

# Licensing of scientific audiovisual media in Germany<sup>1</sup>

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## Abstract:

TIB has set up a competence center for non-textual materials with the goal to collect, archive and present scientific audiovisual media among other non-textual material to its users via its portals. The acquisition of the necessary rights for the audiovisual media which enter into TIB's collection profile is complex. The market for scientific information is international and does not end at national borders. Thus the scientific audiovisual media which TIB licenses are produced in Germany but also in other countries. Challenges are encountered regarding the German national law and, when collaborating with licensors from other countries, with other national laws. This paper aims at describing the legal framework within which TIB has to build up services and the challenges which TIB encounters when licensing electronic audiovisual media in Germany with a special focus on currently valid and new developments in European and German legal deposit and copyright law.

## Full Text:

With more than 6 million media units, 25.000 journal titles and about 12,5 million patents, the German National Library of Science and Technology (TIB) ranks as one of the largest specialized libraries worldwide. It is jointly financed by the federal government and the federal states ("Länder") of Germany. TIB is a member of the Leibniz-Association, an umbrella organisation for 86 institutions conducting research and providing scientific infrastructure.

Apart from the services provided for local users, TIB provides access to electronic resources and operates a large document delivery service which provides services for commercial as well as academic clients via its online portal worldwide (currently GetInfo).

TIB supports Open Access, as the Leibniz-Association was one of the first signatories of the Berlin Declaration<sup>2</sup>.

TIB has set up a competence center for non-textual material and acquires digital non-textual material that can be relevant to science such as audiovisual films, animations, 3D architectural models, recorded university lectures and the respective metadata. This initiative has been appraised by external experts with a positive result.

<sup>1</sup> This paper was first published as IFLA conference paper for IFLA 2012 in Helsinki, Session: Copyright law and legal deposit for audiovisual materials, <http://conference.ifla.org/past-wlic/2012/148-brehm-en.pdf>

<sup>2</sup> Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 2003, <http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung/>, last accessed on May 4<sup>th</sup> 2012;



TIB provides web-based access to non-textual material as well as textual documents to its users. The material is displayed in a manner adapted to the media type (together with metadata and previews such as individual sequences, trailers or thumbnails) and (if licensed for this purpose) made available for download.

The competence center also develops new or implements known tools for the analysis of text-, multimedia- and audiovisual documents (e. g. form, speech or structure recognition) in projects in cooperation with external partners. By creating and indexing additional content-related and structural metadata, better search functions are provided to the users.

The material is mainly produced by researchers within their specific research projects, but may also be produced or co-produced by other organisations.

Building up online services for and licensing of audiovisual media concerns very many different aspects and fields of law except copyright (such as for example different aspects of private law, personal or publicity rights, patent law or data protection law). This paper will only focus on legal deposit and copyright law.

First, the status quo of German Legal Deposit Law regarding audiovisual media will be depicted, then the legal framework of Copyright Law and the necessary copyright and licensing questions described.

### **German Legal Deposit Law for audiovisual media:**

For a long time, films were not recognized as having significance for the national cultural heritage. Thus even though legal deposit regulations have existed in Germany since the middle ages, audiovisual films were not comprised. But the perception changed on the national and international level: In Germany first an obligation to transfer the broadcasting rights for a period of five years (1967<sup>3</sup>) and later an obligation to deposit a copy of each film (1979<sup>4</sup>) at the Federal German Archive (Bundesarchiv) was constituted for cinematographic films for which the production was financed by public funds (Filmförderungsgesetz), independently of the legal deposit regulations of the federal states.

At the same time the UNESCO Recommendation of 1980 recognized the significance of films for the national cultural heritage and contains the recommendation to enact a mandatory deposit for films on a national level<sup>5</sup>.

The Council of Europe initiated the European Convention for the Protection of the Audiovisual Heritage in 2001<sup>6</sup>. It constitutes a legal obligation of the Member states to

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<sup>3</sup> § 12 par. 1 of the Filmförderungsgesetz, Bundesgesetzblatt 1967, part 1, pp.1352, 1356;

<sup>4</sup> § 21 par. 1 of the Filmförderungsgesetz, Bundesgesetzblatt 1979, part 1, pp. 803, 810;

<sup>5</sup> [Briefing of the Federal Government, BT-Drucksache 9/963 of October 30<sup>th</sup> 1981, \[http://www.unesco.de/fileadmin/medien/Dokumente/Bibliothek/Bundestagsdrucksache\\\_9\\\_963.pdf\]\(http://www.unesco.de/fileadmin/medien/Dokumente/Bibliothek/Bundestagsdrucksache\_9\_963.pdf\)](http://www.unesco.de/fileadmin/medien/Dokumente/Bibliothek/Bundestagsdrucksache_9_963.pdf), last accessed on May 4<sup>th</sup> 2012 ;



designate an archive body and to constitute a legal deposit rule for “moving image material forming part of the national cultural heritage”<sup>7</sup>. This comprises “any set of moving images recorded by whatever means and on whatever medium, whether or not accompanied by sound, capable of conveying an impression of movement”<sup>8</sup>. From its entry into force, this convention immediately applies to all cinematographic works and television productions<sup>9</sup>, but does not extend to those films, which do not form part of the “cultural heritage”. The convention has to date not yet been ratified by Germany due to protracted legislative procedures, as all bills which touch upon cultural themes are within the legislative competence of the federal states: The regional parliaments have to give their consent to this convention, before it can be ratified by Germany on the national level. But this process has been concluded now, so that the convention will be ratified within the current legislative period which ends in fall 2013<sup>10</sup>. The European Union continues to encourage the member states to constitute a mandatory deposit for all audiovisual media<sup>11</sup>.

The status quo in Germany is as follows:

Legal deposit law has always been and still is essentially within the jurisdiction of the federal states in Germany (Länder) and each federal state has an individual legal deposit law which may differ from the respective regulations of other federal states<sup>12</sup>. All federal states have a legal deposit for printed, audio and digital media, but this does not necessarily include audiovisual media. Some states, as for example Baden-Württemberg or Nordrhein-Westfalen however also have legal deposit regulations for audiovisual material<sup>13</sup>. But for many states the regulations are unclear due to ambiguous phrasing and therefore interpretations of the regulations differ, which leads to different practices in each state and library.

These “regional” laws are accompanied by legal deposit regulations on the national level: The German National Library is obliged to collect all printed, audio and electronic

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<sup>6</sup> European Convention for the Protection of the Audiovisual Heritage, 2001, 8.XI.2001, <http://conventions.coe.int/Treaty/en/Treaties/Html/183.htm>, last accessed on May 4<sup>th</sup> 2012 ;

<sup>7</sup> Art. 5 of the European Convention for the Protection of the Audiovisual Heritage, 2001, see above;

<sup>8</sup> As defined in Art. 2a of the European Convention for the Protection of the Audiovisual Heritage, 2001, see above;

<sup>9</sup> Art. 3 of the European Convention for the Protection of the Audiovisual Heritage, 2001, see above;

<sup>10</sup> Reply of the Federal Government to the parliamentary request, BT-Drucksache 17/6834 v. 23.8.2011, <http://dipbt.bundestag.de/dip21/btd/17/068/1706834.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>11</sup> Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities, (2005/865/CE), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:323:0057:0061:EN:PDF>, last accessed on May 4<sup>th</sup> 2012 ; Council conclusions on European film heritage, including the challenges of the digital era, (2010/C 324/01) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:324:0001:0004:EN:PDF>, last accessed on May 4<sup>th</sup> 2012 ;

<sup>12</sup> Schricker, Verlagsrecht, 3. Aufl. 2001, Rn. 9;

<sup>13</sup> Pflichtexemplargesetz Nordrhein-Westfalen, [https://recht.nrw.de/lmi/owa/br\\_bes\\_text?anw\\_nr=2&gld\\_nr=2&ugl\\_nr=2250&bes\\_id=4494&aufgehoben=N&menu=1&sg=0](https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=2250&bes_id=4494&aufgehoben=N&menu=1&sg=0) <http://www.landesrecht-bw.de/jportal/?quelle=jlink&query=PfliExpAbIG+BW&psml=bsbawueprod.psml&max=true&aiz=true>, last accessed on May 4<sup>th</sup> 2012;



media and since 2006 this also extends to internet publications. However, audiovisual media such as films are not comprised<sup>14</sup>. This also applies for films published online, for example if embedded on a website.

The obligation to deposit a copy of each film funded under the prerequisites of the Filmförderungsgesetz is still valid today<sup>15</sup>. The prerequisites for the subsidies are quite strict: The goal is to subsidize German and international productions of cinematographic films produced in Germany or in a European member state or translated into German which touches upon culture, society or history, etc. This covers approximately 80-90 % of all films produced yearly. All other media which do not fulfil the prerequisites of the Filmförderungsgesetz (estimated to be at about 10-20 % of the film production in Germany) have to be bought or else are not collected.<sup>16</sup>

Due to the absence of an all-encompassing legal deposit, many German films and documentaries which form part of the cultural heritage are lost<sup>17</sup>.

To date, the Federal German Archive (Bundesarchiv) has the biggest collection of German films. In cooperation with the Foundation "Deutsche Kinemathek"<sup>18</sup> and the German Film Institute ("Deutsches Filminstitut"<sup>19</sup>) these three partners fulfil the tasks of archiving and analysing the German film heritage from a cinematographic and historic perspective<sup>20</sup>. Apart from the task to archive all films deposited due to regulations of the Filmförderungsgesetz, the Federal German Archive has acquired culturally very significant film collections for Germany and is entrusted with the assignment to collect and archive all material which has been produced by federal administrative bodies and which may be of permanent interest also in the future. This includes films produced by these institutions<sup>21</sup>.

The network of mediacenters ("Netzwerk für Mediatheken") aims at providing access to films for the public for educational and scientific purposes<sup>22</sup>.

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<sup>14</sup> § 3 par. 4 Gesetz über die deutsche Nationalbibliothek, 2006, BGBl. I S.1338 last amended on February 2<sup>nd</sup> 2009, <http://www.gesetze-im-internet.de/bundesrecht/dnbg/gesamt.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>15</sup> § 21 par. 1 Filmförderungsgesetz, 2004, BGBl. I, 2277 last amended on July 31<sup>st</sup> 2010,

[http://www.gesetze-im-internet.de/bundesrecht/ffg\\_1979/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/ffg_1979/gesamt.pdf), last accessed on May 4<sup>th</sup> 2012;

<sup>16</sup> Reply of the Federal Government to the parliamentary request, p. 2, BT-Drucksache 17/6723 of August 3<sup>rd</sup> 2011, <http://dipbt.bundestag.de/dip21/btd/17/067/1706723.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>17</sup> „Studie des Deutschen Kinemathekenverbunds“, December 2005,

[http://www.bundesarchiv.de/imperia/md/content/abteilungen/abtfa/kinematheksverbund\\_studie\\_zum\\_stand\\_der\\_filmarchivierung.pdf](http://www.bundesarchiv.de/imperia/md/content/abteilungen/abtfa/kinematheksverbund_studie_zum_stand_der_filmarchivierung.pdf), last accessed on May 4<sup>th</sup> 2012;

<sup>18</sup> Website of the Foundation „Deutsche Kinemathek“, <http://www.deutsche-kinemathek.de/>, last accessed on May 4<sup>th</sup> 2012;

<sup>19</sup> Website of the German Film Institute, <http://deutsches-filminstitut.de/>, last accessed on May 4<sup>th</sup> 2012;

<sup>20</sup> Cooperation Agreement „Kinemathekenverbund“, 2005,

<http://www.bundesarchiv.de/imperia/md/content/abteilungen/abtfa/222.pdf>, <http://www.deutsche-kinemathek.de/>;

<sup>21</sup> Bundesarchivgesetz, 1988, BGBl. I pp. 62, last amended on September 5<sup>th</sup> 2005, <http://www.gesetze-im-internet.de/bundesrecht/barchg/gesamt.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>22</sup> Website of the Network of mediacenters „Netzwerk für Mediatheken“, <http://www.netzwerk-mediatheken.de/html/zielsetzung/ziel.html>, last accessed on May 4<sup>th</sup> 2012;



It is planned to introduce an obligation to register films at the German National Archive with the next amendment of the regulations about the German National Archive. This will allow for an estimate of the costs involved in case a mandatory deposit for all filmographic material was constituted. The German government assumes that the requests of the European Convention are already satisfied by the regulations laid down in the Filmförderungsgesetz, so no need for a general legal deposit rule for audiovisual material is seen at the moment (in excess of the regulations of the Filmförderungsgesetz).<sup>23</sup>

The scientific films that TIB collects do not usually fulfil the prerequisites for the subsidies laid out in the regulations of the Filmförderungsgesetz and in general are not produced by federal government bodies, so they are not subject to legal deposit regulations to date. Of course it would be of interest to TIB if a legal deposit regulation was constituted which also comprised the scientific films of interest for TIB. But most films which TIB collects are produced within research projects and not by publishers, whose products (publications or audiovisual films) could be subject to a legal deposit. It is very unlikely that a legal deposit rule will be constituted for audiovisual media produced within non-commercial research projects (as also for all other printed “grey literature”). However TIB tries to implement the obligation to deposit these kinds of films on a contractual basis as part of the funding guidelines of the funding agencies for projects funded by the specific funding agency.

Though legal deposit rules would solve the problem of how to obtain the media, they can not solve the problem of how to obtain the necessary usage rights for an up to date presentation and online access for users: Legal deposit regulations at most permit the on-site-use of the media (sometimes only for scientific purposes) in the reading rooms of the archiving institutions, but do not allow for the online presentation of the media, which is intended by TIB. The necessary rights have to be obtained in another manner.

### **International Framework of Copyright Law**

First the general principles of copyright law regarding cases with international aspects are shown<sup>24</sup> and then some aspects of European Copyright Law are pointed out: Copyright law is national law and the legal effect of a regulation of one country ends at the borders of the specific country (principle of territoriality). National law also decides, whether and under which circumstances works of foreigners are protected by national copyright law. German copyright law decides for example, whether the work of a foreign author is copyrightable in Germany. In cases where the facts and circumstances of a case do not point to only one nation or one national copyright law, international private and civil procedure law of the nations concerned will decide which national law is applicable and whether this case is within the jurisdiction of the national courts. The

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<sup>23</sup> Reply of the Federal Government to a parliamentary request, p. 2, BT-Drucksache 17/6723 of August 3<sup>rd</sup> 2011, <http://dipbt.bundestag.de/dip21/btd/17/067/1706723.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>24</sup> International bi- and multilateral treaties are not taken into account at this point.





rights granted by the respective national copyright regulations and how it is enforceable may differ.<sup>25</sup>

A large number of bilateral and multilateral treaties regarding different aspects of copyright or neighboring rights exist today which superimpose the general principles layed out before within their scope of application. They may contain harmonized substantive law so that national copyright regulations do not have to be consulted. But at the very least they constitute a principle of “reciprocity”, meaning that a foreigner for example in Germany will be granted the same protection for his works as a German national would receive in the respective foreign country<sup>26</sup>.

The most important multilateral agreements are the Berne Convention, the Universal Copyright Convention and the Agreement on Trade Related Aspects of Intellectual Property Law<sup>27</sup>.

The Revised Berne Convention<sup>28</sup> (administered by the World Intellectual Property Organisation) on the one hand contains the principle that members of the partner states will be treated as nationals (with some exceptions)<sup>29</sup> and also sets the minimum standards for the protection of copyrightable works for nationals of the member states within its scope of application.

The main goal of the Universal Copyright Convention of the UNESCO<sup>30</sup>, stipulated in 1952, was to integrate the United States of America, the Union of Soviet Socialist Republics and China into the Berne Convention. Due to their entry into the Revised Berne Convention, this convention has lost much of its impact.

The Agreement on Trade Related Aspects of Intellectual Property Law<sup>31</sup> of 1994 (TRIPS, now administered by the World Trade Organisation) introduced the protection of intellectual property into the world trade regime. With this agreement, all partner states are obliged to grant nationals of the partner states the standards of protection of intellectual property law as layed out in the Berne Convention (as amended in Paris 1971) and to grant the protection especially for computer programs as well as for databases. Furthermore it constitutes some regulations regarding the resolution of disputes. Since the TRIPS was signed by almost all countries worldwide, the standards of protection layed out in the Berne Convention of 1971 have become effective almost in all countries worldwide<sup>32</sup>.

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<sup>25</sup> Dreier/Schulze, Kommentar zum UrhG, 3. ed., Einl. no. 42 ff., § 121 no. 1 ff.;

<sup>26</sup> Dreier/Schulze, Kommentar zum UrhG, 3. ed., Einl. no. 43;

<sup>27</sup> This is by no means a conclusive list.

<sup>28</sup> Berne Convention for the Protection of Literary and Artistic Works of Sept. 9<sup>th</sup> 1886, last amended on Sept. 28<sup>th</sup> 1979, [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html), last accessed on May 4<sup>th</sup> 2012;

<sup>29</sup> „Inländerbehandlung“;

<sup>30</sup> Universal Copyright Convention of Sept. 6<sup>th</sup> 1952, last amended on July 24<sup>th</sup> 1971, [http://portal.unesco.org/en/ev.php-URL\\_ID=15241&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html), last accessed on May 4<sup>th</sup> 2012;

<sup>31</sup> Agreement on Trade Related Aspects of Intellectual Property Law of April 15<sup>th</sup> 1994, original text [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm), last accessed on May 4<sup>th</sup> 2012;

<sup>32</sup> Dreier/Schulze, Kommentar zum UrhG, 3. ed., § 121 no. 11;



To master the new challenges posed to copyright law by digitisation and digital networking, WIPO initiated the WIPO Copyright Treaty<sup>33</sup>. This treaty will be adopted by the member states of the European Union after the Directive 2001/29/EG on the harmonisation of certain aspects of copyright and related rights in the information society<sup>34</sup> has been implemented in the EU member states. This Treaty also contains the principle that residents of partners to this treaty must be treated as nationals (where protection of their intellectual property rights is concerned) and regulations regarding renting rights for audiovisual media and protection of creative databases and software.

In general, these bilateral or multilateral treaties will prevail over any national regulations within their scope of application. But the legal situation has to be evaluated individually for each case and type of copyright or neighboring right, because different rules may apply. None of these treaties contains regulations which permit the use of the films as intended by TIB.

### **Copyright law and the European Union:**

The European Union has adopted seven EU-Directives<sup>35</sup> regarding some specific aspects of copyright law with the goal to create a single European commercial market, which leads to a harmonisation of some aspects of copyright within the EU.

Only two of the EU-Directives shall be mentioned here, because they have influenced aspects of German copyright law of major relevance with regard to the activities of TIB:

The Database Directive of 1996 has set up general guidelines for the protection of original databases and introduced a protection of databases, for the production of which substantial investments had to be made. In consequence, databases which contain non copyrightable data may receive protection under the database right, which may also apply to large collections of bibliographical metadata.

The Directive on the harmonisation of certain aspects of copyright and related rights in the information society of 2001<sup>36</sup> was meant firstly to implement copyright regulations

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<sup>33</sup> WIPO Copyright Treaty of Dec. 20<sup>th</sup> 1996, [http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf), last accessed on May 4<sup>th</sup> 2012;

<sup>34</sup> Directive 2001/29/EG on the harmonisation of certain aspects of copyright and related rights in the information society of May 22<sup>nd</sup> 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>, last accessed on May 4<sup>th</sup> 2012;

<sup>35</sup> Art. 288 par. 3 of the Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, last accessed on May 4<sup>th</sup> 2012; Seven Directives and their respective amendments: Database Directive (96/6/EC); InfoSoc Directive (2001/29/EC); Directive about Renting and Lending Rights (2006/115/EC); Term of Protection Directive (2006/116/EC); Computerprograms Directive (2009/24/EC); Resale Right Directive (2001/84/EC); Enforcement Directive (2004/48/EC); Satellite and Cable Directive (93/83/EC);

<sup>36</sup> Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EG) of May 22<sup>nd</sup> 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>, last accessed on May 4<sup>th</sup> 2012;



which adequately reflect the technological development and secondly to oblige the member states to transpose into national law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996. It constituted the obligation for the member states to introduce an exclusive right „of making available to the public“ (online-presentation) for the author and explicitly states that the right of distribution is not exhausted by the online distribution of the work as it would be for a tangible object and gives the member states the „option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives“ among others<sup>37</sup>.

The decision about the interpretation of EU regulations lies within the competence of the European Court of Justice. Thus the influence of the European Union on national copyright law is increasing continuously<sup>38</sup>.

Within the program for economic growth “Europe 2020”<sup>39</sup>, the European Union has launched the “Digital Agenda for Europe” and has taken or is planning these legislative steps (regarding the topic of this paper)<sup>40</sup>:

- Proposition of legislation to simplify pan-European licensing for online works
- Adoption of the proposed directive on orphan works<sup>41</sup>
- Initiation of a broad discussion about support of the film industry by launching the “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market”<sup>42</sup>

The European Union is currently considering whether a single European Copyright Codex should be prepared, which consolidates the Directives adopted by the European Union and harmonizes statutory exceptions to the exclusive rights of the creator and other rights holders<sup>43</sup>.

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<sup>37</sup> Recitals 28, 29, 34 and Art. 3, 5 par. 3a of the Information Society Directive, see above;

<sup>38</sup> Axel Metzger, „Der Einfluss des EuGH auf die gegenwärtige Entwicklung des Urheberrechts“, GRUR 2012, 118 ff.;

<sup>39</sup> Economic Program „Europe 2020“, [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm), last accessed on May 4<sup>th</sup> 2012;

<sup>40</sup> Planned activities „Digital Agenda for Europe“, [http://ec.europa.eu/information\\_society/newsroom/cf/pillar.cfm?pillar\\_id=43&pillar=Digital%20Single%20Market](http://ec.europa.eu/information_society/newsroom/cf/pillar.cfm?pillar_id=43&pillar=Digital%20Single%20Market), last accessed on May 4<sup>th</sup> 2012;

<sup>41</sup> Draft of the Orphan Works Directive, COM (2011) 289 final, [http://ec.europa.eu/internal\\_market/copyright/docs/orphan-works/proposal\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf), last accessed on May 4<sup>th</sup> 2012;

<sup>42</sup> Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, COM(2011) 427 final, [http://ec.europa.eu/internal\\_market/consultations/docs/2011/audiovisual/green\\_paper\\_COM2011\\_427\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf), last accessed on May 4<sup>th</sup> 2012;

<sup>43</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „A Single Market for Intellectual Property Rights“, COM(2011) 287 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0287:FIN:EN:PDF>, last accessed on May 4<sup>th</sup> 2012;





The EU and a number of other states have already signed the multilateral Anti-Counterfeiting-Trade Agreement<sup>44</sup>. It is directed at introducing international standards for fighting product piracy and infringement of copyright. Even though it does not introduce any new regulations and concentrates on enforcing the regulations already laid down in the TRIPS agreement, it has led to controversies in the public. Due to these controversies it is currently being re-evaluated by the European Court of Justice and the signing of the agreement for Germany has been adjourned for the time being<sup>45</sup>.

The framework of international copyright law is very complex. The harmonized copyright regulations of the EU do not contain a permission of the use of the audiovisual media as intended by TIB. Furthermore, the initiatives on the European level are directed at creating a single European market and at promoting the commercial film industry more than at promoting scientific and educational use of audiovisual material in an online-environment. In consequence, even though a number of initiatives are taken, they might not result in support of the activities of TIB.

#### **Activities of TIB viewed in the light of German copyright law:**

TIB acquires the scientific audiovisual media as digital files with the corresponding metadata as single items or as large collections. The audiovisual media collected by TIB are usually subject to copyright or a neighboring right in Germany<sup>46</sup>.

The single set of metadata is not subject to copyright, but due to the implementation of the database directive into German copyright law, large sets of metadata can be protected by the so called database right within the European Union<sup>47</sup>.

To be able to present and allow TIB's users to download the media via its portal in a manner adapted to the media type, TIB essentially needs the following rights:

- right of making publicly available so that users may access the media from a place and at a time individually chosen by them (video on demand or just online-presentation)
- right to create and present/distribute derivatives online (trailers, thumbnails, segmentation, change of formats, e. g.)
- right to reproduce the work on any type of medium and any number of times and to distribute the work (digital copy)

In general, the copyright holder has to consent to all types of use intended by TIB. But it would not be necessary to conclude licenses, if TIB had the necessary rights due to legal exceptions or a fair use doctrine.

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<sup>44</sup> Draft of the Anti-Counterfeiting Trade Agreement, 12196/11, <http://register.consilium.europa.eu/pdf/en/11/st12/st12196.en11.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>45</sup> [Reply of the Federal Government to a parliamentary request, BT-Drucksache 17/8980 of March 12<sup>th</sup> 2012](http://www.bundestag.de/dip21/btd/17/089/1708980.pdf), <http://dipbt.bundestag.de/dip21/btd/17/089/1708980.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>46</sup> §§ 2 par. 1, 88 ff., 95 Urheberrechtsgesetz (UrhG), 1965, BGBl. I, 1273, last amended on December 22<sup>nd</sup> 2011, <http://www.gesetze-im-internet.de/bundesrecht/urhg/gesamt.pdf>, last accessed on May 4<sup>th</sup> 2012;

<sup>47</sup> §§ 87a ff. UrhG, [see](#) above;



Germany does not have a fair use doctrine as it is known in Anglo-American copyright law, but German copyright law permits the use of a copyrightable work without consent of the author in a number of specific cases (statutory exceptions). Some statutory exceptions exist for scientific or educational purposes. But these unfortunately do not cover the activities of TIB:

German copyright law does not contain a general limitation of the authors copyright for the online presentation of the work for scientific or educational purposes: The online presentation of a limited part of the work for scientific or educational purposes is only allowed in a password secured environment such as an intranet or on an especially secluded computer terminal in the reading room of the library<sup>48</sup>.

Also, the creation of derivatives is permitted only for internal purposes, so TIB would not be able to present the trailers or other forms of visual abstracts online<sup>49</sup>.

Even though the production of digital copies of a work for an organisation such as TIB is specifically permitted for archival purposes, such copies may not be presented online or distributed to users in digital form<sup>50</sup>.

None of the other statutory exceptions contained in German copyright law apply to the use intended by TIB.

The federal government is currently preparing a new draft to revise and adapt copyright law to modern needs. It is currently not known whether new measures to support Open Access for scientific results or new statutory exceptions to the exclusive rights of the copyright holders will be adopted in favor of scientific or educational purposes, or whether the current legal exceptions for scientific or educational use will be upheld, as the contents of the new draft have not been published yet<sup>51</sup>.

Even though German copyright law has some statutory exceptions to the exclusive copyright of the creator or rights holder, these statutory rights do not permit TIB to prepare and present the media to its users online in a manner appropriate to the technical possibilities and as requested by the users.

### **Acquisition and licensing of audiovisual media**

As a result, license contracts have to be concluded with the film producers or other rights holders when newly produced audiovisual media are acquired. This will continue to be so, since the implementation of a mandatory deposit on a national level is not meant to have any effect on the necessity to license the necessary rights for the exploitation of the copyright<sup>52</sup>.

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<sup>48</sup> Dreier/Schulze, Kommentar zum UrhG, 3. ed., § 52a no. 8 f.; §§ 52a, 52b UrhG, see above;

<sup>49</sup> § 23 UrhG, see above;

<sup>50</sup> § 53 par. 2 No. 3 UrhG, see above; Dreier/Schulze, Kommentar zum UrhG, 3. ed., § 53 no. 26 f.;

<sup>51</sup> Reply of the Federal Government to a parliamentary request, BT-Drucksache 17/667, of July 26<sup>th</sup> 2011, <http://dipbt.bundestag.de/dip21/btd/17/066/1706678.pdf>, last accessed on May 4<sup>th</sup> 2012 ;

<sup>52</sup> Art. 4 and 12 of the European Convention for the Protection of the Audiovisual Heritage, see above;



The contracting partners of TIB can be individual scientists or large organisations, the creators themselves or copyright holders who have acquired the necessary rights from the creators beforehand. Fortunately, in case a larger organisation was necessary to produce the film, TIB can acquire the rights from one single contractual partner, the film producer, due to special legal regulations introduced to simplify the exploitation of films<sup>53</sup>.

TIB has to acquire the necessary rights for the copyrightable work itself and (in case a large amount of audiovisual films are acquired at the same time) the rights in the collection of metadata if they were provided by the contractual partner.

The goal is to provide the widest possible access to these media and to acquire the necessary rights to allow for the technical processing of the media to provide up-to-date search tools, online presentation and the widest possible usage rights to the users.

First TIB tries to obtain the audiovisual media under one of the Open Access Licenses of the non-profit organisation Creative Commons in the jurisdictional version adapted to German copyright law<sup>54</sup>. Creative Commons provides standardised license texts which are very easy to understand and handle for users due to the simplified explanation of the license text provided by Creative Commons (“License Deed”). These licenses are internationally known and used, allow the free distribution of scientific results and are easy to handle in the context of scientific communication which already is and will become more and more international in the future. Creative Commons licenses are designed to provide as many rights to the licensee as is permitted by copyright law, as long as the correct creator is named and the other restrictions of the specific license chosen by the rights holder are complied with, while at the same time they comply with German copyright law. Specifically they allow the free distribution of the material online or offline and thus make the material accessible for scientific and educational purposes worldwide. The most important clauses of the licenses will be valid in most other countries, in case the rights holder is not German.

These licenses have been subject to legal disputes in German courts of law and have been judged to be valid licenses<sup>55</sup>.

TIB leaves the choice of which license to choose to the rights holder, but advises the most permissive license: CC by Germany 3.0<sup>56</sup>.

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<sup>53</sup> §§ 88 ff. UrhG, [see](#) above ; Dreier/Schulze, Kommentar zum UrhG, 3. ed., Vor §§ 88 ff. no. 1 f.;

<sup>54</sup> Open-Access Licenses of Creative Commons: <http://creativecommons.org/licenses/>, last accessed on May 4<sup>th</sup> 2012;

<sup>55</sup> Last decision: LG Berlin, Beschluss v. 8.10.2010, Az.: 16 O 458/2010, in: Computer und Recht 2012, 134 f.;

<sup>56</sup> Open-Access License CC by Germany 3.0, <http://creativecommons.org/licenses/by/3.0/de/>, last accessed on May 4<sup>th</sup> 2012;



If the contractual partner is not willing to license the audiovisual media under an Open-Access License, TIB concludes a less permissive license with the rights holder. This can be one of the following three scenarios:

- TIB receives the audiovisual media and metadata and the user may download, but not redistribute the films
- TIB receives the audiovisual media and metadata, but may use the audiovisual media only for internal purposes and only provides a link to the films on the website of the rights holder for the users
- TIB only obtains the metadata

Due to TIB's participation in the Linked Heritage Project, metadata are acquired under a CC0 1.0 Universal Public Domain Dedication License<sup>57</sup>.

### Challenges for TIB

When trying to set up the described services in the legal environment, TIB encounters a number of challenges:

It is not always easy to convince creators and producers to sign the license agreements due to legal language, even though they are specifically designed to inform the licensor about the planned use.

In case TIB should acquire older scientific audiovisual media from other entities who are not the producers or the creators, the legal situation is very complex: Until 1995 the internet and all its services, which developed after the internet could be used for civil purposes, did not exist. Thus older contracts usually do not contain any provisions regarding these new services. There is considerable uncertainty of how older contracts must be interpreted with regard to these new methods of use among legal experts. This especially, since the regulations of German copyright law changed a number of times regarding the question of whether and how unknown methods of use could and can be licensed<sup>58</sup>. In consequence, the consent of the creators or producers to extend the existing licenses to video on demand or other internet services must usually be obtained separately<sup>59</sup>.

Most of the times the current contact details of the creator or producer or their heirs or successors are not known or they cannot be reached for different reasons. Since a copyright register does not exist, a time-consuming search must be conducted.

Fortunately, the problem of how to license orphaned works may soon be solved when the Orphan Works Directive of the EU has been adopted by the European Parliament

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<sup>57</sup> CC0 v. 1.0 Universal Public Domain Dedication License, <http://creativecommons.org/publicdomain/zero/1.0/>, last accessed on May 4<sup>th</sup> 2012;

<sup>58</sup> Dreier/Schulze, Kommentar zum UrhG, 3. ed., §§ 31a, 137I; Among others: Martin Diesbach, „Unbekannte Nutzungsarten bei Altfilmen: Der BGH gegen den Rest der Welt?“, ZUM 2011, 623 ff.;

<sup>59</sup> In general, this can only be evaded if either the older contract (concluded before 1966) explicitly extends to all methods of use, even those unknown at the time of stipulation of the contract, or the contract fulfils all prerequisites of § 137I UrhG, which will not usually be the case;



and the European Council and transposed into German law. Currently a proposal for its implementation is being prepared by the Federal German government<sup>60</sup>.

When drafting the contracts with contractual partners from outside Germany or the EU, the different legal culture must be taken into account. Also different rules may apply to the licensed content in Germany and the country of the contractual partner (e. g. Database Right of the EU).

TIB has to take the necessary precautions and be prepared in case third parties claim copyright infringement. There is considerable discussion among legal experts regarding the liability of online archives for copyright infringement of their content, which of course makes it difficult to assess liability risks.

### **Conclusions:**

Legislative efforts and discussions within the EU are directed towards promoting the commercial market for cinematographic films. To simplify the distribution of scientific information and also scientific films does not seem to be a goal. This may have negative side effects for the acquisition and distribution of the mostly non-commercial scientific films TIB is trying to acquire for its services<sup>61</sup>.

It will always be difficult and pose an interesting challenge to provide up-to-date-services and use new business models, because the development in law will always be slower than the technological development and the development of new business models.

Thus services such as the online portal of TIB for audiovisual media will always have to overcome the legal uncertainties by acquiring the necessary rights to allow for a modern search, retrieval or presentation of the media from the creators or producers of the audiovisual media directly.

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<sup>60</sup> Response of TIB Hannover to the „Green Paper on the online distribution of audiovisual works in the European Union”, (KOM (2011) 427 endg., Drucks. 413/11)  
[http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual/non-registered-organisations/tib-hannover\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/tib-hannover_en.pdf), last accessed on May 4<sup>th</sup> 2012;

<sup>61</sup> Response of TIB Hannover to the „Green Paper on the online distribution of audiovisual works in the European Union” (KOM (2011) 427 endg., Drucks. 413/11), 2011,  
[http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual/non-registered-organisations/tib-hannover\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/tib-hannover_en.pdf), last accessed on May 4<sup>th</sup> 2012;

