim, Urheberrecht, 3rd ed. 2006, § 16 para. 19; Härting, Internetrecht, 3rd ed. 2008, p. 204; Schulze, ZUM 2000, 432, 439). The general exceptions to the reproduction right and the right of making available to the public do, however, apply. These exceptions can be divided into those that apply to specific digital
forms of use (see aa) below), and those that apply also for analogue forms of use but have particular significance for digital use or contain special provisions (see bb) below). In addition, when ascertaining whether digitisation is allowed, the interpretation of existing licenses is of particular importance (see cc) below).

aa) Specific exceptions for digital uses

Some exceptions regulate specific forms of digital use: Section 52a GCA provides the possibility of making parts of works or magazine articles available to the public for purposes of education and research to schools and other educational institutions for participants in lessons or a limited circle of researchers (intranet-exception). Section 52b GCA provides for the possibility of making the stock of public libraries, museums and archives available to users at electronic reading stations. Section 53a GCA allows libraries, to a limited extent, to send magazine articles and parts of works on request in electronic form. These exceptions, which relate mainly to libraries and educational institutions, are further described under question 4.

A further exception, particularly related to digital uses, can be found under Section 44a GCA, which implements Art. 5, par. 1 InfoSoc Directive. According to this provision, temporary reproductions are permitted which are transient or incidental, and represent an integral and essential part of a technological process which and no independent economic significance, and are either part of a technological transmission process, or enable a lawful use (so-called ephemeral reproductions). Typical lawful reproductions include the copying of a CD ROM into the RAM of a PC for the purpose of playing, the loading of files into the working memory of a PC when browsing, or the temporary storage of data in order to relieve transmission networks for the purpose of faster data retrieval (caching). Courts have rejected to extend the exception to include reproductions which in any way serve to make works available for commercial or potentially commercial uses, as is the case, for example, with the thumbnails in a Google image search (OLG Jena MMR 2008, 408, 410) or the email distribution of press articles (KG GRUR-RR 2004, 228, 231). Accordingly, the application of Section 44a GCA to acts of reproduction for the purposes of online book offers, such as the Google Book Search, has been rejected in the legal literature (Kubis, ZUM 2006, 370, 375 et seq.; Ott, GRUR Int. 2007, 562, 564). A special provision applies with respect to computer programs: unless otherwise contractually agreed, acts of reproduction are permitted to the extent they are required for the intended use of the program (Section 69d sentence 1 GCA).

bb) General exceptions and digital use forms

The most important exception in German copyright law is the exception to the right of reproduction for private and other uses (Section 53 GCA, private copying exception). The private copying exception also applies to copies in digital form (BT-Drs 15/38, 20). The exception allows copies made for private uses and the conversion of analogue to digital reproductions for private purposes. In addition, reproductions for other
purposes of the user, e.g. scientific or educational use, are also permitted. With respect to digitisation, Section 53 GCA contains two relevant counter-exceptions: Firstly, copies in digital form for inclusion in an archive are only permitted if they are solely for analogue use or if the archive acts in the public interest and does not pursue any direct or indirect commercial or economic gain (Section 53, subsec. 2, sentence 2 GCA). Secondly, reproductions of entire books or magazines in digital form are only permitted with the consent of the author unless the works are out-of-print or the reproductions are made for archival purposes (Section 53, Par. 4 GCA). In any case, the reproductions produced for private or other own use may be neither distributed nor used for communications to the public; online offers on the basis of general exceptions to the right of reproduction are thereby excluded (Section 53, subsec. 6 GCA).

Rights holders are free to prevent the digital reproduction of works through technological protection measures. This also applies for the private copying. However, to the extent that reproductions for other purposes of the user are permitted, such as scientific use, use in educational institutions, for non-commercial archiving purposes or reporting on current events, rights holders who use technological protection measures are obligated to provide users with the necessary means to realise such permitted uses (Section 95b GCA).

Another exception, for which particular limitations apply in respect of digital forms of use, is section 49 GCA which permits reproduction and distribution of press reviews. Under this provision, the courts have accepted the creation and distribution of analogue press reviews. In respect of electronic press reviews, the German Federal Court of Justice has confirmed the application of the exception only for in-house press review in the form of graphic files (BGHZ 151, 300, 307 et seq. - Elektronischer Pressespiegel). In the case of electronic press reviews covered by Section 49 GCA, the authors of the articles have a statutory claim to equitable remuneration which must be asserted through a collecting society (subsec. 1, sentence 3). In practice, claims are managed by the collecting society VG Wort.

If the exception does not apply, the rights must be obtained from the rights holders, usually the publishers. In order to exercise these rights, the associations of newspaper and magazine publishers founded the Presse-Monitor GmbH (PMG) in 2000. It grants, on behalf of currently about 560 newspaper and magazine publishers, licences for electronic press reviews, for which Section 49 German Copyright Law has not already granted a statutory licence and also makes digital versions of the articles available. The PMG also undertakes, on the basis of a contractual agreement with VG Wort, the collection for the remuneration claims arising from the statutory exception. Hence, in practice, claims based on licensed uses and uses allowed by the exception are managed collectively by one company.

b) Existing grants of rights and Digitisation

In particular in respect of older works and contractual agreements, it is not only relevant, whether the digitisation of works and their use is permitted by
the exceptions but also whether grants of rights enable digital uses. It is recognised that the right to digitise is deemed to have been granted if the digitisation is necessary in order to exercise a right of use already granted (Wandtke / Bullinger/ Wandtke-Grunert, Urheberrecht, 3rd ed.2008, par. 31a marg. no. 29). There has been a lot of discussion, however, whether or not granted rights, which do not explicitly cover digital uses, may be construed as to allow them. This depends on whether the digital use constitutes an independent type of use compared to the exploitation specified in the contract and is covered by the purpose of the agreement. It has been assumed, for example, that a special licence must be obtained for the distribution of magazines on CD ROM in addition to the licence for the printed version (BGH GRUR 2002, 248, 251 - Spiegel-CD ROM), whilst the production and distribution of CDs was covered by a grant of rights for phonographs (BGH GRUR 2003, 234, 236 - EROC III).

A special problem exists in relation to agreements which provide for granting of rights for future, as yet unknown, types of use. Under the law applicable until 2008, the granting of rights for unknown types of use was invalid. The question arose therefore, whether digital uses had to be considered 'new' compared to analogue forms so that the use would require a separate licenses even if rights had been assigned through a buy-out arrangement. Under the case law, this depended upon whether the digital use, in comparison to the prior (analogue) use, created new marketing opportunities (Schricker /Schricker, ibid., § 31 para. 48; Dreier / Schulze /Schulze, ibid., § 31 para. 46). It was rejected for the marketing of a film on DVD because DVD was considered a substitute to analogue video tapes (BGHZ 163, 109 - Der Zauberberg). Under the new law, granting of rights is possible also for unknown types of use but must be in writing (see also question 6).

c)  Format Shifting

The conversion of a work into another technological format (format shifting) is not considered an alteration of the work as long as the content is not changed (cf. BGH ZUM 2006, 318, 320 - Alpensinfonie). However, the Higher Regional Court of Jena assumed in respect of thumbnails that the reduction of the format through a lower number of pixels constitutes an alteration and therefore requires consent (OLG Jena MMR 2008, 408, 409). The question arises as to whether similar considerations apply in the case, for example, of mobile TV.

As format shifting usually requires a reproduction, the conversion is permitted only if the user can rely on a right to reproduce the work, either in the form of permitted uses based on the private copy exception, or in the case of commercial use based on a license. In the latter case, it must be ascertained for each individual case, whether the respective technical format is covered by the license. This may be doubtful if, for example, mechanical rights have been granted for the production of a conventional CD, but the product is then to be offered for download in the form of an MP3 file.

In addition, users must observe moral rights of the author: format shifts or the use of works in electronic forms of use must not compromise the intellectual and personal interests of the author (Section 14 GCA). Such may be the case if the electronic format changes the character of the work, if the context (e.g. through the inclusion on particular websites) affects the perception of the work.
or if the electronic reproduction leads to defective quality, for instance in the case of scanned images.

In a much noted decision, the German Federal Court of Justice ruled that a use as a ring tone for mobile telephones violates the moral rights of the composer. The violation did not depend on whether or not the work was in any way; it was deemed sufficient that the interests of the author were infringed through the form and type of communication of the work. For ring tones, the distortion was due to the fact that, irrespective of the quality of the ring tone, the music is no longer perceived as a melodious sensory experience but as an irritating acoustic signal (BGH GRUR 2009, 395 - Klingeltöne für Mobiltelefone).

Format shifts are facilitated, however, by the statutory provisions relating to adaptation of a work which balance the interests of the author with those of potential users (Sections 39, 62 and 93 GCA). Hence, according to Section 39 subsec. 2 GCA, changes to a work by the holder of an exploitation right are permitted, even if they have not been expressly agreed upon, provided the author may not deny consent in good faith. The same applies under Section 62 GCA, if the use of a work is permitted on the basis of a statutory exception. Whether or not an alteration is allowed, must be decided on the basis of a balancing of interests test. In the above mentioned ring tone decision, the German Federal Court of Justice determined, for example, that the permission to use a ring tone for mobile telephones implies consent to the modifications which are typically required they for such a use (BGH GRUR 2009, 395, 398 - Klingeltöne für Mobiltelefone). In addition, if rights to an Internet or multimedia use have been granted, the permission for the format changes necessary for such use are deemed to be included in the license (in Hoeren / Sieber /Decker, Handbuch Multimediarecht, as of 2008, Part 7.2, para. 51; Dreier / Schulze /Schulze, ibid., § 39 para. 28) or if parts of a work are lawfully quoted on the Internet (Bisges, GRUR 2009, 730, 733).

In respect of cinematographic works, in deviation from Section 39 GCA, the principle applies that authors may only prohibit "gross distortions or other gross impairments" of the work in the production and exploitation of the film (Section 93 GCA). The provision is intended to allow the often necessary changes to film works in order to ensure broad distribution of the film. These include, in addition to abridgement or measures for the purpose of protection of minors, in particular format shifts which are necessary for the various distribution forms and distribution channels. Nonetheless, there is a dispute as to the circumstances under which, for example, the adjustment of films for the television format (panning and scanning) or the time adjustment in respect of television distribution or presentation in airplanes (time compression or time expansion) may be considered gross distortions and thus infringements of the author's moral rights (vgl. e.g. of Lewinsky / Dreier, GRUR Int.1989, 646; Schack, Urheberrecht, 4th ed. 2007, p. 192 et seq.). These questions can also arise in relation to new formats, such as mobile TV, where the decodes do not allow the display of the work in the original format.

4. Are there specific exceptions permitting libraries to format shift or to make digital copies for archive or other purposes?

As described in Question 3, the transfer of a work in a digital format generally constitutes a reproduction and is thus subject to the respective exceptions. For
libraries, the exceptions which are particularly relevant are the private copy exceptions which also permit (digital) archiving of the library's stock to a limited extent (Section 53 subsec. 2, sentence 1 No. 2 GCA, see a) below), the exceptions in favour of electronic reading stations (Section 52b GCA, see b) below), and the sending of copies (Section 53a GCA, see c) below). For educational institutions, Section 52a GCA also applies which permits making available to a limited group of users (Section 52a GCA, see d) below).

a) Archiving of stock for own purposes (Section 53 subsec. 2 sentence 1 No. 2 GCA)

According to Section 53 subsec. 1, sentence 1 No. 2 GCA, making individual reproductions of a work for the purpose of inclusion in an own archive is permitted provided the reproduction is required for this purpose and the reproduction is made on the basis of a copy owned by the user. Beneficiaries of this provision are, in addition to private individuals, also legal persons and corporations and thus in particular also libraries (OLG Köln GRUR 2000, 414, 416). Since the implementation of the InfoSoc Directive in 2003, digital copies and uses of the copies in digital form are only permitted for institutions that are active in the public interest and do not pursue direct or indirect commercial or economic gain, such as public libraries or foundations (c.f. Art. 5 para 2c) of the InfoSoc Directive). Apart from this, the consent of the author is required in respect of copies of electronically accessible databases for archive purposes (Section 53 subsec. 5 GCA).

An archive is considered to be any collection of works, i.e. not only books or printed works, but also films or phonograms may be reproduced for archiving purposes under this provision. The law stipulates, however, that the copy of the work from which the reproduction is made must be owned by the one making the copy. It is assumed that in the case of archiving under different categories, a printed copy of the work must be available for each electronic copy (see BGHZ 134, 250, 258 - CB-infobank I).

Most importantly, the archive is restricted to use for internal purposes, only. This includes, for instance, back-up copies for security purposes but not the display or communication of copies to third parties. A making available of digital versions of printed works by libraries to external library users is not covered by the exception, irrespective of whether the library pursues commercial or economic aims (BGHZ 134, 250, 257 et seq. - CB-infobank I). Furthermore, courts have prohibited electronic reproduction for internal use within a company, as the intensity of the use is thereby increased and the risk of further reproductions is increasing (BGH GRUR 1999, 324, 327 - Elektronische Pressearchive). In any case, commercial uses such as Google Book Search are not covered.

For the reproduction, right holders receive compensation through the so-called equipment levy, i.e. the remuneration obligation of manufacturers, dealers or importers of devices which are used to produce such reproductions (Section 54 GCA). The right can only be asserted by collecting societies (Section 54h GCA). In practice, the remuneration collected by the collecting society VG Wort, is divided between publishers and authors for the reproduction of written works for archive purposes and paid as a supplement to the remuneration for other uses.
b) Electronic reading stations (Section 52b GCA)

In 2008, an exception was introduced, which allows the making available of library stocks at electronic reading stations (Section 52b GCA). According to this exception, it is permissible to make available published works from the stock of publicly accessible libraries, museums or archives on the institution's own premises at specially equipped reading stations for research or private study purposes provided this does not contravene any contractually agreed provisions. Again, the exception only applies to institutions which do not pursue a direct or indirect economic gain. The provision is based on Article 5 par. 3 n) of the InfoSoc Directive (so-called “On the Spot Consultation”). The aim of the provision is that analogue collections can also be used in digital form (BT Dr: 16/1828, p. 26). The legislator is currently considering whether the provision should be extended to other educational institutions.

Although Section 52b GCA mentions the making available of works at "reading stations", the prevailing opinion assumes that not only written works but also audio or video products are covered by the exception (but not computer programs; c.f. Wandtke / Bullinger / Jani, ibid., § 52b para. 4). However, the provision stipulates a strict stock requirement. Reproduced works must belong to the current inventory of the institution and the number of electronic copies of the work that are displayed simultaneously must not exceed the number of print versions available at the library. With some minor exceptions (e.g. for load peaks c.f. legal committee on the draft legislation BT DS 16/5939, p. 44; for works out of print Wandtke / Bullinger / Jani, ibid., § 52b para. 35), simultaneous access by several readers is not allowed.

Under a literal reading, the provision only allows the making available of works and does not regulate the production of copies for such purpose or the uses to which the reader is entitled. According to prevailing opinion, confirmed by some court decisions, Section 52b GCA also includes the right to digitise, i.e. to read in and store the work (OLG Frankfurt am Main, GRUR-RR 2010, 1, 3 et seq.; LG Frankfurt GRUR-RR 2009, 330, 331; Dreier / Schulze / Dreier, ibid., § 52b para. 14 with further refs.). It is unclear, however, whether the works may be digitised centrally - i.e. for several libraries - or whether each library has to digitise its own stocks on the basis of its own copies (Steinhauer, K & R 2009, 688).

In respect of the uses allowed by the exception, the Higher Regional Court of Frankfurt recently stated that institutions may not allow the storing on external storage media (USB stick) ot the printing of the work; reading stations must therefore be set up accordingly (OLG Frankfurt GRUR-RR 2010, 1, 3 et seq.).

The meaning of the requirement, that the making available of works must not violate existing contractual agreements is highly controversial. In particular, it is in dispute whether the mere offer of a licensing agreement is sufficient in order to exclude the privilege or whether an agreement has to actually have been concluded. The Higher Regional Court of Frankfurt has decided that the offer of a licence alone is not sufficient and referred to the French and English version of the Directive - which others have, however, interpreted to mean the exact opposite (OLG Frankfurt a.M. GRUR-RR 2010, 1, 1 et seq.; differently e.g. Dreier / Schulze / Dreier, ibid., § 52b para. 12; Spindler, FS Loewenheim, 2009, p. 287, 290; Wandtke / Bullinger / Jani, ibid., § 52b marg. 27). If one follows the decision of the Higher Regional Court of Frankfurt, the exception is
not generally subordinate to licensing offers of the publishers but only subject to contracts executed by the parties. It remains to be seen, however, whether other courts follow this and decision and whether the issue will ultimately have to be clarified by the ECJ.

The author is entitled to fair remuneration for the use at electronic reading stations, a right which can only be asserted by collecting societies - in this case, VG Wort (Section 52 sentences 3 and 4 GCA).

c) Copy Delivery Services

After lengthy legal proceedings on the legality of the copy delivery services of libraries which copied magazine articles and parts of books in response to orders from individual users and sent the copies to the respective orderer, the legislator confirmed in 2008 the results found in case law: under the newly introduced § 53a GCA, libraries are allowed to reproduce newspaper and magazine articles as well as parts of longer works upon individual orders and send these to the orderer provided the orderers themselves would have been entitled to reproduce said articles or works for private or other personal use. This includes digitisation and electronic delivery but only as a graphic file for the illustration of teaching or for scientific and non-commercial purposes. In return, the authors are entitled to remuneration which can only be asserted by a collecting society and can only be assigned to it in advance.

The exception is, however, subordinate to offers of publishers i.e. the reproduction and delivery are not permitted if the work is made available to the public in an accessible manner and at reasonable contractual conditions. The provision is based on a compromise between publishers and libraries and is designed on the one side to prevent an unreasonable impairment of online marketing and on the other to ensure public access at reasonable conditions. In practice, online publisher offers are registered on a university website, so that libraries can find out whether there are online offers. The provision is new and so far unique in that the law makes the applicability of the exception dependent on whether the online offers are reasonable. For the first time, the scope of the exception and market behaviour are thereby directly related. Offers are, for example, deemed unreasonable if the user is only offered the desired part or work in connection with a subscription or a package with other works (Wandtke / Bullinger /Jani, ibid., Section 53a GCA, marginal. 35 with further refs.). In the legal literature, however, this link is predominantly criticised; it remains to be seen how courts handle it.

In Germany, copy deliveries are handled in a large part by the initiative "Subito", which currently organises the copy delivery for about 40 libraries. This organisation form has been deemed acceptable (Wandtke / Bullinger /Jani, ibid., Section 53a GCA marg. no. 9 with further refs.). Subito concludes framework agreements with publishers relating to copy delivery. However, in practice, this also leads to a combination of uses permitted by the statutory exception as well as by licenses.

d) Intranet exception for educational institutions

According to Section 52a UrhG parts of works or magazine articles may be made available to the public for purposes of teaching and research at schools,
higher education institutions and non-commercial educational institutions for participants in lessons or a group of researchers provided this is undertaken for non-commercial purposes and is necessary for the respective purpose (intranet exception). This is one of the exceptions for which the GCA stipulates that the right holder may not prevent uses through technological protection measures. The right holder is to be paid a reasonable remuneration for the use which is asserted by collecting societies. In practice, framework agreements were first concluded between the collecting societies and the German Länder for the payments for these uses. In particular, the collecting society of authors (VG Wort) has not signed this agreement so that the fairness of the remuneration is currently being assessed by the courts. The provision which was introduced in 2003 after long discussions, was initially limited in time by the legislator to 2012. The impact of the provision will then be re-evaluated by the legislator in order to decide whether the time limit for the exception should be lifted.

5. Are there exceptions or other permissions allowing the use of orphaned works? If so, what is their scope?

German copyright law does not contain general statutory provisions for the use of "orphaned" works, i.e. works for which it is not possible to ascertain either the author or the expiry of the term of protection. As a result, as long as the work is protected by copyright, any user who has not obtained a licence (because he/ she could not find the right holder) is liable to claims for injunctive relief and damages under civil law as well as criminal sanctions.

The problem is particularly relevant in Germany because until 2008 unknown types of use could not be granted before the form of use became known. The exploiters could therefore, even in cases of a comprehensive buy-out of rights, only acquire the rights for the forms of use known at the time of entering into the agreement (see under question 3). Accordingly, if agreements were concluded prior to online exploitation becoming known online exploitation and consequently did not contain a specific license for exclusive rights for present and future of use assigned to him. Therefore, for example, the retroactive digitisation of magazines for the purpose of online databases for the periods in which the online use was not known requires the consent of all authors and editors. Since 2008 it has been possible to grant rights also for unknown forms of use whereby additional remuneration must be paid should such uses be implemented.

For existing contracts, a provision was enacted in 2008 under the heading "opening the archives" in order to eliminate the consequences of a lack of granting of rights. According to § 137I GCA, the granting of rights is assumed for such types of use which were unknown at the time of concluding the agreement provided the author had, in the respective agreements, exclusively granted rights for all known forms of use both contributed in time and geographic scope and had not objected to the legal fiction by the end of 2008 (or in the case of types of use unknown in 2008 within three months of receipt of a notification as to the usage). This legal fiction does not apply to cases in which exploitation rights were granted before 1966 and also does not apply to cases in which the author has granted rights to third parties in the meantime. A number of questions are still open, however, inter alia concerning the treatment of agreements concluded prior to 1966, the application of the rule to magazine articles, the rights of the editors or the scope of the rights granted on the basis of the legal fiction.
In addition, German copyright law contains a number of provisions that facilitate the reproduction of works which are out-of-print. Thus, according to Section 53 subsec. 2 No 4 b) GCA, the reproduction of works for personal use is permitted in the form of analogue copies or copies for analogue use could not confer rights to online exploitation even if the Parties had agreed that the license had provided that the works have been out of print for at least two years. Out of print works are those which are no longer available from the publisher. Furthermore, contrary to general principles, reproductions of entire books or magazines for archiving purposes are permitted if the work is out of print.

While the new law has brought a degree of legal certainly for publishers, the situation with respect to orphaned works is predominantly perceived to be unsatisfactory (e.g. Spindler/Heckman, GRUR Int. 2008, 271, 273, Bohne/Elmers, WRP 2009, 586, 590). There is a clearing house of the collecting societies, the "Clearingstelle Multimedia für Verwertungsgesellschaften von Urheber- und Leistungsschutzrechten GmbH (CMMV)" (multimedia clearing house for collecting societies for copyright and related rights) which offers research services to find rights holders for a fee. However, where the right holders cannot be found, the clearing house can not help. At the request of the European Commission, the legislator will re-examine further measures to be taken in the context of another legislative proposal (so-called 3rd Basket). In general, provisions allowing the use of explain work are supported. A working group on digital libraries has already prepared a draft law, which is based on allowing exploiters to use a work without permission (against payment of a fair remuneration to the collecting society) unsuccessful search for the right holders if they have conducted a different albeit

6. What, if any, fair dealing/fair use provisions apply? Are there any examples of fair dealing/use provisions having a particular application to library/search facilities such as Google Book Search?

In German law, the statutory exceptions are considered to constitute a closed and conclusive list. A general clause, equivalent to the fair use exception in U.S. law, does not exist. In addition to the exceptions contained in the GCA, there are certain general concepts, such as the prohibition of acting contrary to good faith (Section 226 German Civil Code) self-defence (Section 227 German Civil Code) or emergency (Section 904 German Civil Code) which can theoretically limit copyrights but play almost no role in practice.

In addition to the statutory exceptions, copyright law generally allows the free use of works, if the work serves as inspiration for a new work and is completely absorbed in the new work (Dreier / Schulze /Schulze, ibid., § 24 para. 2). Classic cases of free use are transfers to another type of use (e.g. audio recordings of written works). The German Federal Court of Justice, recently considered it possible that the inclusion of short extracts of television programmes or inclusion of brief sections from a phonogram (sampling) can be permitted under the principle of free use even without the permission of the right holder (BGH GRUR 2000, 703, 705 - Mattscheibe; BGH GRUR 2009, 403, 405 - Metall auf Metall). Case law also considers the inclusion of elements from book reviews for the purpose of abstracts published online a use permitted by these rules (OLG Frankfurt GRUR 2008, 249, 251 - Abstracts, Appeal before the German Federal Court of Justice under I ZR 12/08 and I ZR 13/08).

In addition, in respect of content uploaded to the Internet the principle of implied consent is also used. If, for example, rights holders upload content to the Internet without protecting it, they are assumed to have consented to typical Internet activities
such as linking, downloading, printing etc. BGHZ 174 359, 367 et seq. - Drucker und Plotter). Alternatively, it is considered contrary to good-faith dealing if right holders rely on their copyrights to enjoin others from such uses (OLG Jena MMR 2008, 408, 413 - Thumbnails). Accordingly, courts have found the linking of content on the Internet or the creation and use of thumbnails to be permitted (BGHZ 156, 1, 11 et seq. - Paperboy on linking; LG Erfurt MMR 2007, 393, 394 on thumbnails). Whether the use of thumbnails in the scope of image search engines can actually be justified through the legal principle of tacit consent or misuse of rights is, however, controversial; a decision of the German Federal Court of Justice is expected soon (BGH, AZ.I ZR 69/08).

The various approaches to deal with conflicts of interest are overshadowed by the growing significance of constitutional fundamental rights (Grundrechte) for the scope of copyrights and the interpretation of the exceptions. In the prevailing view in Germany, fundamental rights are not only directed against state intervention but also guarantee an objective order of values which are deemed to govern civil law relations. To the extent legal positions protected by fundamental rights interfere with other interests that enjoy constitutional protection, they must be settled by way of a balancing of interests. In this process, copyright and neighboring rights are protected by the constitutional guarantee of private property.

On this basis, courts have permitted the publishing or communication of works without the consent of the right holder where copyright has deemed to be subordinated to the constitutionally guarantees of free speech and freedom of information (BGH GRUR 2003, 956, 957 - Gies-Adler (on caricature); OLG Hamburg GRUR 2000, 146, 147 - Berufungsschrift; OLG Stuttgart NJW-RR 2004, 619, 621 et seq.). In the same vein, in respect of the constitutional guarantee of artistic freedom, the German Federal Constitutional Court extended the scope of the exception allowing quotations beyond its actual scope in order to allow the use of texts from the poet Bertold Brecht in a play by Heiner Müller (BVerfG GRUR 2001, 149, 151 et seq. - Germania 3). In respect of press reviews, the scope of the exception, which had originally been limited to analogue uses, was extended to cover digital press reviews (BGHZ 151, 300, 310 - Elektronischer Pressespiegel). Methodologically, courts implement decisions based on balancing of interests through a narrow interpretation of copyrights or a broad interpretation of the exceptions (BGH GRUR 2003, 956, 957 - Gies-Adler). In practice this leads to a situation whereby uses which would otherwise only be possible with the consent of the right holder, are allowed in certain circumstances on constitutional law grounds without consent.

Finally, in German law, through the implementation of the E-Commerce Directive, certain activities of service providers such as mere acts of transmission, caching and hosting are freed from copyright responsibility (Section 8 et seq. German Telemedia Act, see under questions 1 and 2 above). The service providers are also not subject to any general monitoring obligations (Section 7 subsec. 2 German Telemedia Act, Article 15 E-Commerce Directive). It has not yet been clarified whether search engine operators may also rely on these provisions in respect of their activities. The German Federal Court of Justice will possibly decide on this issue in the scope of the dispute on preview images in Google image searches (see above). As the privileges based on the E-Commerce Directive exclude liability for damages but not for injunctive relief (Section 7, subsec. 2, sentence 2 German Telemedia Act), they lead to the fact that services are initially permitted but then particular works have to be removed upon request of the right holders (so-called notice and take-down procedures).
7. How does the law in your country/region understand the requirement of international treaties that exceptions to copyright must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author?

a) The Three-Step Test

In Germany, the criteria contained in question are commonly referred to as the three-step test, as it is usually assumed that - in addition to the criteria mentioned in the question - one must examine whether an exception affects “certain special cases”. In summary, the three-step test, therefore, covers the following steps: exceptions may (1) only affect certain special cases, (2) not interfere with the normal exploitation of the work, and (3) not unreasonably prejudice the legitimate interests of the authors or right holders. The three-step test applies to authors and holders of neighbouring rights pursuant to the slightly different wording of the relevant provisions of international conventions (Art. 9 para 2 Berne Convention, Article 13 TRIPS, Article 10 of WCT and Article 16, para 2 WPPT) and on the basis of European Directives (i.a. Art. 5, par. 5 InfoSoc Directive, Art. 6, par. 3 of Directive 91/250/EEC of the council of 14 May 1991 on the legal protection of computer programs ("Software Directive"), Art. 10, par. 3 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("Rental and Lending Directive") and Art. 6, par. 3 of the Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases ("Database Directive").

b) Implementation and Applicability

The German legislator did not implement the three-step test in the form of a general rule which governs all rights and forms of use. Only two provisions in the GCA contain criteria corresponding to the three step test (decompilation of software, Section 69e, subsec. 3 GCA and use of non-substantial parts of databases, Section 87b, subsec. 1 sentence 2 GCA). The question whether Germany is obligated to implement the three step test is unclear, in particular with regard to the European directives. Convention requirements can also be applied directly without implementing legislation and have the status of a statutory law. They are subject, however, to the general principles, in particular the rule of lex posterior derogat legi priori.

In a decision in 1999, the German Federal Court of Justice left open the question of direct application of the three-step test on the grounds that the provisions of German law should in any case be interpreted in accordance with international conventions or European directives and the three-step test would be taken into account when interpreting of the rules of the GCA. In the particular case, the rules on private copying and remuneration (Sections 53, 54 GCA) were extended in scope to comply with the requirements of the three-step test (BGHZ 141, 13, 28 et seq. - Kopienversanddienst). Lower courts, when applying the three step test, usually do not explicitly question the applicability of the three-step test. As a result, the courts examine the three-step test regardless of the fact that it has not been implemented by statutory law. German courts, however, unlike the Austrian Federal Court of Justice, have never declared a statutory exception which would otherwise
have been applicable, inapplicable on account of a violation of the three step test (see GRUR Int. 1995, 729 - ludus tonalis).

The three-step test is significant in two respects: First, in interpreting the exception itself, i.e. the question of whether the application of a statutory exception justifies a certain use (BGHZ 141, 13, 28 et seq. - Kopienversanddienst). Second, in determining the remuneration claims which the rights holders are entitled to as compensation for statutory exceptions, i.e. the question as to at the amount of equitable compensation which must be paid to right holders as a compensation for the exception (BGH GRUR 2004, 669, 671 et seq. - Musikmehrkanalendienst).

c) The Three Steps

In applying the three-step test, courts rarely distinguish clearly between the three criteria, in particular between steps 2 and 3 (impairment of the normal exploitation and the unreasonable prejudicing of legitimate interests). In part, reasoning referring to the three-step test is not expressly directed towards a particular step and it is difficult to assess which criteria the court is examining (e.g. LG Frankfurt a. M. ZUM 2009, 662, 664 - elektronische Leseplätze). In other decisions, two criteria have been combined such that, for example, the non-impairment of normal exploitation has been dealt with as a part of the legitimate interest test (e.g. BGH GRUR 2004, 669, 671 - Musikmehrkanalendienst). It is therefore difficult to assess how courts construe the requirements of the individual steps.

aa) Certain Special Cases

In case law and in literature, it has not yet been clarified as to whether the requirement that exceptions may only be applied in certain special cases represents constitutes a separate criterion. This is especially true with regard to the application of European directives which specifically list the possible exceptions (see Dreier, ZUM 2002, 28, 35). In case law, this criterion has only been tested in one case: the court concluded that the reproduction of works upon individual order (copy delivery) represented a special case in light of the comparability with private copying and the interest of the public in unhindered access to information (BGHZ 141, 13, 31 - Kopienversanddienst). Thus, qualitative aspects have been decisive. In the legal literature, however, scholars have argued that the criterion of a special case is already violated if the exception leads to quantitatively significant impairment - as in the case of the private copying (e.g. Poll / Brown, ZUM 2004, 266).

bb) Impairment of Normal Exploitation

The second step - no interference with normal exploitation - has as yet not been examined extensively. Whilst the literature has produced a variety of approaches in respect of the "normal exploitation" (c.f. for example Sentleben, CR 2003, 914, 917), case law as yet lacks a more precise definition. The German Federal Court of Justice assumed in a decision that in respect of phonogram producers the sale of phonograms constituted a conventional - and therefore normal -
exploitation (BGH GRUR 2004, 669, 671 - Musikmehrkanaledienst). The exploitation can be impaired if the music is distributed in a de facto comparable fashion through the broadcasting of music in multi-channel music services without an equitable remuneration. It is unclear, however, whether it can be inferred from the equation of conventional exploitation with normal exploitation that the court tends towards an empirical approach.

In the case law on database law, courts have examined whether the use in question competes with the normal exploitation of the database. An impairment of the normal exploitation (Section 87b subsec. 1 sentence 2 GCA refers to acts which are contrary “to normal exploitation”) is already affirmed if the owner of the database rights suffers an economic disadvantage through the questionable use (c.f. BGHZ 156, 1, 16 et seq. - Paperboy). When ascertaining whether or not the use leads to an economic disadvantage reference is repeatedly made to whether the behaviour in question substitutes for the use of the original creator's database or encourages it (e.g. BGHZ 156, 1, 17 - Paperboy). No definite statements can be found in case law on the question of how severe the economic disadvantage must be, in order to assume an impairment of the normal exploitation.

Finally, in particular in database cases, the question is raised whether or not it is contrary to normal exploitation, if third parties use data from an existing offer to develop their own commercial offer and then to compete with the original database offeror (OLG Hamburg, BeckRS 2009, 20101; LG Köln MMR 2002, 689, 690 - Online-Fahrplanauskunft; OLG Frankfurt, ZUM-RD 2003, 532, 535 - Abstracts; LG München I, MMR 2002, 760, 762 - Online-Pressespiegel).

cc) No Prejudicing of Legitimate Interests of Right Holders

More specific statements can be found on the criterion of unreasonable prejudice of legitimate interests of the author. According to the decision of the German Federal Court of Justice in the Kopienversanddienst case, authors’ rights are unreasonably prejudiced if the author does not participate in a commercially significant exploitation of the work (BGHZ 141, 13, 32 - Kopienversanddienst).

The Higher Regional Court of Dresden recognises a case of unreasonable prejudice in the systematic commercial exploitation of a work without the possibility of equitable monetary participation of the rights holder (OLG Dresden, ZUM 2007, 203, 206 - Online-Videorekorder).

In database cases, the legitimate interests of database owners are considered impaired if they suffer loss of income through the use in question (c.f. OLG Köln ZUM 2001, 414, 417 - Suchdienst für Zeitungsartikel; LG Berlin ZUM 2006, 343, 345). In addition, it is sufficient if the use of the data does not correspond to the intended purpose of the creator (OLG Hamburg, BeckRS 2009, 20101 in II.2.c.), if the user exploits the investment of the creator (LG Köln, BeckRS 2008, 08839 under 2. of the grounds for the decision), if the creator's
It is evident, however, that with respect to the unreasonable infringement of legitimate interests criterion - and also in respect of an impairment of normal exploitation - courts accept a compensatory effect if an equitable remuneration is paid to the author (BGHZ 141, 13 (33) - Kopienversanddienst; BGH GRUR 2004, 669, 671 - Musikmehrkanaldienst). The Kopienversanddienst decision stated expressly: "Art 9 para 2 Berne Convention, allows to [...] avoid an unreasonable prejudice of the legitimate interests of the author ... through the award of a claim for remuneration" (BGHZ 141, 13, 33 - Kopienversanddienst). In this particular case, the statutory rule - according to which copying upon individual order was permitted - could be applied if the author was granted a claim to equitable remuneration which must be asserted by a collecting society. This remuneration claim, established in case law, has since been confirmed by the legislator (see question 4).

d) Summary

In conclusion, it can be said that the criteria mentioned in question 7 are discussed in Germany under the heading 'three-step test' as it is also examined whether exceptions concern certain special cases. The three-step test is, though not explicitly implemented into German law, applied by the courts as a limitation of the statutory exceptions. It is difficult, however, to derive the precise meaning of the individual criteria from the court decisions. Mostly, courts only consider whether the use in question prejudices the legitimate interests of right holders. Where courts come to the conclusion that the economic gain from a possible exploitation of the work could be significantly affected, it is usually said that right holders at least must be entitled to a remuneration claim which compensates the losses to the normal exploitation of the work.

8. Are there any other exceptions or permitted uses which you consider particularly relevant to the hi-tech and digital technology sectors with regard to ISPs, digitisation and format shifting or orphaned works?

In respect of ISPs, in particular the "safe harbour" provisions of Sections 8 to 10 German Telemedia Act (Art. 12 to 14 E-Commerce Directive) are relevant which only afford the ISPs a privilege in respect of claims for damages and criminal liability (see point 1. a) above). If these privileges do not apply, in particular in respect of claims for injunctive relief or removal, then the liability rules of "Stoererhaftung" (Breach of Duty
of Care) in German law are extremely relevant; however, these afford privileges to the ISPs to a lesser extent than Sections 8 to 10 German Telemedia Act. In particular - in contrast to Sections 8 to 10 TMG - there exists, according to the principle of „Stoererhaftung“ (Breach of Duty of Care), the obligation for the hosting provider to prevent similar, just as obvious rights infringements in the future as soon as the hosting provider has gained knowledge of a rights infringement (see points 1.b) and c) aa) above).

Your Views

a) In your opinion, are the exceptions to copyright protection for (i) the activities of an ISP (ii) digitisation or format shifting; and (iii) orphan works, and the fair dealing/fair use provisions that apply to library/search facility applications in your country/region reasonable, suitable for maintaining the balance between the interests of the public at large and of copyright owners in the hi-tech and digital sectors?

aa) Activities of ISPs

The Internet is used for mass copyright infringement. Effective legal protection is therefore required in practice and provided for under law (Art. 41 TRIPS; Art. 3 par. 2 Enforcement Directive; Art. 8 par. 1 InfoSoc Directive). An effective legal protection for rights owners does not as yet exist consistently for rights infringements. Effective copyright protection is in the public interest insofar as copyright infringements on a massive scale cannot be tolerated. Furthermore, an effective legal protection can lead preventively to a situation whereby far fewer end consumers are made to pay for copyright infringements as is the case in Germany today:

(1) Hosting Providers: In this area, particular criticism may be directed at the fact that a claim for damages in addition to the claim for injunctive relief against hosting providers can, after gaining knowledge of the infringement, only arise for a repetition of the same infringement (e.g. uploading the same illegal movie file). For merely similar but just as clearly identifiable infringements of copyright, there exists for the hosting provider only a due diligence obligation, the violation of which can only lead to claims for injunctive relief against the hosting provider. This means that hosting providers are not motivated enough also to take measures against merely similar but just as clearly identifiable infringements. For example, the share hoster Rapidshare has made it a policy only to delete the precise film file specified in the notice and take-down letter from its servers. If the same work is used on Rapidshare in the form of a different file, Rapidshare is not liable for damages, but merely a breach of the cease and desist obligation. The resulting penalties (e.g. administrative fines by the court) will naturally remain lower than those which the hosting provider would have to fear if it not only had the duty to cease and desist but was also liable for damages. Therefore, a violation of duties of care in respect of similar, but just as clearly identifiable infringements, should also lead to claims for damages.

---

1 The following section aa) reflects only the opinion of the author, Nordemann.
Access Providers: In this area, the German practice is unsatisfactory inasmuch as claims against access providers are only clearly regulated in respect of claims for information of the right holder to identify rights infringing customers. These claims for information are also asserted in huge numbers. Such claims for information are, however, from the perspective of the right holder, not necessarily the most effective way. They are associated with a very high cost risk for the right holder, due to the risk that the costs associated with the court proceedings, necessarily invoked for information cases, will not be reimbursed by the end user. In this case, the right holder has to bear the cost alone as the provider is expressly not burdened with costs under Section 101 GCA.

Furthermore, it is unclear in the present situation, as to whether the right holder can demand less interfering measures from the access provider e.g. a mere notification of the rights infringing customer of the copyright infringement which could possibly have a sufficiently disciplining effect, as far as the right holder is concerned. The same applies in respect of a request by the copyright holder to the access provider that he modify the Internet access for "repeat offenders" in a proportionate manner, e.g. particular ports in the case of repeated rights infringing use of peer-to-peer networks by the customer or a reduction of the available speed for downloads and uploads for repeat offenders. A complete block would only be the last resort. It is also not explicitly regulated in German law whether voluntary agreements between rights holders and access providers on the notification of customers or on the regulation of repeat offenders may be concluded at all. All of this limits the right holder, according to current German practice, to identifying the rights infringing user through mandatory court proceedings and taking action against them for costs; this represents the most burdensome measure from the perspective of the rights infringing customer so that from the point of view of the end consumer a greater degree of flexibility in the choice of measures against the Internet access provider would seem to make sense.

This also holds against the background that the question as to whether the blocking of particular content can be demanded of Internet access providers is still open under German law. If the right holder had such a possibility (e.g. via DNS blocking, blocking of IP addresses or the interposition of audio-visual or audio filters by the Internet access provider), infringements by end-users would be greatly reduced, action would no longer be taken against end-users such that no serious cost burden could be incurred by the end consumers.

Also for this reason, not only from the perspective of the right holder but also in the interests of the general public, it could make sense for the right holders to be given a flexible set of instruments for proceeding against Internet access providers and not to be forced - as is the case in practice in German law - to take direct action against end users which can be very costly for said end users.
bb) Digitization, Format Shifting, and Orphan Works

Under German law, reproductions associated with digitisation and the use of works in electronic (e.g. web-based) offers require the consent of the right holder if the use is not permitted through one of the exceptions contained in the GCA. This rather rigid system is, however, flexible in two respects: firstly, grants of right in cases where digitisation does not create new markets are interpreted with a view to the purpose of the agreement, and as a result, in some cases, digitisation or digital forms of use are considered to be permitted without the further consent of the right holder. Secondly, both copyright and the exceptions are interpreted in light of fundamental rights and other constitutional principles. The resulting system, by in large, has proven to be sufficiently flexible to respond to the challenges of digitization appropriately and quickly.

Three areas, however, can be identified in which modifications seem appropriate: first, very strict requirements exist in respect of the digitisation of library stocks and archives. Many institutions, in particular if they are private and commercial in nature, cannot make use of the exceptions, and uncertainties of the narrow wording of the exceptions can occasionally lead to delays. In practice, licensing models emerge which possibly make a broadening of the scope of the exception superfluous. The simultaneous application, however, of statutory remuneration claims, created to balance the exceptions, and licensing fees leads to a complex remuneration structure which creates problems with regard to efficiency and equitable distribution. Only if - contrary to the current tendency - no valid market models emerge, should clear, and practical exceptions be adopted which enable a transparent and effective distribution of the compensatory remuneration claims.

Second, the existing regulations do not allow either the digitization or any other use of orphan works. If the search for right holders remains unsuccessful, despite utilising clearing house and other mechanisms, any exploitation would render the exploiter liable to injunctive relief and removal claims and could even (theoretically) lead to criminal prosecution. For these cases, an amendment to the law is recommended. Where necessary, required amendments to the European and possibly also the international conventions should be considered. Models to regulate this area are available either in the form of exceptions or collective licenses.

Third, the activities of the search engine operators are the subject of intense discussion. While European law provides for privileges for ISPs and hosting providers, the responsibility of search engine providers is in some respects unclear. Given the importance of search engines for the use of the Internet a regulation of the relevant issues is recommended. The provisions based on the E-Commerce Directive can serve as a model here even if different evaluations may be appropriate in respect of individual questions.
cc) **Fair Dealing / Fair Use**

German law contains no general provisions which generally allow a balancing of interests between right holders and users in the way of a fair-use exception. However, copyright provisions are to be interpreted in light of fundamental rights and other constitutional principles such that adjustments are possible in individual cases to achieve a fair balance between the different interests involved even if contrary to the wording of the relevant statutory provision. In addition, the prohibition of abusive exercise of rights also applies in copyright law and may in some cases justify an appropriate solution to conflicts which arise. A statutory fair use exception in the Copyright Act would not yield greater legal certainty.

b) **Are these exceptions and permitted uses appropriate to the technology, understandable and realistic? Do they contribute to a situation where copyright is enforceable in practice?**

In the literature it is variously criticised that on the one side exploitation rights are designed such that they automatically include new types of use whilst on the other side the exceptions are partly related to technological peculiarities and do not allow for technical change. Regardless of the general discussion, it can be said that exceptions which provide for particular technological uses (such as the transmission of graphic files in the case of copy delivery services) often prove unrealistic in practice due to the rapid pace of technological change. This may be acceptable, provided the exceptions are minimum standards, on the basis of which standard licensing models are quickly developed. If this does not occur, such narrow wording of exceptions with references to a specific and sometimes obsolete technology lead in the long term to a complicated coexistence of statutory exceptions and licensing models which result in unclear and inefficient distribution rules. It is therefore recommended to define the exceptions as technology-independent and technology-neutrally as possible. Where this leads to risks to right holders, this can be counteracted through a more frequent examination of the statutory provisions.

Enforcement difficulties arise mainly, on the other hand, from the liability privilege for information intermediaries, such as ISPs, hosting providers or cache providers. On the one side, one can stress that it is in part practically impossible or at least useless for right holders to seek out and pursue rights infringers themselves. While this situation could apparently be improved, it should not be overlooked that the Internet, in addition to mass infringements of copyright, produces to a much larger extent legal and desirable forms of use. Any regulation has to balance the enforcement interests of infringed right holders with the competing interests, in particular with respect to data protection as well as freedom of speech and information. Moreover, it must also be ensured that the costs associated with the tracing and legal prosecution of rights infringements are fairly allocated.

c) **What, if any, additional exceptions would you wish to see relevant to these areas?**

See questions a) and b).
d) Given the international nature of the hi-tech and digital field, do you consider that an exhaustive list of exceptions and permitted uses should be prescribed by international treaties in the interests of international harmonisation of copyright? Might you go further and say that there should be a prescribed list? If so, what would you include?

Even if a conclusive list of exceptions would promote the harmonisation of copyright law, neither does the associated expense seem reasonable nor is it to be expected that the harmonisation would lead, overall, to more appropriate results. First, a long list would be expected, especially given the significance of copyright law for the various cultures which copyright law must reflect. The resulting degree of harmonisation would therefore be rather low. Such experiences have already been made in Europe in the scope of the exhaustive list of exceptions in the InfoSoc Directive. Second, there are fears that the exceptions, as they are overtaken by technological developments, cannot be adjusted in line with the times due to the inflexible nature of international conventions. This can lead to a situation whereby the exceptions are no longer up to date and will be modified by national courts. In this respect also, the interest of harmonisation would not be served.

For similar reasons, a list of prescribed exceptions is not supported insofar as the exceptions protect the cultural and information interests in various legal systems. In these cases, it seems more appropriate for the national legal systems to be given the freedom to decide for themselves in which form these interests can be realised. A different approach may be appropriate in cases where exceptions - e.g. in the area of reproduction - exclude from copyright protection technological processes which are necessary in order to realise certain other legal uses. An example is the so-called ephemeral copy (Section 44a GCA). Similar problems arise with regard to digitisation as an intermediate step to a contractually or statutorily permitted use. The standardisation of such exceptions may serve to promote the often web-based and thus international offers.
Summary

For activities of ISPs and other intermediaries, there exist numerous liability relief measures in German law - parallel to EU law. Many court decisions have imposed strict filter obligations for third party content on hosting providers, which go beyond the removal of specific infringements. Hosting providers then have to prevent similar, just as obvious rights infringements in the future. For access providers, however, German case law is still in its infancy. Even though blocking measures must be possible under EU law, there exists a special conflict here between rights under copyright law, data protection law and other constitutionally guaranteed rights.

Reproductions made in connection with the digitisation of works and offers in electronic form require the consent of the right holders unless the use is covered by a specific exceptions. For libraries, archives and educational institutions such exceptions exist, some of which have been enacted recently. In practice, however, the relevant uses are often also regulated through licensing models. Currently, orphan works are not covered by special rules. German law also does not contain a general fair use exception but a balancing of interests test based on constitutional principles can lead to a restrictive interpretation of rights or an extension of the scope of an exception. In addition, even though it has not been formally implemented, courts apply the three step test to examine whether a use is covered by an exception.

Résumé

Pour les activités des FAI et des autres intermédiaires, il existe en droit allemand – parallèlement au droit communautaire –, de nombreux cas d’atténuation de responsabilité. Dans de multiples décisions de justice, les fournisseurs d’hébergement se voient imposés des obligations strictes en matière de filtrage de contenus tiers, lesquelles vont au-delà de la simple suppression de l’infraction concrète. En effet, les fournisseurs d’hébergement doivent empêcher, dans l’avenir, la reproduction d’infractions de même nature tout aussi manifestes. En revanche, pour les fournisseurs d’accès, la jurisprudence allemande n’en est qu’à ses débuts. Même si des mesures d’interdiction devraient être possibles en vertu du droit communautaire, il y a ici une dynamique particulière entre le droit de la protection des données issu du droit d’auteur et d’autres droits garantis par la Constitution.

En principe, les reproductions liées à la numérisation des œuvres ainsi que les offres électroniques doivent recevoir l’autorisation préalable du titulaire des droits, sauf restrictions particulières. Pour les bibliothèques, les archives et les établissements culturels, il existe des restrictions spéciales dont certaines n’ont été introduites que très récemment, mais qui, en pratique, ont déjà été évacuées par les modèles de licence. Cependant, il n’y a pas de réglementation de forme générale pour les œuvres orphelines. Le droit allemand ne connaît pas de limitation générale équivalente à l’exception de fair use ; cependant, une comparaison basée sur le droit constitutionnel, notamment entre des droits fondamentaux concurrents, peut, selon les cas, limiter les droits du titulaire ou élargir les restrictions. En outre, les tribunaux examinent les restrictions à l’aide du « test des trois étapes », même si ce dernier n’a pas encore été transposé par le législatrice allemand.
Zusammenfassung
