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## **AD HOC INFORMAL MEETING ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES**

**Geneva, November 6 and 7, 2003**

INFORMATION ON GERMANY RELATING TO THE QUESTIONNAIRE TO  
NATIONAL EXPERTS CONTAINED IN THE APPENDIX TO THE STUDY ON  
TRANSFER OF THE RIGHTS OF PERFORMERS TO PRODUCERS OF AUDIOVISUAL  
FIXATIONS (DOCUMENT AVP/IM/03/4)

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\* The views expressed in the Study are those of the authors and not necessarily those of the Member States or the Secretariat of WIPO.

## TABLE OF CONTENTS

	<u>Page</u>
PART I .....	2
I. NATURE AND EXISTENCE OF AUDIOVISUAL PERFORMERS' RIGHTS.....	2
A. Characterization of Audiovisual Performers' Rights .....	2
1. <i>Does your national law characterize the contribution of audiovisual performers as coming within the scope of:</i> .....	2
a. <i>Copyright</i> .....	2
b. <i>Neighboring rights (explain what in your country "neighboring rights" means)</i> .....	2
c. <i>Rights of personality</i> .....	2
d. <i>Other (please identify and explain)</i> .....	2
B. Scope of Rights Covered.....	3
2. <i>Do audiovisual performers enjoy exclusive economic rights?</i> .....	3
a. <i>Fixation</i> .....	3
b. <i>Reproduction</i> .....	3
c. <i>Adaptation</i> .....	3
d. <i>Distribution of copies, including by rental</i> .....	3
e. <i>Public performance; communication to the public</i> .....	3
f. <i>Other (please describe)</i> .....	3
2. <i>What is the duration of performers' exclusive rights?</i> .....	4
3. <i>Do audiovisual performers enjoy moral rights?</i> .....	4
a. <i>Attribution ("paternity")</i> .....	4
b. <i>Integrity</i> .....	4
c. <i>Divulcation</i> .....	5
d. <i>Other (please describe)</i> .....	5
4. <i>What is the duration of performers' moral rights?</i> .....	5

	<u>Page</u>
5. <i>Do audiovisual performers have remuneration rights?</i> .....	6
<i>a. Are these in lieu of or together with exclusive rights?     (Please explain)</i> .....	6
<i>b. Describe the rights to remuneration that audiovisual performers     have</i> .....	6
6. <i>Are audiovisual performers' rights subject to mandatory collective management?</i> .....	8
<i>a. Which rights?</i> .....	8
<i>b. Which collective management associations; how do they work?</i> .....	9
II. INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS .....	9
A. Who is the initial owner?.....	9
1. <i>In your country, is the performer vested with initial ownership?</i> .....	9
2. <i>Is the performer's employer/the audiovisual producer so vested?</i> .....	9
3. <i>Is a collective so vested?</i> .....	9
4. <i>Anyone else? Please explain</i> .....	9
B. What is owned? .....	10
1. <i>Is the performer the owner of rights in her performance?</i> .....	10
2. <i>Is she a co-owner of rights in the entire audiovisual work to which her     performance contributed?</i> .....	10
3. <i>Other ownership? Please describe</i> .....	10
III. TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS .....	10
A. Legal provisions regarding contracts .....	10
1. <i>Does the copyright/neighbors rights law, or other relevant legal norm     set out rules regarding transfers of rights?</i> .....	10

	<u>Page</u>
2. <i>Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighboring rights.....</i>	11
3. <i>Must the transfer be in writing?.....</i>	11
4. <i>Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?.....</i>	11
5. <i>Must the writing be signed by the performer? By the transferee?.....</i>	12
B. <i>Transfer by Operation of Law .....</i>	12
1. <i>Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights? .....</i>	12
2. <i>Expropriation.....</i>	12
3. <i>Bankruptcy.....</i>	12
4. <i>Divorce; community property.....</i>	13
5. <i>Intestacy.....</i>	13
6. <i>Other (please explain).....</i>	13
C. <i>Irrebuttable Presumptions of Transfer.....</i>	13
1. <i>Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights? .....</i>	13
2. <i>What rights does the transfer cover?.....</i>	14
3. <i>If fewer than all rights, please identify and explain which rights are transferred and which are retained. ....</i>	14
D. <i>Rebuttable Presumptions of Transfer .....</i>	14
1. <i>Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer's rights?..</i>	14
2. <i>What rights does the transfer cover?.....</i>	14

3.	<i>If fewer than all rights, please identify and explain which rights are transferred and which are retained.</i> .....	14
E.	Contract Practice .....	15
1.	<i>If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?</i> .....	15
2.	<i>Do these provisions appear in collective bargaining contracts?</i> .....	15
3.	<i>In individually negotiated contracts?</i> .....	15
4.	<i>What rights do these provisions transfer? Please describe.</i> .....	15
F.	Limitations on the Scope or Effect of Transfer .....	16
1.	<i>Does copyright/neighborhood rights law or general contract law limit the scope or effect of transfers? Please indicate which law is the source of the limitation.</i> .....	16
2.	<i>Do these limitations concern:</i> .....	17
a.	<i>Particular rights, e.g., moral rights</i> .....	17
b.	<i>Scope of the grant, e.g., future modes of exploitation</i> .....	17
c.	<i>Other (please describe)</i> .....	18
3.	<i>Do audiovisual performers enjoy a legal right to terminate transfers of rights?</i> .....	18
b.	<i>Is this termination right transferable?</i> .....	18
c.	<i>Waivable?</i> .....	18
	PART II.....	19
I.	LAW APPLICABLE TO DETERMINE INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS .....	19
A.	What country's (countries') copyright/neighborhood rights law determines whether the granting performer initially owned the rights transferred: .....	19
1.	<i>The country of origin of the audiovisual work?</i> .....	19

	<u>Page</u>
2. <i>The country of residence of the performers?</i> .....	19
3. <i>The country designated by (or localized to) the contract of transfer?</i> .....	19
4. <i>Each country in which the work is exploited?</i> .....	19
5. <i>When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), how is the substantive copyright or neighboring rights law underlying the initial ownership of the rights determined?</i> .....	20
a. <i>with reference to the country from which the communication originates?</i> .....	20
b. <i>or with reference to the country or countries in which the communication is received?</i> .....	20
II. LAW APPLICABLE TO TRANSFERS OF RIGHTS .....	21
A. Transfers by operation of law .....	21
1. <i>Does your country's law or caselaw give local effect to a transfer by operation of a foreign country's law?</i> .....	21
a. <i>by expropriation</i> .....	21
b. <i>bankruptcy</i> .....	22
c. <i>divorce; community property</i> .....	22
d. <i>intestacy</i> .....	22
e. <i>other (please explain)</i> .....	22
B. Transfers effected by contract .....	23
1. <i>When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others); is the substantive copyright or neighboring rights law underlying the grant determined:</i> .....	23
a. <i>with reference to the country from which the communication originates?</i> .....	23
b. <i>or with reference to the country or countries in which the communication is received?</i> .....	23

	<u>Page</u>
2. <i>What law governs issues going to the scope and extent of a transfer: .....</i>	23
a. <i>The (single) law of the contract?.....</i>	23
b. <i>The substantive copyright/neighboring rights laws of the countries         for which the rights are granted?.....</i>	23
3. <i>What law governs issues going to the validity of the form of a transfer: ....</i>	25
a. <i>The (single) law of the contract?.....</i>	25
b. <i>The substantive copyright/neighboring rights laws of the countries         for which the rights are granted?.....</i>	25
C. <i>The Role of Mandatory Rules and Ordre Public .....</i>	26
1. <i>Do mandatory rules (lois de police) automatically apply local law to local         exploitations made under a foreign contract? .....</i>	26
2. <i>Describe the instances in which mandatory rules apply to transfers of         rights by audiovisual performers. ....</i>	28
3. <i>Do local courts, having initially identified the applicability of the law of         the foreign contract, nonetheless apply local law on grounds of public         policy/ordre public?.....</i>	29
4. <i>Describe the instances in which the ordre public exception applies to         invalidate transfers of rights by audiovisual performers.....</i>	29

## PART I

## Substantive Rules Governing the Existence, Ownership and Transfer of Audiovisual Performers' Rights

## I. NATURE AND EXISTENCE OF AUDIOVISUAL PERFORMERS' RIGHTS

## A. Characterization of Audiovisual Performers' Rights

*I. Does your national law characterize the contribution of audiovisual performers as coming within the scope of:*

- a. Copyright*
- b. Neighboring rights (explain what in your country "neighboring rights" means)*
- c. Rights of personality*
- d. Other (please identify and explain)*

The performances of audiovisual performers are protected under the rules of performers' protection in their performances under Section 3 regarding performing artists, within the scope of the Part 2 of the German Copyright Act<sup>1</sup> on "Neighboring Rights". Neighboring rights in general under German law protect achievements which are not creative and therefore not works, but which usually are connected to literary and artistic works or are similar to them.<sup>2</sup> They protect achievements which have been considered by the legislator to be worth protecting as such and which are either of an artistic nature, such as performances by performers, or in the nature of a technical, organizational or economic investment (such as phonograms made by producers, audiovisual fixations made by film producers, broadcasts made by broadcasting organizations, etc.).<sup>3</sup> In particular, Part 2 of the German Copyright Act covers under the subtitle of "Neighboring Rights" scientific editions of works that are not protected (§ 70 CA); first publications and communications to the public of unpublished works after the expiry of the copyright term (§ 71 CA); photographs and similar achievements that are not works, due to the lack of an individual personal creation (§ 72 CA); performances by performing artists (§§ 73 *et seq.* CA); the organization of a performance by a company/enterprise (such as a concert organizer) (§ 81 CA); phonograms (§§ 85, 86 CA); broadcasts (§ 87 CA); databases that are the result of a substantial investment according to the rules on the *sui generis* right under the EC Database Directive 96/9<sup>4</sup> (§§ 87a *et seq.* CA);

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<sup>1</sup> Act on Authors' Rights and Neighboring Rights of 9 September 1965, BGBl. I p. 1273, last amended by Act of 10 September 2003, BGBl. I p. 1774.

<sup>2</sup> Legislative motives in Haertel/Schiefler, Urheberrechtsgesetz und Gesetz über die Wahrnehmung von Urheberrecht und verwandten Schutzrechten, Textausgabe und Materialien, 1967.

<sup>3</sup> See for ex. Schricker/Schricker, Urheberrecht, 2<sup>nd</sup> ed. Munich 1999, Einleitung, note 28.

<sup>4</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J. EC L 77/20 of 27 March 1996, Articles 7 *et seq.*



and audiovisual fixations (whether they are audiovisual works or simply sequences of moving images not protected by copyright) for which film producers are protected (§§ 94, 95 CA).

## B. Scope of Rights Covered

### 2. *Do audiovisual performers enjoy exclusive economic rights?*

- a. *Fixation*
- b. *Reproduction*
- c. *Adaptation*
- d. *Distribution of copies, including by rental*
- e. *Public performance; communication to the public*
- f. *Other (please describe)*

Performers in general, including audiovisual performers, enjoy the exclusive rights of fixation of their unfixed performance (§ 77(1) CA), reproduction and distribution of their fixed performance (§ 77(2) CA). The definitions of reproduction and distribution in the part on authors' rights are in principle also applied to performers' rights.<sup>5</sup> Accordingly, the distribution right is generally understood as under § 17 (1) CA (regarding the distribution right of authors) and, accordingly, covers the offering of the original or copies of the performance to the public and their putting into circulation. In particular, acts such as sale, rental and lending are covered by the broad scope of the distribution right. The rental is exempted from the exhaustion of the distribution right; exhaustion occurs upon the first putting into circulation by alienation with the consent of the right owner in the territory of the European Union or a Contracting State of the Agreement on the European Economic Area (§ 17(2) CA as applied by analogy to performers).<sup>6</sup>

In addition, performers including audiovisual performers enjoy the exclusive right of making their performance available to the public in the meaning of Art. 10 WPPT (§ 78 (1) 1. CA). They also enjoy an exclusive right of broadcasting by wire and wireless means (including satellite and cable broadcasting and re-broadcasting/re-transmission), unless the performance had already been lawfully recorded on an (audio or) audiovisual fixation that has been released (see fn 7) or lawfully made available to the public (in the latter cases, a remuneration right applies instead of the exclusive right, see § 78 (1) 2. and (2) 1. CA and no. 5. hereunder). Finally, they enjoy an exclusive right of communication to the public of their performance outside the place of the performance by screen, loudspeaker and similar technical devices (§ 78 (1) 3. CA).

Performers do not enjoy an exclusive right of adaptation of their performance.

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<sup>5</sup> Schricker/Krüger, *Urheberrecht*, 2<sup>nd</sup> ed. Munich 1999, Vor §§ 73 ff., note 18.

<sup>6</sup> Schricker/Krüger, *Urheberrecht*, 2<sup>nd</sup> ed. Munich 1999, Vor §§ 73 ff., note 23 and § 75 note 13. For the remuneration rights in context with rental and lending see hereunder 5.

2. *What is the duration of performers' exclusive rights?*

The duration of performers' economic rights, including the exclusive rights, is fifty years after the release (“*erscheinen*” in the meaning of § 6(2) CA)<sup>7</sup> of the fixation of the performance or, if it was first lawfully used for public communication, fifty years thereafter. If the fixation has not been released (“*erschienen*”) or been lawfully used for public communication within fifty years after the performance, then the duration is fifty years after the performance. The term of protection is calculated from the end of the calendar year in which the event giving rise to them took place (§ 82/§ 69 CA).

3. *Do audiovisual performers enjoy moral rights?*

a. *Attribution (“paternity”)*

Performers including audiovisual performers enjoy the right to be recognized as performers in respect of their performances. They have the right to determine whether or not, and if so, by what name they have to be named (§ 74 (1) CA).

A special provision has been added in § 74 (2) CA in respect of groups of performers: If several performers have made a common performance and if the mentioning by name (Nennung) of each of them would require an unreasonable effort (Aufwand), the performers can only claim to be named as a performers' group. If the group has an elected representative, that person alone has the right to represent the performers towards third persons. If the group does not have any elected representative, the right to be named can be claimed only by the director of the group or by a person to be elected by the group. If one of the performers of the group has a special interest, he may continue to claim to be personally named. § 74(2) CA has been drafted against the background of orchestras, choirs and the like musical or ballet groups who perform a work commonly and will therefore not always apply to actors in audiovisual works who often perform independently from other performers.

Consequently, a separate provision has been adopted in respect of performers who participate in audiovisual works: § 93(2) CA states that it is not required to name each individual performer, if this would mean a disproportionate effort.

In both cases, the right to be recognized as performer of her performance is unaffected.

b. *Integrity*

§ 75 CA provides for the right of a performer, including an audiovisual performer, to prohibit any distortion or other alteration of the performance of such nature as to jeopardize her standing or reputation as a performer. If several performers have made a common performance, they are obliged to take the others into due account when exercising this right.

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<sup>7</sup> § 6 (2) phrase 1 CA reads: “A work shall be deemed released if, with the consent of the copyright owner, copies of the work have been produced and offered to the public or put into circulation in sufficient quantity.”

The integrity right has been limited in respect of performers who participate in the production of an audiovisual work: Under § 93(1) CA, the performers who participate in the production of an audiovisual work or whose performances are used in its production may prohibit, in respect of the production and exploitation of the audiovisual work, only gross distortions or other gross mutilations of their performances. They shall take the other contributors, namely authors and neighboring right holders, as well as the film producer into due account when exercising the integrity right under § 75 CA.

c. *Divuligation*

Audiovisual performers do not enjoy a divuligation right. However, in individual cases, they may claim damages on the basis of § 823 BGB for violation of the general personality right.<sup>8</sup>

d. *Other (please describe)*

Audiovisual performers do not enjoy other moral rights. In particular, the rights of withdrawal/revocation due to non-exercise and to changed conviction which apply in general to performers (§ 79 (2) phrase 2 CA in connection with §§ 41, 42 CA) do not apply to performers who conclude a contract with a film producer on their participation in the production of an audiovisual work (§ 92 (3) CA in connection with § 90 CA).

4. *What is the duration of performers' moral rights?*

The performers' moral rights under §§ 74 and 75 CA (paternity and integrity) expire with the performer's death; however, if the performer has died before the expiry of fifty years after the performance, the duration is fifty years after the performance and, in any case, the duration is not shorter than that of the performer's economic rights under § 82 CA (see hereabove, I.B.2.) (§ 76 CA). The duration is calculated in the same way as the duration of performers' economic rights (see above I.B.2.) (§ 76 phrase 2 CA).

If several performers have made a common performance, the death of the last surviving performer is relevant for the calculation of the duration. After the death of the performer, her relatives enjoy her moral rights (§ 76 phrase 3 CA). Relatives are the spouse or life partner and the children or, if there is neither of them, the parents (§ 76 phrase 4 CA in connection with § 60 (2) CA).

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<sup>8</sup> Schricker/Krüger, Urheberrecht, 2<sup>nd</sup> ed. Munich 1999, Vor §§ 73 ff., notes 21, 25 with further references.

5. *Do audiovisual performers have remuneration rights?*

Performers, including audiovisual performers, enjoy a number of statutory remuneration rights under the German Copyright Act.

a. *Are these in lieu of or together with exclusive rights? (Please explain)*

Most of these rights are in lieu of the corresponding exclusive rights, two have been provided together with an exclusive right. In particular, the remuneration right for rental under § 77 (2) phrase 2 in connection with § 27(1) CA has been vested in the performers in addition to the exclusive right of rental. This is meant to serve as a remedy against the typically weak bargaining position of performers in their relation to producers, and implements Article 4 of the EC Rental Rights Directive<sup>9</sup> (for its description see hereunder b.). Also the remuneration right for cable retransmission under § 78 (4) CA in connection with § 20b (2) CA has been provided in addition to the exclusive right of cable retransmission (to the extent the exclusive right has been provided, see above I. B. 1.). This also serves as a remedy against the typically weak bargaining position of performers in their relation to exploiting businesses.

In addition, one may mention here the right to equitable remuneration in the contractual framework on the basis of the Law, under §§ 32 *et seq.*<sup>10</sup>

The other remuneration rights have been provided in lieu of exclusive rights, namely either as an “other right” (Subtitle 4. in Part 1 Section 4 of the German Copyright Act), i.e., the remuneration right for public lending under § 27(2) CA (as referred to by § 77 (2) phrase 2 CA), or as a compensation for the limitations of exclusive rights in Part 1 Section 6 on limitations (§ 83 CA in connection with Part 1 Section 6 CA), and in certain cases of broadcasting and communication to the public where no exclusive right exists (§ 78 (2) CA). For the description of these rights see hereunder b.

b. *Describe the rights to remuneration that audiovisual performers have.*

As an exception to the performers’ exclusive right of broadcasting, § 78 (2) 1. CA provides a right to equitable remuneration where the performance that has been lawfully fixed on a carrier that has been released (“*erschienen*,” § 6 (2) CA) or lawfully made available to the public (within the meaning of Art. 15 (4) of the WPPT) is lawfully broadcast. In addition, a remuneration right applies to the communication to the public of the performance by means of a fixation, such as the public showing of a videogram that includes the performance (§ 78 (2) 2. CA). The performer also has a right to equitable remuneration for the public communication of the broadcast of her performance, such as the public showing of a TV program which includes the performance; the same is true for the communication to the public of a performance which has been made available to the public in the meaning of

<sup>9</sup> Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, O.J. EC L346/61 of 27 November 1992.

<sup>10</sup> See also hereunder, Part I., III. A.4.

Art. 10 of the WPPT such as a public showing of a film (including a performance) which has been made available to the public through the Internet (§ 78 (2) 3. CA).

Performers, including audiovisual performers, enjoy the remuneration right for public lending of the original or copies of their fixed performances, if such lending takes place by an institution that is accessible to the public, such as public libraries, collections of audiovisual recordings and others (§ 77(2) phrase 2 in connection with § 27(2) CA). This right applies in respect of all originals and copies for which the distribution right has been exhausted under § 17(2) CA. “Lending” has been defined as the making available for use for a limited period of time and not for direct or indirect commercial advantage; excluded from the notion of lending are in particular acts that would otherwise be lending and that occur in the framework of an employment or service contract for the only purpose to be used for the fulfillment of obligations under such contract (§ 77(2) phrase 2 in connection with § 27(2) phrase 2 in connection with § 17(3) phrase 2 no. 2 CA). The remuneration must be equitable. The right must be exercised through a collecting society.

In addition, performers enjoy those statutory rights of remuneration provided for as a compensation for limitations of exclusive rights in the section on limitations (§ 83 CA in connection with Part 1 Section 6 CA). Accordingly, performers enjoy the remuneration rights in respect of private and own/personal reproduction (§ 54 CA), reproduction, distribution and making available of released performances for the purpose of collections for church and specified educational uses (§ 46 CA), reproduction of performances which are broadcast in the framework of a school broadcast program and that are kept beyond the end of the school year following the fixation (§ 47 CA); theoretically (but not in practice), they also enjoy the remuneration right under § 49 CA<sup>11</sup> and under § 52 CA for the communication to the public of released performances on audiovisual fixations that are not works in non-commercial events under further specified circumstances (§ 52 CA). Finally, the recently introduced limitation to the right of making available for purposes of education and research under § 52a CA which is subject to a statutory right of equitable remuneration (§ 52a (4) CA), will be relevant in principle also for performing artists; the same is true at least in theory for the remuneration right for the reproduction and distribution of performances in favor of disabled persons for whom a new limitation has been introduced (§ 45a CA).

In addition to the exclusive rental right, performers enjoy the right to claim an equitable remuneration for rental from the renter where they have granted a rental license to the producer (§ 77 (2) phrase 2 CA in connection with § 27 (1) CA). This provision is supposed to be a remedy against the typically weak bargaining position of performers<sup>12</sup> and, instead of leaving them with a potentially disadvantageous individual agreement, shall secure them an equitable remuneration for these uses through a separate statutory remuneration right administered by collecting societies.

Similarly, in addition to the exclusive right of cable retransmission (to the extent it is an exclusive right, see above I. B. 1.), performers enjoy the right to claim an equitable remuneration for the cable retransmission from the cable distributor, after having licensed the exclusive right to a broadcasting organization or to a phonogram or film producer

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<sup>11</sup> Schricker/Vogel, Urheberrecht, 2<sup>nd</sup> ed. Munich 1999, § 84 note 8.

<sup>12</sup> Legislative Motives, BT-Drs 13/115 p. 7; see also on Article 4 EC Rental and Lending Rights Directive, which is the background for § 27 (1) CA, Reinbothe/von Lewinski, The EC Directive on Rental and Lending Rights and on Piracy, London 1993, p. 65 et seq.

(§ 78 (4) CA in connection with § 20b (2) CA). This provision also is supposed to be a remedy against the typically weak bargaining position of performers and, instead of leaving them with a potentially disadvantageous individual agreement, shall secure them an equitable remuneration for these uses through a separate statutory remuneration right administered by collecting societies. This right does not affect collective agreements, to the extent that those provide for performers an equitable remuneration for each cable retransmission (§ 20b (2) phrase 4 CA).

6. *Are audiovisual performers' rights subject to mandatory collective management?*

Yes, a number of rights of audiovisual performers are subject to mandatory collective management.

a. *Which rights?*

The exclusive right of simultaneous, unaltered and complete cable retransmission (§ 78 (1) 2. CA and above, I. B. 1.), except those rights which are asserted by broadcasting organizations in respect of their own broadcasts, is subject to mandatory collective administration (§ 78 (4) CA in connection with § 20b (1) CA which implements Article 9 EC Satellite and Cable Directive<sup>13</sup>).

The statutory remuneration right for cable retransmission under § 20 b (2) CA (see above, 5.b.) can be transferred in advance only to a collecting society, cannot be waived and can only be administered by such a society (§ 78 (4) in connection with § 20 b (2) phrases 2, 3 CA).<sup>14</sup>

In addition, the mandatory collective administration has been laid down for the statutory remuneration rights for public lending and for rental in the above-mentioned case<sup>15</sup> (§77 (2) phrase 2 in connection with §27(3) CA); the remuneration right for rental also can be transferred in advance only to a collecting society, and the performer cannot waive it.

The statutory remuneration rights for the broadcasting of a fixed performance, the public communication of the performance by means of a fixation and the public communication of a broadcast performance and of a performance that has been made available to the public as specified under § 78 (2) CA (see above, 5.b) can be transferred in advance only to a collecting society (§ 78 (3) CA), and cannot be waived.

All statutory remuneration rights under Part 1 Section 6 of the Copyright Act (see hereabove, 5. b.; §§ 45a, 46, 47, 49, 52, 52a and 54 CA in connection with §§ 83 and 63a CA) can be transferred in advance only to a collecting society, and the performer cannot waive them in advance. These provisions serve at protecting the performer (and the author) against

<sup>13</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, O.J. EC L 248/15 of 6 October 1993.

<sup>14</sup> § 79 (1) phrase 1 CA regarding the transferability of the performers' rights leaves these provisions under § 78(3) and (4) CA unaffected, see § 79(1) phrase 2 CA.

<sup>15</sup> See 5. b hereabove, regarding § 27 (1) CA.

the potential pressure by exploiting businesses to transfer even the remuneration rights to them.

b. *Which collective management associations; how do they work?*

The “*Gesellschaft zur Verwertung von Leistungsschutzrechten*,” GVL, administers the rights of phonogram producers, audio performers and audiovisual performers. It works like any other collecting society in Germany under the rules of the Act on the administration of authors’ rights and neighboring rights.<sup>16</sup> In particular, it is obliged to conclude contracts with performers regarding the rights administered by GVL, to distribute the revenues from administration of performers’ rights according to clear, pre-established rules, to provide the annual financial statement (§§ 6, 7, 9 of the above mentioned Act) and to conclude agreements with users on equitable terms, to establish tariffs (§§ 11, 13 of that Act), and so on.

## II. INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS’ RIGHTS

### A. Who is the initial owner?

1. *In your country, is the performer vested with initial ownership?*

Yes, in Germany the performer is vested with initial ownership in his performance under the rules on performers’ neighboring rights (§§ 73 *et seq.* CA).

2. *Is the performer’s employer/the audiovisual producer so vested?*

No, the initial ownership in the performance is never vested in anyone else than the performer herself. The audiovisual producer has its own neighboring right in respect of the technical, organizational and financial investment made in the production, i.e., in the audiovisual fixation, as opposed to the performance.

3. *Is a collective so vested?*

See the answer under 2 above. A collecting society may have derived rights from performers only.

4. *Anyone else? Please explain.*

See the answer under 2. above.

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<sup>16</sup> Act of 9 September 1995, BGBl. I. p. 1294, last amended by Act of 10 September 2003, BGBl. I p. 1774.

B. What is owned?

1. *Is the performer the owner of rights in her performance?*

Yes, the performer is granted her rights in the performance of a work or of an expression of folklore, and in her artistic participation in the performance (§ 73 CA).

2. *Is she a co-owner of rights in the entire audiovisual work to which her performance contributed?*

No, the performer as such has no rights as co-owner of the entire audiovisual work. This is a logical consequence of the fundamental distinction between authors' rights in works (personal intellectual creations) and other achievements which are not personal intellectual creations and which are therefore protected as neighboring rights only.<sup>17</sup> Only if she makes, in addition to the performance, a separate, creative contribution which results in a personal intellectual creation, she may be a co-author of the audiovisual work in this respect (but not in respect of the performance, and not in her function as a performer). For example, if the performer in a particular case has the freedom to shape a scene like an artistic director would otherwise do it, and if she creates such a scene herself, she is protected as co-author (in her function as a film director, not as performer).<sup>18</sup> However, this will happen in exceptional cases only.

3. *Other ownership? Please describe.*

The performer has the right in her personality in respect of the performance (the moral rights).

### III. TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Legal provisions regarding contracts

1. *Does the copyright/neighboring rights law, or other relevant legal norm set out rules regarding transfers of rights?*

Yes, a number of provisions regarding the transfer/grant of performers' rights are laid down either specifically for performers ( § 78 (3), § 79 (1), (2) phrase 1 CA, § 92 (1), (2) CA), or the respective rules regarding authors apply by reference to performers (§ 79 (2) phrase 2 CA in connection with the relevant provisions regarding authors, namely §§ 31 (1) - (3) and (5) and §§ 32 – 43, except (for audiovisual performers, see § 92 (3) in connection with § 90 CA) §§ 34, 35, 41, 42 CA, and § 78 (4) CA in connection with § 20 b CA, § 83 CA in

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<sup>17</sup> Legislative Motives, BT-Drs IV/270 p. 98; Schricker/Katzenberger, Urheberrecht, 2<sup>nd</sup> ed. Munich 1999, Vor §§ 88 ff., note 54 with further references.

<sup>18</sup> Legislative Motives, BT-Drs IV/270 p. 99 f.; Schricker/Katzenberger, Urheberrecht, 2<sup>nd</sup> ed. Munich 1999, Vor §§ 88 ff., note 56, with further references.



connection with a number of provisions of Part 1 Section 6, § 77 (2) phrase 2 CA in connection with § 27 CA).

They may also concern very general aspects such as the specific requirements of written form and the consequences of the lack thereof, or questions of legal capacity, and therefore are regulated in the Civil Code/BGB.

2. *Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighboring rights.*

Please see 1 hereabove.

3. *Must the transfer be in writing?*

The written form is mandatory only in respect of future performances: § 79 (2) phrase 2 CA in connection with § 40 CA requires the written form for contracts by which the performer obliges himself to grant exploitation rights in future performances that are in no way specified or only referred to by *genre*. General civil law determines the specific requirements of written form and the consequence of the lack thereof, namely the consequence that the contract is null and void (§ 125 phrase 1 Civil Code/BGB; see also F. 1. hereunder).

4. *Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?*

There is no explicit obligation to determine in detail the terms of the transfer/grant, e.g., as to the scope of each right and the remuneration provided. However, if the terms regarding the scope of rights to be transferred/granted are not sufficiently well specified, the rule of interpretation under § 31(5) CA which applies by reference also to performers (§ 79 (2) phrase 2 CA) has the effect that the transfer/grant extends only to those rights which have been envisaged by both parties according to the underlying purpose of the contract (so-called rule on the purpose of grant of exploitation rights).

According to this rule, “if the types of use were not specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract. A corresponding rule shall apply to the questions of whether an exploitation right has been granted at all, whether it shall be a non-exclusive or an exclusive exploitation right, how far the right to use and the right to forbid extend, how far the exploitation right shall be limited.”

Also in respect of the remuneration, the law does not oblige the contractual parties to determine the remuneration. However, if the contract does not determine the amount of remuneration, the law presumes that an equitable remuneration has been agreed on. The law provides for several ways to determine the equitable remuneration in every single case (see

§ 32 in connection with § 36 CA, as referred to in § 79 (2) phrase 2 CA).<sup>19</sup> Where the remuneration which has been agreed on is not an equitable one, the performer may claim that the contractual partner agrees to a modification of the contract leading to an equitable remuneration (§ 32 (1) phrase 2 CA in connection with § 79 (2) phrase 2 CA).

5. *Must the writing be signed by the performer? By the transferee?*

If written form is required at all (i.e., only in the case of future performances, § 40, see above 3.), the general rules of civil law require that the contract must be signed by both parties—the performer and the licensee—on the same document or, instead, by each party on one copy of the contract delivered to the other party, or by each party on an electronic document with identical text, indication of the relevant party's name and electronic signature under the conditions of the Signature Act, or by authentication of the contract by a notary (§§ 126/126a BGB).

B. Transfer by Operation of Law

1. *Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?*

Yes, see hereunder.

2. *Expropriation*

In principle, the Constitution (*Grundgesetz*) allows expropriation of property (including intellectual property such as performers' rights), however only under specific conditions (see Article 14 (3) *Grundgesetz*). It seems that expropriation took place during and after World War I and II.<sup>20</sup> Today, this seems rather theoretical and is not discussed in literature.

3. *Bankruptcy*

There is no transfer by operation of law. In the case of bankruptcy, in principle all economic performers' rights become part of the bankrupt's estate (§ 35 *Insolvenzordnung*/Law on Bankruptcy). However, exempt are any rights which cannot be subject to judicial execution (§ 36 *Insolvenzordnung*). If one follows the opinion that the performer's right as a whole (or even also the individual exclusive rights) cannot be transferred (see hereunder, F. 1.), they then also are not subject to judicial execution nor part of the bankrupt's estate. However, claims to remuneration or income earned from the

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<sup>19</sup> See on these and related provisions which have been introduced in Germany in 2002 by the Law of Strengthening the Contractual Position of Authors and Performers of March 22, 2002, BGBl. I no. 21 of March 28, 2002; see, for example, *Dietz*, Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers, IIC 2002, Vol. 33, p. 828 et seq.

<sup>20</sup> Schack, Urheber- und Urhebervertragsrecht, note 781.

exercise of the rights are principally subject to judicial execution and part of the bankrupt's estate. The full extent thereof may however be questionable in cases where the remuneration right can be transferred only to a collecting society for administration or where it cannot be waived. Also, remuneration obtained through collecting societies has been decided by the Kammergericht Berlin (regarding composers' remuneration obtained by the collecting society GEMA) as not being subject to judicial execution (nor, as a consequence, part of the bankrupt's estate) under § 850 i) Civil Procedure Code (ZPO).<sup>21</sup>

In any case, both the judicial execution and the bankruptcy do not lead to a transfer of rights by operation of law, but rather to a restraint on disposal by the right holder.<sup>22</sup>

4. *Divorce; community property*

No, there is no transfer by operation of law in these cases.

5. *Intestacy*

Yes, the exclusive rights and remuneration rights are inheritable and pass on by law to the heirs upon death of the performer under the general rules of civil law (§ 1922 BGB).<sup>23</sup>

6. *Other (please explain)*

The Law on Mergers (*Umwandlungsgesetz*) states in § 20 (1) no. 1 that the entire assets pass on to the new right holder where a merger is agreed on. However, the basis for this legal succession is a contract.<sup>24</sup>

C. Irrebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights?*

No, the German law does not provide for any irrebuttable presumption of transfer from the audiovisual performer to the producer.

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<sup>21</sup> KG, Schulze Rechtsprechungssammlung KGZ no. 20.

<sup>22</sup> See in particular, for bankruptcy, § 80 Insolvenzordnung.

<sup>23</sup> See for ex. Wandtke/Bullinger-Büscher, § 78 UrhG note 2 (Praxiskommentar zum Urheberrecht, 2002).

<sup>24</sup> See on mergers and other cases under the *Umwandlungsgesetz* and under trade law in respect of authors' rights, Wandtke/Bullinger-Block, § 28 UrhG note 13 (Praxiskommentar zum Urheberrecht, 2002).

2. *What rights does the transfer cover?*

3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained.*

D. Rebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer's rights?*

No, it is not the employment relationship between the audiovisual performer and the producer which gives rise to the rebuttable presumption of grant of rights (“*Einräumung*”), but only the fact that the performer concludes a contract with a film producer regarding his or her participation in the production of an audiovisual work (§ 92 (1) CA), whether or not this is an employment contract.

2. *What rights does the transfer cover?*

The presumption of grant covers the exclusive rights of fixation, reproduction and distribution (including rental) under § 77(1), (2) phrase 1 CA, and the rights of making available to the public (in the meaning of Art. 10 WPPT) and broadcasting (except broadcasting from a lawfully fixed performance where the fixation has been released or lawfully made available to the public), under § 78 (1) 1., 2. CA (§ 92 (1) CA).

3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained.*

Whereas the rights specified under 2. hereabove are covered by the presumption of grant, the following right is not covered thereby: the exclusive right of communication to the public of the performance outside of the place of the performance by screen, loudspeaker or similar technical devices (§ 78 (1) 3. CA). In addition, the presumption of grant does not cover any of the statutory remuneration rights listed here above, I.B.5. (regarding rental, cable retransmission, public lending, broadcasting of certain fixations, communication to the public of fixed performances, communication to the public of performances which have been broadcast and made available to the public, and those regarding private reproduction and other remuneration rights in the context of limitations, as indicated above).

Since the presumption applies only where there is doubt as to the scope of grant, those rights (even out of those covered by § 92 (1) CA) will not be covered by the grant, which have clearly not been granted, either because this is clear from the contract, or because the purpose of the agreement or the employment contract clearly does not cover the rights in question (§ 79 (2) phrase 2 CA in connection with §§ 43, 31 (5) CA).<sup>25</sup>

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<sup>25</sup> *Reber, Die Beteiligung von Urhebern und ausübenden Künstlern and der Verwertung von Filmwerken in Deutschland und den USA, Munich 1998, p. 84.*

The performers' moral rights which are inherently linked to her personality cannot be waived nor transferred and are therefore retained by the performer.<sup>26</sup> This is confirmed by § 79 CA which refers, in respect of transferability or grant of performer's rights, only to her economic rights.

#### E. Contract Practice

1. *If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?*

Yes, in the film industry, most agreements are standardized.<sup>27</sup>

2. *Do these provisions appear in collective bargaining contracts?*

Yes, collective agreements mostly contain provisions on the grant of performers' rights.<sup>28</sup>

3. *In individually negotiated contracts?*

Also individual contracts mostly contain explicit provisions on the grant of performers' rights.<sup>29</sup>

4. *What rights do these provisions transfer? Please describe.*

Usually, the scope of grants is very broad, and sometimes accompanied by agreements on separate royalties for repeated broadcasting, etc. (collective agreements regarding public television). Private broadcasters have not concluded collective agreements and usually insist on the grant of all economic rights for a lump sum.<sup>30</sup>

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<sup>26</sup> Regarding the right of integrity under the previous law see for ex. Schricker/Vogel, *Urheberrecht*, 2<sup>nd</sup> ed. München 1999, § 83 note 7, and Wandtke/Bullinger-Büscher, § 83 UrhG note 2 (Praxiskommentar zum Urheberrecht, 2002), both with further references.

<sup>27</sup> Reber, German Report, in: Roussel (ed.), *Conference Proceedings "Protection of Authors and Performers through Contracts," ALAI Conference 1997, Cowansville 1998*, p. 983, 987.

<sup>28</sup> Reber, *Die Beteiligung von Urhebern und ausübenden Künstlern and der Verwertung von Filmwerken in Deutschland und den USA, Munich 1998*, p. 84.

<sup>29</sup> Op. cit., (fn 21).

<sup>30</sup> Reber, *Die Beteiligung von Urhebern und ausübenden Künstlern and der Verwertung von Filmwerken in Deutschland und den USA, Munich 1998*, p. 85.

## F. Limitations on the Scope or Effect of Transfer

1. *Does copyright/neighboring rights law or general contract law limit the scope or effect of transfers? Please indicate which law is the source of the limitation.*

The statutory remuneration rights of performers are subject to mandatory collective administration and/or can only be transferred to a collecting society, as further explained hereabove, I.B.6.a.

The performer cannot transfer his or her “performer’s right” as a whole.<sup>31</sup> This is deduced from the fact that § 79 (1) phrase 1 CA on transfer refers only to the individual exclusive and remuneration rights under §§ 77, 78 CA, however not to the “performer’s right”. This is confirmed by a conclusion *e contrario* from §§ 85 (2) and 94 (2) CA regarding the neighboring rights of phonogram producers and film producers: they explicitly state that „the right” (as a whole) of the producer can be transferred. Such a clause has not been provided for performers. This result is also deduced from § 76 phrase 4 CA according to which the performer’s moral rights are due to his relatives upon his death, and from the transitional provision of § 137 (5) in connection with (1) CA under which a transfer of the performer’s right before the entry into force of the Copyright Act means that the relevant, individual exploitation rights are due to the acquirer.

The question whether the performer can transfer her individual exclusive rights is controversial. Under the previous law which was in force until the last amendment to the Copyright Act of September 10, 2003 came into force, the performers enjoyed only “rights to give their consent” (“*Einwilligungsrechte*”) to specified uses, instead of full exclusive rights to authorize or prohibit uses. Under that situation, the transfer (“*Abtretung*”) was interpreted by the majority of the legal doctrine as a grant of rights to use the performance as specified.<sup>32</sup> Under the new law which introduced full exclusive rights, the question whether the performer can fully transfer her rights or only grant the rights to use his performance is still controversial. Although § 79 (1) phrase 1 uses the word “transfer,” other arguments that the law is not clear in this respect from a dogmatic point of view have been expressed.<sup>33</sup>

The rules on copyright contracts under §§ 31(1) – (3) and (5) and 32 – 43 CA apply by analogy to performers in general (§ 79 (2) phrase 2 CA); regarding performers who have concluded a contract about their participation in the production of an audiovisual work with a film producer, the contractual provisions under §§ 34, 35, 41 and 42 CA on the required consent to the further transfer of licenses, to the grant of a non-exclusive license by an exclusive licensee, on the right of withdrawal due to non-exercise of a license and the right of

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<sup>31</sup> Majority of legal doctrine, see for ex. Schricker/Krüger, *Urheberrecht*, 2<sup>nd</sup> ed. München 1999, § 78 note 1; Wandtke/Bullinger-Bücher, § 78 *UrhG* note 1 (*Praxiskommentar zum Urheberrecht*, 2002), both with further references.

<sup>32</sup> See for ex. Schricker/Krüger, *Urheberrecht*, 2<sup>nd</sup> ed. München 1999, § 78 note 4, with further references.

<sup>33</sup> See in particular the report on the discussion of the Draft Amendments to the Copyright Act, v. Rom, *Die Leistungsschutzrechte im Regierungsentwurf für ein Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft*, ZUM 2003, 128, 131. See also critical remarks on the unclear (then draft) amendments in Krüger, *Kritische Bemerkungen zum Regierungsentwurf für ein Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft aus Sicht eines Praktikers*, ZUM 2003, 122, 125.

withdrawal due to changed conviction do not apply (§ 92 (3) CA in connection with § 90 CA).

However, the scope of grant is limited by the rule of interpretation under § 31(5) CA as explained here above under III.A.4. Similar rules of interpretation which may have the effect of restricting the scope of grant where the contract is not specific enough, under §§ 37, 38 CA do either not fit for an analogous application (e.g. because the performer does not have an exclusive right of adaptation) or would be of very little practicable relevance (such as § 37 (3) CA on the communication to the public of the performance to a room outside the production by screen and/or loudspeaker). However, § 40 CA applies regarding contracts about future performances that are not specified or only referred to by *genre* (see hereon already above, III.A.3.). In this case, the consequence of the lack of the written form of the contract, namely its invalidity, follows from general civil law (§ 125 phrase 1 Civil Code/BGB); the invalidity of the grant of the license itself regarding not yet delivered performances is laid down in § 40 (3) CA.<sup>34</sup>

The performers' moral rights by nature cannot be transferred; this may be also concluded *e contrario* from § 79 (1) CA which explicitly states the transferability of exploitation rights only.<sup>35</sup>

2. *Do these limitations concern:*

a. *Particular rights, e.g., moral rights*

The limited transferability (only to collecting societies) and the mandatory collective administration concern the statutory remuneration rights and the exclusive cable retransmission right under §§ 78 (1) no. 2, (4) in connection with 20b (1) CA. The non-transferability in principle concerns the moral rights and the performer's right as a whole, and possibly also the individual exploitation rights.<sup>36</sup> The other above mentioned limitations of the scope or effect of grants regarding individual rights (in particular §§ 31 (5), 40 CA in connection with § 79 (2) phrase 2 CA) concern all economic rights of the performer.

b. *Scope of the grant, e.g., future modes of exploitation*

The above mentioned rules under §§ 31 (5) and 40 CA in connection with § 79 (2) phrase 2 CA concern the scope of the grant of rights and, regarding the written form, the kind of performances (non-specified future performances).

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<sup>34</sup> In general, it is controversial whether the so-called principle of abstraction ("*Abstraktionsprinzip*") which applies in general civil law, applies also to authors' rights and neighboring rights. The majority of legal doctrine argues against its applicability in this special field of civil law. Under this principle, the transfer or grant of a right is independent, in its validity, from the validity of the underlying contract under which a person obliges herself to transfer or grant a right. See on this topic in particular Schricker/Schricker, *Urheberrecht*, 2<sup>nd</sup> ed. München 1999, Vor §§ 28 ff. notes 59 – 62.

<sup>35</sup> Regarding the right of integrity under the previous law see for ex. Schricker/Vogel, *Urheberrecht*, 2<sup>nd</sup> ed. München 1999, § 83 note 7, and Wandtke/Bullinger-Büscher, § 83 UrhG note 2 (*Praxiskommentar zum Urheberrecht*, 2002), both with further references.

<sup>36</sup> See comments on this controversy above, F. 1.

c. *Other (please describe)*

3. *Do audiovisual performers enjoy a legal right to terminate transfers of rights?*

The otherwise provided rights to withdraw exploitation rights from the producers due to non-exercise thereof or due to a changed conviction (§ 79 (2) phrase 2 CA in connection with §§ 41, 42 CA) do not apply to audiovisual performers (§ 92 (3) CA in connection with § 90 CA).

Only in the context of § 40 CA, the parties of a contract regarding the grant of rights in a future performance may terminate the contract after five years after conclusion of the contract (§ 40 (1) CA).

No termination rights regarding the transfer/grant but only the general civil law rules on the termination of contracts apply otherwise.

b. *Is this termination right transferable?*

c. *Waivable?*

The right under § 40 (1) CA to terminate a contract on the grant of rights in future performances (see above, 3.) cannot be waived (§ 40 (2) phrase 1 CA).



## PART II

### International Private Law Rules for Determining the Law Applicable to Transfer of Audiovisual Performers' Rights

This portion of the questionnaire requests a description of the response that your country's private international law rules would supply to the following questions. In other words, we are seeking to learn about your domestic private international law rules with regard to the matters referenced below.

In addition, please indicate clearly the extent, if any, to which your national private international law rules as to the law applicable to the ownership and transfer of audiovisual performers' rights differs from your national private international law rules as to the law applicable to the ownership and transfer of rights under copyright.

#### I. LAW APPLICABLE TO DETERMINE INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

A. What country's (countries') copyright/neighbors rights law determines whether the granting performer initially owned the rights transferred:

1. *The country of origin of the audiovisual work?*

No, see the answer under 4 below.

2. *The country of residence of the performers?*

No, see the answer under 4 below.

3. *The country designated by (or localized to) the contract of transfer?*

No, see the answer under 4 below.

4. *Each country in which the work is exploited?*

Yes. Although, as far as can be seen, there is no specific case law with regard to the specific question of the law applicable to the initial ownership of performers' rights, the corresponding question of the law applicable to the initial ownership in a copyright work has been answered by the German Federal Court in a recent decision in a clear and distinct way.

In German international private law of copyright it is the law of the country (countries) of protection, i.e., the law of each country for whose territory copyright protection

is sought, which determines the initial owner of a copyright work.<sup>37</sup> Ultimately, application of the law of the country-of-protection results in the application of the law of each country, in which the work is exploited.

The dominant opinion in German doctrine supports this application of the country-of-protection rule to the question of initial ownership and has always supported it, for the rights both of authors as well as audio-visual performers.<sup>38</sup> Some scholars though have a dissenting opinion and favor application of a country-of-origin rule; the suggested concepts for the determination of the country that shall play the role of “country-of-origin” differ.<sup>39</sup>

5. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), how is the substantive copyright or neighboring rights law underlying the initial ownership of the rights determined?*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

As far as can be seen, there is no specific caselaw with respect to this question.

According to German international private law the initial ownership in an audiovisual work is determined by the law of the country of protection, i.e., by the law of each and all countries, for whose territory protection is sought (see answer to I.A.4 above). Thus, no “either / or” but a cumulative application of the laws of all countries possibly affected by the overall act of exploitation applies; the country from which the communication originates is a protecting country as well as the country or countries in which the communication is received.

Each country decides independently whether a relevant act of use of a right is committed on its territory, establishing the initial ownership of those domestic rights also independently. Each protecting country is allowed to apply its domestic copyright or neighboring rights law to domestic acts of exploitation and to decide, whether, for example, the originating act establishes an act of use or not.<sup>40</sup>

This means that, if a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), the contract might affect rights in the country from which the communication originates as well as rights in the country or countries in which the communication is received. The substantive copyright or neighboring rights law underlying the initial ownership is then determined according to the law of the country from which the communication originates with respect to the rights (possibly) affected in this country, and it is determined according to the law of the country (or countries)

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<sup>37</sup> BGH GRUR Int. 1998, 427, 429 - Spielbankaffaire - with further references.

<sup>38</sup> Ulmer, Immaterialgüterrechte, S. 39 f.; Schricker/Katzenberger, Urheberrechtsgesetz, 2. Ed., 1999, Vor §§ 120 ff. note 129; Möhring/Nicolini/Hartmann, Commentary to the German Copyright Act, 2. Ed, 2000, Vor §§ 120 ff. note 15; all with further references.

<sup>39</sup> For example Schack, Urheber- und Urhebervertragsrecht, 2. Ed., 2001, p. 408 with further references.

<sup>40</sup> BGH GRUR Int. 2003, 470, 471 f. - Sender Felsberg - with further references.

in which the communication is received with respect to the rights (possibly) affected in this (these) country (countries).

A special regulation is provided by the European Satellite Directive for European satellite transmissions; the directive harmonizes the satellite transmission right in the substantive copyright law of the member states of the European union in such a way that this right is deemed to be affected only in the country of the origin of the transmission.<sup>41</sup> In practice, this leads to the effect that only the substantive copyright law of this country determines who is the initial owner of the right.

## II. LAW APPLICABLE TO TRANSFERS OF RIGHTS

### A. Transfers by operation of law

1. *Does your country's law or caselaw give local effect to a transfer by operation of a foreign country's law?*

#### a. *by expropriation*

Absent binding international treaties German law denies an expropriation any effects outside of the country of expropriation.

German international private and public international law acknowledges the effects of an expropriation only with respect to claims:

- which have arisen out of an exploitation of the copyright or neighboring right on the territory of the country where the expropriation took place, and
- whose debtor either lives or owns property in the expropriating country.<sup>42</sup>

This leads to a splitting of the copyright or neighboring right, as the beneficiary of the expropriation has only become owner of the right with respect to domestic legal transactions within the expropriating country, while in all other countries the original rightowner, e.g., author or performer, reserves her ownership in the right.<sup>43</sup>

For example, the former Soviet Union's foreign trade monopoly could not hinder Alexander Solschenizyn to licence publishing rights for Western countries, as this monopoly could not have any effects outside of the Soviet Union's territory.<sup>44</sup>

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<sup>41</sup> See Art. 1 (2) lit. a and b Council Directive 93/83/EEC of September 27, 1992 (fn. 13 above).

<sup>42</sup> Cf. OLG München IPRspr 1958/59, p. 225, 227 seq.

<sup>43</sup> Cf. Schack, Urheber- und Urhebervertragsrecht, 2. ed, 2001, p. 352 seq.

<sup>44</sup> BGHZ 64, 183, 189 ff. - August Vierzehn; the foreign trade monopoly of the former Soviet Union being no "transfer" though but only restricting the right of disposal with respect to the copyright in a work: cf. Also in this respect OLG Hamburg GRUR Int. 1998, 431, 434, 436 - Feliksas Bajoras (Lithuanie); parallel case (Estonia) GRUR Int. 1999, 76, 79 f.

*b. bankruptcy*

There is, as far as can be seen, no specific case law with respect to this question.

In principle, German law would give local effect to a transfer by operation of a foreign country's law in the case of bankruptcy. Nevertheless, the transferability of rights would be determined according to the law of the country of protection.<sup>45</sup> In addition, mandatory rules for the protection of the author / performer would apply.

*c. divorce; community property*

There is, as far as can be seen, no specific case law with respect to this question.

In principle, German law would give local effect to a transfer by operation of a foreign country's law in the case of divorce and community property. Nevertheless, the transferability of rights would be determined according to the law of the country of protection.<sup>46</sup> Mandatory rules for the protection of the author / performer would apply.

*d. intestacy*

There is, as far as can be seen, no specific case law with respect to this question.

While the question whether the neighboring right can be inherited, is determined according to the law(s) of the country (countries) of protection,<sup>47</sup> the question to whom the neighboring right passes in case of intestacy is determined according to the "*lex successionis*,"<sup>48</sup> which is, according to Art. 25 EGBGB the law of the deceased performers' nationality.

*e. other (please explain)*

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<sup>45</sup> See the discussion on transferability in Part I, III. F. 1 above.

<sup>46</sup> See the discussion on transferability in Part I, III. F. 1 above.

<sup>47</sup> See for ex. Katzenberger IPRax 1983, 158, 160; Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. Ed., 2000, Vor §§ 120 ff. note 16.

<sup>48</sup> Schack, Urheber- und Urhebervertragsrecht, 2. Ed, 2001, p. 410; Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. Ed, 2000, Vor §§ 120 ff. Rn. 16.

B. Transfers effected by contract

1. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others); is the substantive copyright or neighboring rights law underlying the grant determined:*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others) the law underlying the grant is determined according to the principle of the country (countries) of protection.<sup>49</sup> This is established practice of the courts and the dominant opinion in German doctrine. There is no exception for contracts which grant the right to communicate or make an audiovisual work available via a transmission from one country to another (or others).

This means that, if a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), the substantive copyright or neighboring rights law(s) underlying the grant is (are) determined according to the domestic copyright or neighboring rights law of each country, which is (possibly) affected in case the granted transmission rights would be exercised.<sup>50</sup>

Thus, German courts would determine the substantive copyright or neighboring rights law underlying the grant with respect to the country from which the communication originates as well as with respect to the country or countries in which the communication is received. There is no choosing (or “either/or” between the laws of those countries. Instead, the laws of all countries possibly affected by the exploitation are relevant, each for the grant of rights within the specific country’s territory.<sup>51</sup>

2. *What law governs issues going to the scope and extent of a transfer:*

- a. *The (single) law of the contract?*
- b. *The substantive copyright/neighboring rights laws of the countries for which the rights are granted?*

According to the general principles of German contract law contracts granting a transfer of (neighboring) rights consist in fact of two distinct legal transactions, the “obligatory agreement” containing the stipulations to which the parties have obliged themselves, for example to transfer a right, and the “executory agreement,” with which the obligation between the parties, for example the actual transfer of the right, is executed

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<sup>49</sup> BGH GRUR 1988, 296, 298 - GEMA Vermutung IV; BGHZ 118, 394, 397 f. - Alf; BGHZ 136, 380, 386 - Spielbankaffaire; OLG Hamburg UFITA 26 (1958) 344, 350 - Brotkalender; OLG München GRUR Int. 1960, 75 f. - Le mans; LG Stuttgart Schulze LGZ 88, 6 f. – Puccini.

<sup>50</sup> Cf. BGH GRUR Int. 2003, 470 – Sender Felsberg; LG Stuttgart, GRUR Int. 1995, 412 – Satellitenrundfunk.

<sup>51</sup> Cf the references in Fn. 50 above.

While it is the unanimous opinion in German legal doctrine and case law that, as far as the “obligatory agreement” between the parties is concerned, the (single) law of the contract is applicable to arising legal questions concerning the contractual obligations between the parties, the opinion is divided with respect to the law(s) applicable to the “executory agreement”.

The established practice of the courts as well as the dominant opinion among German copyright scholars holds that the (single) law of the contract is also applicable to questions of the “executory agreement” (“*Einheitstheorie*”), the reservation being that questions relating to the “(copy)right itself” always have to be answered according to the law of the country (countries) of protection.<sup>52</sup> The dissenting opinion of in particular scholars of international private law wants to apply the law of the country-of-protection to the “executory agreement” as a whole (“*Spaltungstheorie*”).<sup>53</sup>

Nevertheless, according to the prevailing “*Einheitstheorie*,” questions relating to the scope and extent of a contractual transfer have been determined according to the single law of the contract, such as:

- the territorial scope of a transfer;<sup>54</sup>
- the duration of a transfer;<sup>55</sup>
- a possible termination of the rights;<sup>56</sup>
- whether a specific right is included in the transfer;<sup>57</sup>
- general questions regarding the interpretation of a contract;<sup>58</sup>

In contrast, the following questions have been qualified as relating to the “(copy)right itself,” with the effect that they must be answered according to the law of the country of protection:

- the transferability of the right;<sup>59</sup>
- whether a bona fide purchase is possible;<sup>60</sup>

<sup>52</sup> OLG Frankfurt/M GRUR 1998, 141, 142 - Mackintosh-Entwürfe; OLG München Schulze OLGZ 2, 4 ff., 7 ff. - Dreigroschenroman.

<sup>53</sup> See for example MünchKomm/Kreuzer, Nach Art. 38 EGBGB, Anh. II note 20, 22, 116.

<sup>54</sup> OLG München Schulze OLGZ 2, 4 ff., 7 ff.; BGH GRUR 1959, 331, 333 (application of Dutch law to a contract concerning German exploitation rights).

<sup>55</sup> LG Stuttgart Schulze LGZ 88, 6 f. - Puccini(application of Italian law to a contract concerning German exploitation rights).

<sup>56</sup> OLG München Schulze OLGZ 2, 4 ff., 7 ff.; ebenso BGH GRUR 1959, 331, 333 (application of Dutch law to a contract concerning German exploitation rights).

<sup>57</sup> OLG München Schulze OLGZ 8, 7 ff. - Papaveri e Papere (application of Italian contract law to the question whether the an exclusive adaptation right has been granted for Germany); OLG Hamburg UFITA 26 (1958) 344, 350 -Brotkalender (application of Swiss contract law to the interpretative question what rights had been granted for Germany as country of protection); OLG Frankfurt/M Schulze OLGZ 183, 12 - Das Millionenspiel (application of US law to the extent of the contractual grant of an adaptation right).

<sup>58</sup> OLG München GRUR Int. 1960, 75 f. - Le mans (application of French law to the interpretation of a transfer agreement).

<sup>59</sup> BGH GRUR 1988, 296, 298 - GEMA Vermutung IV; BGHZ 136, 380, 386 - Spielbankaffaire; OLG München GRUR Int. 1960, 75 f. - Le mans; LG Stuttgart Schulze LGZ 88, 6 f. - Puccini.

<sup>60</sup> Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. ed, 2000, Vor §§ 120 ff. note 42.

- whether in case of multiple transfers the priority principle applies or some other principle applies.<sup>61</sup>
3. *What law governs issues going to the validity of the form of a transfer:*
- a. *The (single) law of the contract?*
  - b. *The substantive copyright/neighborhood rights laws of the countries for which the rights are granted?*

According to case law and the dominant opinion in German legal doctrine, the validity of the form of a transfer is determined according to the general rule of German international private law with regard to the validity of the form of contracts, Art. 11 EGBGB.<sup>62</sup> This holds true for the “obligatory agreement” as well as for the “executory agreement”. In particular, the validity of the form of the latter one is not determined by the country of protection.<sup>63</sup>

This general rule of German international private law regarding the validity of the form of contracts determines the law applicable to the validity of the form of contracts according to the principle of “*favor negotii*.”

- According to Art. 11 (1) EGBGB a contract, which is concluded between two parties being in the same country at the time of concluding of the contract, is valid, if it meets- alternatively - either the provisions as to form of the law of the country in which the contract has been concluded (law of the place of the contract, “*locus acti*”), or the provisions as to form of the law of the contract.
- If the contracting parties are in different countries at the time of conclusion of the contract, the contract is valid, if it either meets the provisions as to form of the law of either one of the two countries of the parties or the provisions as to form of the law of the contract (Art. 11 (2) EGBGB).
- If the contract is concluded not by a party herself, but by a representative, the place of the representative instead of the place of the party is relevant for the application of paragraphs 1 and 2.

The rule in Art. 11 EGBGB is neither prescribed by European law nor a binding conflicts rule in other respect. Therefore, the parties to a contract may –if they have a choice as to the contract law in general– also determine the law applicable to the validity of the form of their contract.

Thus, for example, they may exclude the alternative applicability of the law of the place of the contract or of another law which is relevant according to Art. 11 (1) EGBGB.<sup>64</sup> Or they could also determine that the law of the place of the contract shall be the only law relevant for the validity of the form of the contract.

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<sup>61</sup> Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. ed, 2000, Vor §§ 120 ff. note 43.

<sup>62</sup> BGH GRUR 1956, 135, 138 - Sorrell and Son.

<sup>63</sup> BGH GRUR 1956, 135, 138 - Sorrell and Son.

<sup>64</sup> Cf. BGHZ 1957, 337.

There are two exceptions to the above described general rules:

- The law of the country of protection applies to the question whether a contract needs, in order to be valid or to be exercised against third parties, to be registered in a public register.<sup>65</sup>
- The validity of the form of employment contracts.

### C. The Role of Mandatory Rules and Ordre Public

1. *Do mandatory rules (lois de police) automatically apply local law to local exploitations made under a foreign contract?*

We assume that the implied “nationality” of a contract is determined as follows: it is either the law chosen by the parties or, absent any choice of law, the law determined applicable by the rules of domestic international private law regarding contracts. Thus, we assume here, that a contract is - from the German perspective - a “foreign contract,” if the parties have either chosen a law other than German law as contract law, or if the German statutory rules of international private law concerning the law applicable to contracts (Art. 27 *et seq.* EGBGB) result in application of a law other than German law as contract law.

From the perspective of a specific country’s national law the above question contains in fact several questions, which may be answered differently:

- a. Application of mandatory rules of German law to a “foreign” contract, if Germany is the country of exploitation.
- b. Application of mandatory rules of the law of a foreign country to a “German” contract, if the foreign country is the country of exploitation.
- c. Application of mandatory rules of the law of a foreign country no. 1 to a contract of a foreign law no. 2, if country no. 1 is the country of exploitation.

The answers in the above cases are as follows:

- a. Application of mandatory rules of German law to a “foreign” contract, when Germany is the country of exploitation.

Yes, according to the general rule of international private law in Art. 34 EGBGB, mandatory rules of German law do apply to copyright contracts even if the parties have chosen a law other than German law as contract law or if, absent a choice of law by the parties, foreign law is applied to a contract on the basis of Art. 27 *et seq.* EGBGB.

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<sup>65</sup> Schricker/Katzenberger, Urheberrecht, 2. ed., Vor §§ 120 ff. Rn. 150 with further references



Nevertheless, the application of German mandatory rules requires a specific “domestic element” (*Inlandsbezug*) of the case, which justifies German law prevailing over foreign contract law.

With respect to the question, in what instances the connection of the facts of a case to Germany are close enough to establish a sufficient “domestic element,” the opinions differ:

- Some are of the opinion that German mandatory rules shall (only) apply if, absent a choice of law by the parties, German law would be applicable as contract law according to the statutory rule of conflicts law in Art. 28 EGBGB.<sup>66</sup>
- Others are of the opinion, that German mandatory rules shall (only) be applied where the exploitation of German copyrights or neighboring rights is concerned<sup>67</sup> This means that if for example, a German performer and a French exploiter have concluded a contract concerning the exploitation of a certain performance in France, Italy and Germany and chosen French law as contract law, the performer could only recall the exploitation rights according to § 41 CA with respect to Germany.<sup>68</sup>
- According to a third opinion,<sup>69</sup> German mandatory rules shall always be applied to the whole contract if either:
  - German exploitation rights are concerned;
  - and/or the domicile or residence of the author/performer is in Germany;
  - and/or the contract was concluded in Germany.

b. Application of mandatory rules of foreign law to a “German” contract.

On the other hand, the question arises, whether, if the parties have chosen German law as contract law, or if in case of the absence of a choice of law the German conflicts rules result in application of German law as contract law, mandatory rules of another country would have to be applied by a German court to exploitations made in the other country.

- If, absent a choice of law by the parties, German law is contract law according to Art. 28, 29 (2) or 30 (2) EGBGB, there would be no application of foreign mandatory rules to foreign local exploitations.
- If the parties have chosen German law as contract law, mandatory rules of the law of a foreign country of exploitation could be applied to local exploitations in that country under the condition of Art. 27 (3), 29 (1), 30 (1) EGBGB.<sup>70</sup>

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<sup>66</sup> Cf. Loewenheim ZUM 1999, 923, 927.

<sup>67</sup> Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. ed, 2000, Vor §§ 120 ff. note 46.

<sup>68</sup> Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. ed, 2000, Vor §§ 120 ff. note 46.

<sup>69</sup> Schricker/Katzenberger, Urheberrechtsgesetz, 2. ed, 1999, Vor §§ 120 ff. note 167 ff.

<sup>70</sup> Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. ed, 2000, Vor §§ 120 ff. note 47.

2. *Describe the instances in which mandatory rules apply to transfers of rights by audiovisual performers.*

For a provision being classified as “mandatory rule” it is required that its regulation has been put up in the public interest and not only in the interest of the parties to the contract.

In particular, a provision of the national law can be established with the effects as a “mandatory rule” of law according to Art. 34 EGBGB by the explicit will of the legislator.

For copyright the necessary public interest can be assumed for such regulations which protect the author or performer as the regularly weaker party to the contract in order to encourage them to enter into licensing agreements with respect to their works or performances. This is because via the stimulation of the conclusion of licensing contracts, the regulations for the protection of the author / performer as the regularly weaker party to a contract serve the spread of the works and performances concerned and, thus, public interests.

In this sense the following regulations are considered as mandatory rules of German copyright law by the dominant German doctrine:

- the provisions concerning the claim of the author/performer for equitable remuneration and additional participation of the author/performer according to §§ 32 and 32a CA.<sup>71</sup> § 32 b CA contains a specific regulation for the scope of applicability of §§ 32, 32a CA in an international context: according to § 32b CA (mandatory application), §§ 32, 32a CA have mandatory application, 1. if but for a choice of law the use agreement would be governed by German law or 2. insofar as the contract concerns substantial use in the territory governed by this law.
- the provision concerning the unwaivable termination right according to § 40 (1) phrase 2 CA and § 40 (2) phrase 1 CA.<sup>72</sup>
- the rule on the purpose of grant of exploitation rights (“*Zweckübertragungsgrundsatz*”) in § 31 (5) CA according to which “if the types of use were not specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract.”<sup>73</sup>

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<sup>71</sup> Beschlussempfehlung, BT-Drucksachen 14/8058, p. 20; Wandtke/Bullinger-v. Welser, Vor §§ 120 ff. note 25 (Praxiskommentar zum Urheberrecht, 2002), cf. the differentiation between Art. 34 EGBGB and § 32b CA by Hilty/Peukert, Das neue deutsche Urhebervertragsrecht im internationalen Kontext, GRUR Int. 2002, p. 643, 648 seq.

<sup>72</sup> Schricker/Katzenberger, Urheberrecht, 2. Ed., 1999, Vor §§ 120 ff. note 166; Fromm/Nordemann, Urheberrecht, 9 Ed., 1998, Vor § 120, note 8.

<sup>73</sup> Schricker/Katzenberger, Urheberrecht, 2. Ed., 1999, Vor §§ 120 ff. note 166; Fromm/Nordemann, Urheberrecht, 9 Ed., 1998, Vor § 120, note 8; Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. Ed. 2000, Vor §§ 120 ff, note 45.

- statutory remuneration right for cable retransmission § 78 (1) no. 2 in connection with §§ 78 (4), 20b (2) phrase 2 and 3 CA, rental § 77 (2) phrase 2 in connection with § 27 (1) CA, the broadcasting and public communication of the performance in the cases as specified under § 78 (2), (3) CA, the statutory remuneration rights according to 45a, 46, 47, 49, 52, 52a, 54 in connection with §§ 83, 63a CA.<sup>74</sup>

Also the provision concerning the right of withdrawal/revocation due to non-exercise or changed conviction according to § 41 CA or § 42 CA as well as the provision concerning the invalidity of the grant of rights for unknown types of use and corresponding obligations according to § 31 (4) CA belong to the mandatory rules of German copyright law. But they do not apply to audiovisual performers' rights.<sup>75</sup>

3. *Do local courts, having initially identified the applicability of the law of the foreign contract, nonetheless apply local law on grounds of public policy/ordre public?*

Yes, in principle.

According to Art. 6 EGBGB a rule of substantive law of a foreign country is to be not applied, if the result of its application apparently contradicts essential principles of German law. In particular such a foreign rule of law is to be not applied if its application cannot be reconciled with the fundamental rights contained in the German constitution. If the absence of a rule in a foreign law leads to a result which cannot be tolerated, this is equivalent to an existing rule in a foreign law.

Thus, Art. 6 EGBGB allows German courts to correct a substantially unjust result, which has been caused by application of a foreign law, which itself has been invoked by application of the German rules of international private law.

4. *Describe the instances in which the ordre public exception applies to invalidate transfers of rights by audiovisual performers*

There is, as far as can be seen, no case law with respect to this question.

Instances in which the ordre public exception might apply to invalidate transfer of rights by audiovisual performers are severe infringements of the performers' moral rights or confiscations of their rights, i.e., expropriations without any compensation.<sup>76</sup>

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<sup>74</sup> Fromm/Nordemann, Urheberrecht, 9, Ed., 1998, Vor § 120, note 8;  
Möhring/Nicolini/Hartmann, Urheberrechtsgesetz, 2. Ed. 2000, Vor §§ 120 ff. note 45.

<sup>75</sup> See the discussion in Part I, I.B.3.d.

<sup>76</sup> See for ex. Schack, Urheber- und Urhebervertragsrecht, 2. ed, 2001, p. 353.