

German database protection

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I.Introduction ➡

In June 13th 1997 the German government implemented the database guideline of the European Union from March 11th 1996 through article 7 IuKDG (Informations- und Kommunikationsdienste Gesetz; Information and Communication Service Statute).

The German law has a double link conception of database protection. It distinguishes between a protection under the general copyright law and the protection right sui generis. It depends if you want to protect a so called “Datenbankwerk” or a database. The difference is inventive performance versus investments. The term “database” (“Datenbank” in German) is in this case kind of confusing because it is as well the generic term for both kinds of accumulations as the term for a compilation under sui generis. It is also possible that a compilation could be subsumed under both protected goods. In the next three sections the distinction between both kinds of databases will be clarified and resulting from these the two different legal approaches will be explained. Aspects like ownership, rights

and their limitations and procedural regulations will be described.

II. Copyright law ➡

A. Introduction ➡

In the first part of the copyright statute book (§§ 1-69g UrhG (Urhebergesetz)) are found the copyright regulations. Based on those statutes I will give an overview of how to obtain copyright for one's database. Therefore some definitions need to be made. I will clarify what kind of works can be subsumed under the definition of a "Datenbankwerk". Also there must be criteria to determine who should be the owner of the "Datenbankwerk" and therefore has all rights concerning it. Even if you possess a copyright there are regulations that limit your power over the "Datenbankwerk". These limits could be limits in preventing third parties from using one's database for free as well as limits in time because the copy right will expire after a particular period of time. Finally I will describe the procedure if someone decides to let his "Datenbankwerk" be registered.

B. What is a "Datenbankwerk"? ➡

Due to the fact that different regulations do exist for "Datenbankwerke" and databases the two kinds need to be distinguished carefully to know which statutes are applicable.

To be called a database in general following requirements must be fulfilled: 1.) Databases contain a collection of works, data or other independent elements; 2.) these are systematically or methodically arranged; 3.) the elements of the database are individually accessible ¹. Databases which fulfil the requirement to be copyrighted are called "Datenbankwerk". The requirement is that the selection and composition of the elements contained in the database are based upon inventive performance ². The copyright law is only applicable for databases that show "creative effort".

C. Ownership of copyright ➡

1. Who is the owner? ➡

The owner of a copyright is the person or group of persons who create the database (§ 7 UrhG). The owner of the right is the person who does the personal intellectual creation ³. For employees the so called "Schöpferprinzip" (creator principle) is applicable ⁴. They are original owners of copyright when they create the database within their work ⁵ (§ 43 UrhG). Due to the sense and purpose of working contracts, employers should have the right to use the working results of their employees ⁶. Therefore the employee should give his employer the right of use for the copy righted good. If the working contract doesn't contain a specific clause concerning using rights usually an implicit granting of using rights is assumed ⁷. The point in time of granting using rights could be at the time of transfer of the finished goods to the employer or in some cases at the time of contracting ⁸. If the employer wants to transfer the use rights to a third party he needs the affirmation of the employee as the originator. An implicit affirmation is assumed if the company asks for it ⁹. Arising from the duty of loyalty to his employer and a forbidden competition the employee is usually not allowed to provide other third parties with use rights ¹⁰.

2. What rights do you have as an originator? ➡

The originator has different rights regulated in §§ 15-22 UrhG. There is a distinction between

works that are physical and ones which are incorporeal.

Utilizing a work in a corporal form, the originator has the right to copy (§ 16), to spread (§ 17) and to exhibit (§ 18) it.

In an incorporeal form the originator has the right to reproduce the work publicly. This could be especially rights like to lecture, perform and demonstrate the work (§ 19), to emit it on television, radio, and so on (§ 20), to reproduce the work through picture and sound storage mediums (§ 21) and to reproduce it in radio programs (§ 22).

Through the utilizing rights the originator has the exclusive right to make use of his protected work and to forbid third parties from using it¹¹. The originator should remain in control of the work¹². The utilization right is the basis to protect as well the originator's economical benefit by usually taking money to provide using rights to third parties as his ideally interests¹³.

D. Are there any limitations of the copyright concerning the use by third parties? ➡

Under some circumstances the copyright is limited. The originator doesn't need to agree to the copying and distribution of the work in following cases. The freedom of copying and distributing is applicable concerning judicature and public safety, collections for the use in churches, schools and other kinds of education, school radio, public speeches, comments in newspapers, reports of daily events, citation, public reproductions and within private use (§§ 45-53 UrhG). In the case of reprographics for private use one should distinguish between protected works in general and "Datenbankwerke" whose elements are separately accessible with electronic help (§ 53 sec. 5 UrhG in conjunction with Article 6 sec. 2 a) of the European database guideline). In general § 53 offers lots of freedom concerning the private use which is limited for electronic "Datenbankwerke". Only the use of private scientific work is permitted without getting the originator's license (§ 53 sec. 2 nr.1 UrhG).

E. How long is the duration of the copyright? ➡

The copyright lasts 70 years after the originator's death (§ 64 UrhG). After the copyright has expired the work is freely usable and realizable for the public. Together with the originator's copyright, also all use rights expire¹⁴.

If the originator is unknown because he wants to remain anonymous the copyright expires 70 years after the first publication. In the case of no publication during 70 years the right expires 70 years after the creation of the "Datenbankwerk". The period of time begins with the expiration of the year within the publication or creation occurred (§ 69 UrhG).

F. What is the procedure to copyright? ➡

In case someone wants to copyright a "Datenbankwerk" he could register his work in the "Urheberrolle" (§ 66 sec. 2 s. 2 UrhG in conjunction with § 138 UrhG) that is the document where the originators are listed. The "Urheberrolle" is administrated by the German patent office in Munich. The originator has to apply in writing at the patent office to register his work. He has to declare his name, date and place of birth and the title of his work. After his death also the date of death will be registered to calculate the validity of the copyright. The patent office doesn't check if the applicant has a claim to copyright or not. The only purpose of the "Urheberrolle" is to calculate the protection period of anonymous works¹⁵.

In the case that the appliance has been dismissed the applicant can claim for a judicial decision. The Higher Regional Court concerning the patent office has jurisdiction.

The register fees amount to 10 EUROS for one "Datenbankwerk".

When several works will be registered at the same time only the first costs 10 EURO, number two to ten cost 5 EURO and all following 2,5 EURO ¹⁶.

Generally copyright comes into existence at the moment the work was created. The originator doesn't have to fulfill any formal procedures ¹⁷. There is no requirement to sign the work with the copyright sign, but it could be a useful warning to third parties ¹⁸.

III. Sui generis ➡

A. Introduction ➡

In the second part of the statute book (§§ 70-87e UrhG) one can find copyright related protection rights. One is sui generis which is an investment protection right protecting databases (§§ 87a-87e UrhG). In this section the term "database" under sui generis will be defined and especially the required element of a substantial investment will be explained. The investment protection right can be obtained by the producer. His rights and the limitations of his rights will be described in this section as well as how long this rights will last.

B. What is a database? ➡

In addition to the three required elements mentioned above ¹⁹, a database under sui generis requires that a substantial investment was made (§ 87a sec 1 s.1UrhG) to obtain, to check and present the data. A precise characterization of the legal term "substantial investment" cannot be found in legal practice and literature ²⁰ but as an orientation the investment effort can be measured in money, work and time ²¹. Examples for expenses that could arise are costs for obtaining the content of the database like license fees, wages for data processing and the costs for providing the database for users ²². The producer's own time and energy should also be taken into consideration while assessing the investment effort. The greater the investment effort, the higher the demand of protection of these activities ²³. Whether the investment is substantial has to be evaluated for each single case individually.

C. Producers of databases ➡

1. Who is the producer? ➡

To be protected under this statute you have to be the "producer" of the database (§ 87a UrhG). A producer is a natural person or an entity that is doing substantial investments and bears organizational and economical risk. Producers draw up all contracts in their own name and for their own account referring to constructing the database ²⁴. The one who is only collecting data for the database and structuring it is not automatically the producer ²⁵.

In case several people invest in the creation of the database and agree and bear the risk together, they all have the right of the producer ²⁶.

2. What rights do database producers have? ➡

The producer of the database has the exclusive right to copy and spread the complete database or substantial parts of it. It is also his right to reproduce it publicly (§ 87 b UrhG). A repeated and systematic reprography and distribution of inessential parts are assumed to be prohibited the same as it is for substantial parts (§ 87 b s.2 UrhG). The mentioned regulations ensure the ancillary copyright.

D. Are there any limitations of the producer's right? ➡

A database can be used (copied and distributed) without permission or paying a fee under the following circumstances: private use is permitted, but only for non-electronic databases, for scientific use, for illustration material while teaching classes if there is no commercial motive and in court and in the sense of public safety (§ 87 c UrhG).

E. How long is the duration of the database producer's right? ➡

The producer's right lasts 15 years after the publication of the database or 15 years after producing it if there was no publication within the 15 years (§ 87 d UrhG). The period of time begins with the expiration of the year within the publication or creation occurred (§ 87 d s.2 UrhG in conjunction with § 69 UrhG).

A substantially changed database could be assessed as a new database (§ 87 a sec 1 s.2 UrhG) for which a new protection period begins. The content must be in the manner and to the extent substantially changed and there must have been a substantial investment in order to do these modifications. To assess whether a net investment is substantial or not you should take in consideration for example the type of database, the purchasing costs for the changed elements of the database, the check-up cost, editorial costs and printing costs²⁷.

IV. Procedural aspects and remedies for the protection of "Datenbankwerke" and databases ➡

A. Introduction ➡

An owner of copyright and the producer of databases have to follow several important procedural rules to enforce their rights. It is important to know who has the burden of proof and which court has jurisdiction. Finally there are several kinds of remedies the plaintiff can claim. The plaintiff has to decide what he wants to claim.

B. Who has the burden of proof? ➡

The injured party has the burden of proof that there was a an infringement and that he is the owner of that violated right²⁸.

C. Which court has jurisdiction? ➡

For copyright disputes the ordinary legal process (ordentliche Rechtsweg) is applicable. In the case that the copyright dispute arises exclusively from claims of performance for an agreed reward in a employment relationship the labor law or administration courts (in case of civil servants) have jurisdiction (§ 104 UrhG).

D. Remedies ➡

In the case that someone violates the copyright or any other protecting law of the producer the producer can claim several remedies.

He can sue the violator to eliminate the caused impairment or claim injunction if there is a risk of repetition (§ 97 sec. 1 s.1 first alternative UrhG). Neither depends on whether the violator bears the fault or not.

In the case of intent or negligence the producer has also the right to claim damages (§ 97 sec. 1 s.1 second alternative UrhG) .

Instead of claiming damages he could claim as well replevin of the profit the violator has made by violating the producers right (§ 97 sec. 1 s.2 UrhG).

If the database is a "Datenbankwerk" there is also the possibility to claim for compensation of the damage that is not property loss (§97 sec.2 UrhG).

Furthermore the injured party can sue for elimination of illegally produced and spreaded copies (§ 98 sec 1 UrhG). Or he can obtain the copies by paying the violator a fee (§ 98 sec 1 UrhG). The claim of damages remains against the violator because the elimination claim and claim of damages are independent rights ²⁹ .

If the producer decides to adopt the copies for a fee he has to regard eventual rights of third parties or the editing copyright (§ 3 UrhG) of the violator ³⁰ . The question that should be asked in any case is what is the "gentlest measure" ³¹ to abolish the infringement.

The same regulations as for illegal copies are applicable for the equipment in possession of the violator which is exclusively or almost exclusively used to produce these copies (§ 99 UrhG).

All claims expire within three year after recognition (§ 102 UrhG).

V. Conclusion ➡

The two database protection systems in Germany follow the database guideline of the European Union. The copyright law as one system protects the rights of the "Datenbankwerk" owner who creates the database through inventive performance and as the other system the protection of databases under sui generis which protects the producer who made a substantial investment to produce the database. The copyright lasts 70 years after the originator's death and the investment protection right under sui generis lasts generally 15 years after publication. Originators and producers have automatic protection rights without going through special procedures, but in any case there is the possibility for originators of "Datenbankwerke" to register the work in the "Urheberrolle". To register is a matter of proof but it is not necessary in order to obtain the copyright.

Producers of databases and originators of "Datenbankwerke" have the exclusive right of disposal of their databases. There are limitations mainly in the case of private use that someone can use the database without getting a license from the owner. In the case of illegal usage, copying or distributions of databases through people without a license there are measures to enforce the owners' rights. A legal process is given and there are several remedies existing.

The German law offers a good protection system and is compatible with European law.

But still there are some unresolved problems. Problems arise because of undefined law terms which have to be interpreted by the court. In the case of databases under sui generis it could be difficult to draw the line when an investment effort is so high that you can talk about a substantial investment. Also the term "substantial", while talking about the exclusive right to reproduce the database publicly, leads to interpretation problems.

In the case of "Datenbankwerke" the term "inventive performance" also need to be interpreted in each single case.

It could be very difficult for the courts in the ordinary legal process because the experience in the field of software and databases is sometimes not sufficient. The cases the courts have to deal with are becoming more and more complex. Due to the faster growing importance of the internet, in my opinion, there should be special courts for internet cases.

However, in general, German law offers so far two good systems for database protection.

1: Cp (compare) Vogel, Urheberrecht Kommentar, § 87a nr. (number) 4, p. (page) 1331 [publisher: Gerhard Schricker, 2nd edition, Munich, Beck 1999] ➡

2: Cp Vogel, Urheberrecht Kommentar, § 4 nr. 33, p. 159 [ibid] ➡

3: Cp Loewenheim, Urheberrecht Kommentar, § 4 nr. 40, p. 163 [ibid] ➡

4: Cp Rojahn, Urheberrecht Kommentar, § 43 nr. 2, p. 676/677 [ibid] ➡

5: ibid ➡

6: ibid, § 43 Rn 37/38, p. 687 ➡

7: ibid, Rn 40, p. 688 ➡

8: ibid, Rn 41/42, p. 688 ➡

9: ibid, Rn 56/57, p. 693 ➡

10: ibid, Rn 59, p. 694 ➡

11: Cp v. Ungern-Sternberg, Urheberrecht Kommentar, § 15 Rn 1, p. 304 [ibid] ➡

12: ibid ➡

13: ibid, Rn 2/4, p. 304/305 ➡

14: Cp Katzenberger, Urheberrecht Kommentar, § 64 Rn 5, p. 1010 [ibid] ➡

15: ibid, § 138 Rn 4, p. 1801 ➡

16: DM 20, 10, 5 cp Katzenberger, Urheberrecht Kommentar, Rn 19, p. 1804 [ibid] ➡

17: Cp Katzenberger, Urheberrecht Kommentar, § 66 Rn 1, p. 1042 [ibid] ➡

18: Cp <http://www.ige.ch/D/urg/u10.htm> ➡

19: Cp II. B "What is a Datenbankwerk", p. 1 ➡

20: Cp Vogel, Urheberrecht Kommentar, § 87a Rn 14, p. 1335 [ibid] ➡

21: ibid Rn 15 ➡

22: ibid Rn 16, p. 1335/1336 ➡

23: ibid ➡

24: Cp Vogel, Urheberrecht Kommentar, § 87a Rn 28, p. 1339 [ibid] ➡

25: ibid ➡

26: ibid, Rn 30, p. 1340 ➡

- 27:** Cp Vogel, Urheberrecht Kommentar, § 87 a Rn 24, p. 1338 [ibid] ➡
- 28:** Cp Wild, Urheberrecht Kommentar, § 97 Rn 103, p. 103 [ibid] ➡
- 29:** ibid, §§ 98/99 Rn 1, p. 1549 ➡
- 30:** ibid, Rn 10, p. 1553 ➡
- 31:** ibid Rn 1, p. 1549 ➡
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