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Copyright Issues

Sound Recordings from German Prisoner of War Camps of World War I and World War II

Christian Czychowski [1], Lea Riechers

[1] *University of Potsdam, Faculty of Law, Germany*

Abstract Berlin has special archives that are of considerable importance not only historically but also politically, especially in present times. The Sound Archive of the Humboldt University of Berlin and the Berlin Phonogramm-Archiv (hereafter BPhA) contain voice recordings from the beginning of the twentieth century as well as sound recordings from prisoner of war camps of the German army in World War I and World War II. These recordings can be described as rather "sensitive" (Timurgalieva et al. 2015:34). They are, thus, archives with the earliest sound recordings in Europe. This can play an important role particularly in view of the discussions about looted art and the restitution of works of art that came to Germany in connection with the colonial period. The unique shared history of the Sound Archive and BPhA in the context of the recording activities of the Phonographic Commission from 1915 to 1918 will create opportunities for cooperation (Humboldt n.d.b). Legal aspects are becoming increasingly important in the context of the possible use of the recordings with a view to further, future university research and teaching as part of the culture of remembrance (Humboldt n.d.c). For these reasons, it is also worth taking a look at the copyright assessment of these recordings.

Introduction

The recordings to be considered are probably all essentially from the recording period from 1890 to 1943. It is assumed that the recordings were made involuntarily and without an explicit grant of rights. Moreover, they have not yet been published in their entirety. Aware of the fact that the BPhA and the

Sound Archive also house recordings other than those of prisoners of war, the focus of the legal consideration here will still be particularly on those of prisoners due to the special coercive situation under which they were recorded.

Furthermore, in the following, we assume that the people recorded are considered "non-imperial" in the sense of § 55 LUG (Law Concerning Copyright in Works of Literature and Sound Art of 1901). According to the former § 3 RuStaG of 1913 (Act Concerning Nationality and Imperial Affiliation of 1913), only people who acquired German citizenship by birth in Germany, by legitimation, by marriage, for a German by admission or for a foreigner by naturalization were considered "imperial." Conversely, people, especially the prisoners discussed here as possible rightsholders, who did not meet one of the requirements above were, therefore, considered as "non-imperial."

Course of consideration

In the following, performance protection and copyright issues regarding the usability of the sound recordings will be discussed. It will turn out that neither the people recorded, nor the phonogram producers can assert their own rights or copyrights related to the recordings due to the expiration of the protection period since 31 December 2015. In addition, probably only special recordings can be considered as work in the sense of copyright law. There are only limited possibilities for the archiving institutions, such as the BPhA or the Sound Archive in Berlin, to use the recordings, such as digitizing them for research and teaching. However, the institutions may have acquired their own ancillary copyrights in individual cases in the sense of bequeathed works through independent publication of the recordings. In conclusion, the question remains whether a revival of the protective rights can be regarded as an instrument of responsible handling of the recordings.

The first question is whether the people recorded, as performers, enjoy protection under related rights in the recordings and if they or the phonogram producers are entitled to possible copyrights to the recordings. This is followed by a discussion of copyright issues related to the presentation of the sound recordings in a museum context and the resulting possible acqui-

sition of rights by the publishing institutions. The review then concludes with a brief moral evaluation of possible term extensions.

Related rights

Related rights exist alongside copyright and grant as neighboring rights, among others, the right of reproduction, the right of making available to the public, or the right to be named, for example the performers. They are governed by §§ 73 et seq. of today's Copyright Act (UrhG), which first came into force in 1966.

However, during the recording period from 1890 to 1943 considered here, the protection of ancillary rights was not as granted as it is today. In this respect, a transitional arrangement provides only a partial remedy. According to § 129 (1) sentence 1 and 2 UrhG, ancillary copyrights are only applicable under the UrhG to works created prior to the entry into force of the UrhG, to the extent that protection already existed under the law then applicable. Taking this transitional provision into account, the provisions of the LUG from 1902 and 1910, thus, play a decisive role.

According to § 55 LUG, rights were obtained in the case of non-imperials by publication in Germany. However, regarding the performers' ancillary copyright, the case law granted them a fictitious arranger's copyright according to § 2 (2) LUG. The Hanseatic Higher Regional Court, for example, also considered the possibility of the creation of fictitious arranger's copyrights as protectable subject matter within the meaning of § 129 (1) UrhG for foreigners as non-nationals within the meaning of § 55 (1) LUG pursuant to § 2 (2) LUG.[1] According to § 125 (2) UrhG, such protection also exists for foreign performers.

a) Possible acquired ancillary copyrights of performers

If the requirements of § 129 (1) UrhG and § 135 UrhG are met, they result in the copyright protection being converted into a performance protection right within the meaning of §§ 73ff. UrhG. In this respect, however, the "right to be named" in § 74 (1) UrhG, the "recording right" within the meaning of §

77 (1), and a "live broadcasting right" from § 78 (1) No. 2 UrhG do not apply to the sound recordings, since these rights were not yet protectable under the LUG at the time of recording, taking into account the exception provision of § 129 (1) UrhG (Lauber-Rönsberg et al. 2022e:§ 129 UrhG, Marginal no. 7) discussed above. §§ 11 ff. LUG mainly only included the right to determine the reproduction, commercial distribution, and, subject to § 22a LUG, the right to determine the public performance and broadcasting of the sound device.[2] The court claims that the broadcasting right is a copyright of its own kind "which is to be included by way of an extended legal analogy in the exclusive rights granted to the author under § 11 LUG without regard to the appearance of the work"[3] (Kleine 1960:580). To the extent that live broadcasts were in question, however, the performing artist's right to perform could not be inferred from § 2 (2) LUG (cf. Kleine 1960:580).

According to this restriction, therefore, only the distribution and reproduction of sound carriers under § 77 (2) UrhG and the right of making available to the public under § 78 (1) No. 1 UrhG remain as possible acts of use, since these were already subject to legal protection under § 11 (1) sentence 1 LUG in conjunction with § 2 (1) LUG of 1910 (Lauber-Rönsberg et al. 2022e:§ 129 UrhG, Marginal no. 7).

b) Expiration of the term of protection since 31 December 2015 and its historical development

Notwithstanding this, however, the protection periods for the proprietary components of the property rights of the respective performing artists have already expired. Initially, according to § 29 LUG 1901, the term of protection in the case of non-publication was 30 years after the death of the performing artist. In 1934, this was extended to 50 years by the Act on the Extension of the Protection Periods in Copyright Law of 13 December 1934 (Freudenberg et al. 2022:§ 135a UrhG, Marginal no. 2).

With the entry into force of the Copyright Act in 1966, the protective rights may, thus, still have existed for a large section of the performing artists – at least those who were still rightsholders in 1971. For cases in which the new Copyright Act has led to a shortening of the term of protection,

according to § 135a UrhG the beginning of the new term is fixed on 1 January 1966 by dating the event – here, the day of performance – triggering the term on this date. This applies to all cases in which the change in the law has led to an advancement of the end of protection and is, consequently, also applicable to most of the sound recordings to be dealt with here.

The Copyright Act of 1966 provided in § 82 UrhG a term of protection of 25 years from the performance or appearance of the work and no longer relied on the death of the artist but, thus, on the day of the recording. Consequently, the 25-year protection period applicable from 1965 would have expired on 31 December 1990, at the latest. However, the term of protection under § 82 UrhG was raised again to 50 years with the copyright reform of 1990. According to § 137c (1) UrhG, this applies to all cases in which – as here – the term of protection was still running in 1990. This means, however, that the term of protection of the sound recordings here expired on 31 December 2015, at the latest.

The renewed extension of the term of protection to 70 years under § 82 UrhG, which, in principle, would also be applicable to old cases under § 137m (1) UrhG, does not apply due to the retention of the 50-year term for unpublished recordings under § 82 (1) sentence 3 UrhG.

In this respect, it can also be assumed that the term of protection will expire much earlier, since § 137a sentence 2 UrhG sets the term previously applicable under § 29 LUG 1934 at 50 years from the death of the artist as the maximum period. This would cover all circumstances in which the artist died before 1966.

c) Original or derivative protection rights of the phonogram producers?

However, the producer of the phonogram is not entitled to a performance protection right within the meaning of § 85 UrhG under the provisions of § 129 (1) UrhG, because the latter were not yet subject to the protection of the LUG at the time of the recordings. The extra copyright protection under § 826 of the German Civil Code (BGB) or the Unfair Competition Act (UWG)

is not sufficient for this purpose either (Schulze et al. 2022b:§ 85, Marginal no. 1). Finally, the protection periods for the phonogram producer have also expired, since an analogous application of the regulations cannot be considered.

A transfer of the fictitious arranger's copyright of the performing artists, in the sense of the interpreters to the phonogram producer as the recording person or institution, can probably also be ruled out due to the special recording circumstances in the prison camps.

The interim results are as follows: The recordings of the prisoners in prisoner of war camps from World War I and World War II should have, thus, been legally in the public domain since 1 January 2016. In this respect, there are also no legal obligations for institutions using the recordings today to name the respective people as performing artists. Recording producers cannot invoke original or derivative ancillary copyrights either. The right to prohibit the distribution of the recordings can, therefore, only arise from a copyright itself.

Copyright valuation

The starting point of the copyright assessment is the question of whether the respective recordings are works within the meaning of § 2 UrhG. In this respect, the work and the related property rights are fundamentally juxtaposed, since the performances – and the musical performances – are fundamentally different in each case (Grünberger et al. 2020:§ 73, Marginal no. 37).

a) Sound recordings as individual creation in the meaning of § 2 UrhG

Copyright protection could, thus, only prevent exploitation if a work within the meaning of § 2 UrhG was presented on the old recordings. This can take the form of both the rendition of an existing work and the improvisation of a new work created ad hoc. However, the classification of the objects on the sound recordings as independent works is not likely to be successful, since this depends on a specific individual performance, which, for example, does

not exist in the case of the mere reproduction of folk songs or the recitation of individual words in one's own language.

In this respect, individual words and signs do not enjoy copyright protection for a lack of originality.[4] The shorter the respective formulation, the more it must stand out from the usual formulation by an imaginative or original choice of words or line of thought (Schulze et al. 2022a:§ 2 Marginal no. 83). If, moreover, the prisoner had only a manuscript to read, only the manuscript itself would constitute the work, in which the prisoner would then also only exercise the right of performance within the meaning of § 19 (1) UrhG (Ahlberg et al. 2022:§ 2 Marginal no. 8). Also, the performance of rhythmic sounds does not constitute a work within the meaning of § 2 UrhG (Dreyer et al. 2018:§ 2 UrhG, marginal no. 51). Since the adaptation of a musical work regularly takes over the melody of the adapted work in a recognizable manner (cf. § 13 (2) LUG, § 24 (2) UrhG), insofar as the unchanged adoption of the melody is intended by the adaptor, his/her personal intellectual creation can only result from other means of musical shaping than that of the melody.[5] A prerequisite for the assumption of a personal intellectual creation is that the instrumentation chosen by the composer has a sufficient individuality that distinguishes it from the unprotected musical common property and the performance that is solely a matter of craftsmanship or routine[6] (Loewenheim et al. 2020a:§ 2 UrhG, Marginal no. 26; Loewenheim et al. 2020b:§ 2 UrhG, Marginal no. 146). Thus, for example, the adaptation of the melody line to the existing vocal possibilities, which is common among singers, is a purely technical and, thus, unprotectable performance (cf. Hertin et al. 2018:§ 49, marginal no. 58).

Only individual cases in which, for example, prisoners transmit personal messages or anecdotes or even their own poems and, thus, perform a personal-creative effort as a prerequisite of the concept of work, are, thus, to be considered here.

b) Legal consequences and protectability of individual recordings

Assuming that some of the old recordings are exceptional works of individual creation and personal performances, the question of the specific consequences of their protectability under copyright law now arises.

As discussed at the outset, protection under § 55 LUG in the case of non-nationals requires, in principle, a domestic appearance. As with related property rights of the performing artist, on the other hand, potential protection is sufficient (Schaefer et al. 2022:§ 129 UrhG, marginal no. 2).

Within the scope of its protection, today's copyright law distinguishes between personal rights, such as the right to be named (§ 13 UrhG), the right of publication (§ 12 UrhG) and exploitation rights, such as the right of reproduction under § 16 UrhG.

According to § 64 UrhG, these rights expire 70 years after the death of the author and should, therefore, initially be applicable to those authors who were still alive in 1951. However, the transitional provision of § 129 (1) UrhG only allows the property rights mentioned above to continue to apply today if they already existed at the time of recording. However, since the legislator of the LUG of 1910 had not yet provided any protection for the naming of authors for these old cases in §§ 11ff. LUG (Peukert et al. 2020:§ 13 UrhG, Marginal no. 3) there is, therefore, no legal obligation to name the author today.

It is particularly relevant that the recordings were not only made without granting rights but could also have been made in morally questionable situations, considering the prevailing circumstances at prison camps. Thus, it may be the case that the prisoners felt obliged to make their language available out of a pressure situation or fear, so that the voluntariness of these recordings must, at least, be doubted. A correspondingly voluntary (comprehensive) granting of rights is unthinkable, so that – assuming protection of the work – exploitation would require consent or a corresponding restriction.

c) Legal framework and handling of published and unpublished sound recordings for institutions

Copyright law permits the use of works in a restricted manner within the framework of exceptions and distinguishes between published and non-published work.

In the case that a contemporary work has already been published, the possible museum use is digitization in accordance with §§ 60e, 60f UrhG. Dissemination in the form of making the recordings accessible at "terminals on the premises" of the institutions is permissible under §§ 60f (1), 60e (1), (4) sentence 1 UrhG, insofar as this serves the institution's users for research or private studies.

On the other hand, comprehensive making available to the public pursuant to § 19a UrhG is not permitted. However, according to § 60c (1) No. 1 UrhG, the work may be made publicly accessible to certain groups of people if this serves non-commercial scientific research. No profit may be made from the research as such (Lüft et al. 2022:§ 60c UrhG, Marginal no. 12). In view of the exception in § 60c (3) var. 3 UrhG, which permits the use of other works of small extent in their entirety, the relevant sound recordings may, thus, also be copied in their entirety. This is because songs and poems are also listed as "other works of small extent" within the meaning of the provision (Grübler et al. 2022:§ 60c UrhG, Marginal no. 15). A limit of 5 minutes, for example, for works of music is envisaged according to the explanatory memorandum to the Act.[7] The author's obligation to pay remuneration under § 60h UrhG remains in place.

The author's sole right of publication for unpublished works, on the other hand, under § 12 UrhG precludes exploitation.

Publication in accordance with the principles on orphan works under § 61 UrhG also fails under § 61 (3), (1) UrhG because the sound recordings have not yet been published. Moreover, the reproduction and making available to the public of orphan works pursuant to § 61 (4), (1) sentence 1 UrhG is also

precluded by the fact that they have not yet been published with the permission of the copyright holder. In addition, no circumstances are apparent proving that the consent of the rightsholder to the use of the sound recordings could be assumed in good faith.

The following interim results can be noted: If the made sound recordings – to the extent that they enjoy copyright protection at all – have not yet been published, exploitation is precluded by § 12 UrhG. If, on the other hand, the potential works have been published, individual provisions on limitations in §§ 60e ff. UrhG are relevant.

Possible scientific edition and protection according to § 71 UrhG for the publishing scientific institution

In the case of a publication of the recordings, § 70 UrhG for scientific editions and § 71 UrhG for bequeathed works also come into consideration as related property rights for the sighting institutions, such as the Sound Archive and the BPhA.

As a sighting institution, the Sound Archive offers to make individual sound recordings accessible in mp3 and WAV format only upon proven, scholarly request and prior registration and, in return, asks for the submission of translations, transcriptions, or interpretations of the recordings by the individual user. On the other hand, direct listening to individual recordings without a request is impossible on the Sound Archive website, except for a few exemplary sound samples. However, the Sound Archive also actively supports the use of recordings for exhibitions, and radio and television reports upon request (cf. Humboldt, n.d.a).

In 2018, in collaboration with the Sound Archive and the AMAR Foundation in Beirut, the BPhA enabled the direct acoustic experience of individual sound recordings through "soundwalks" as part of conferences and film events within the exhibition "Listening to the World" (Humboldt, n.d.d). Furthermore, the so-called "Listening Space" in the exhibition space of the Humboldt Forum Berlin offers the public the opportunity to listen at regular intervals to changing sound sequences in documentary discussion (Hum-

boldt, n.d.e). However, the "sensitive" recordings from prisoner of war camps discussed here are not reproduced there. Assuming that these sound recordings other than by prisoners have not previously been reproduced elsewhere to the public, the BPhA would also be entitled to ancillary copyright according to § 71 (1) UrhG.

a) Related right of exploitation according to § 71 UrhG for scientific institutions

The exploitation rights obtained under § 71 UrhG relate to the respective specific content and, thus, not to the recording as such. The rights are adjacent to each other and independent of each other. According to § 71 (1) sentence 1 UrhG, the exclusive right of exploitation is granted to anyone who, after the expiry of the copyright, allows a work that has not been published to be published for the first time or reproduces it publicly for the first time. § 71 (3) UrhG provides 25 years of protection for this exploitation right. This also applies to unpublished works that were never protected in Germany but whose author has been deceased for 70 years and, thus, the term of protection would have expired. The achievement recognized by § 71 UrhG, thus, lies in the fact that the publisher of such a work secures its existence for the general public as a permanent possession (Stieper 2012:1088).

The alternative of first-time public communication, therefore, has significance for digitization projects that make previously unpublished public domain works available online for the first time (Stieper 2012:1088). These activities are not likely to constitute "communication to the public" within the meaning of the provision because the respective recordings are not available to the public and not accessible to anyone at the internet address of the scientific institutions at hand. However, the provision of the recordings for playback in radio broadcasts is likely to establish a right of exploitation for the Sound Archive, since they are likely to have "caused" the public playback to a significant extent.

The acquisition of a performance right under § 71 (1) UrhG initially requires that a work has not yet been published, which is assumed here. The burden of proof for the non-appearance lies, in principle, with the

party invoking the acquisition of rights under § 71 UrhG, i.e., with the sound archivist.[8]

aa) No existing copyright of respective works

§ 71 (1) sentence 1 and 2 UrhG require that no copyrights exist in the respective works. This is likely to be the case for the works with a sufficient level of creation and individuality, as their term of protection – except for those still alive in 1951 – is likely to have already expired.

bb) Right of exploitation by first-time appearance of the sound recordings within § 6 (2) UrhG

The appearance of a work within the meaning of § 6 (2) UrhG presupposes that the original or physical copies have either been offered to the public or put into circulation (Lauber-Rönsberg et al. 2022a:§ 71 UrhG, marginal no. 13).

Since the storage of works in archives which are not open to the public and which – similar to the Sound Archive – only grant access upon proof of a special interest, does not constitute publication within the meaning of § 6 (1) UrhG[9] (Dreier et al. 2022:§ 6 UrhG, Marginal no. 11), the sending of individual mp3 files or WAV files with prior examination of proven interest cannot constitute an "appearance" as an offer to the public within the meaning of the provision. This is because the Sound Archive already limits the circle of those who can receive the sound recordings, to the extent that in return for the transmission of recording-specific materials, items, such as "translations, transcriptions or interpretations, as well as specimen copies of publications," are to be made available for the recordings. In addition, the Sound Archive reserves the right to "refuse requests for recordings if no interest in the content is apparent or if derogatory, nationalistic or racist forms of use are to be feared" (cf. Humboldt, n.d.a).

However, the recordings in the form of mp3 or WAV files could have been put on the market for the public by the "active support" in recording uses for broadcasts and performances. It is essential that the placing on the market is directed at the public, for which it can be sufficient if the rightsholder

directs her/himself to intermediaries of works, such as distributors, broadcasters, television stations or organizers of performances, provided that the "reproductions are made available for exploitation by the public and everything necessary is initiated for this purpose" (cf. Marquardt et al. 2022:§ 6 marginal no. 27). This is likely to be the case with the Sound Archive's statement on the website that it actively supports the "use of recordings for exhibitions, radio and television contributions," as the broadcast of the respective program also reaches a considerable number of people as the public within the meaning of § 15 (3) UrhG.[10]

The mere request to place orders for copies that are not yet available is insufficient.[11] However, the public offer is sufficient, based on which the delivery can take place immediately upon an order (Ahlberg et al. 2022:§ 6 UrhG, marginal no. 29). It is, thus, decisive that at the time of the demand of possible broadcasting stations, the duplicates of the recordings can be transmitted immediately, which is assumed here according to the statements of the Sound Archive to carry out a transmission after the proof of individual interest and the exclusion of pejorative, nationalistic, or racist forms of use. However, this requires an individual consideration for each recording.

If the bequeathed work appears in this way, the rightsholder is the publisher (Nordemann et al. 2018:§ 71 marginal no. 29; Loewenheim et al. 2020:§ 71 marginal no. 14; Meckel et al 2018: § 71 marginal no. 13) and, thus, the Sound Archive.

cc) Right of exploitation by public reproduction

However, the Sound Archive may have established a right of exploitation by offering to make recordings available for reproduction in radio broadcasts and by subsequently transmitting the recordings, since they may, thus, have significantly "caused" the public reproduction. According to the explanatory memorandum to the Act, the performance right under § 71 (1) UrhG is also available to the person who "arranges" the first public communication of a late work.[12]

In the case of performances or broadcasts, this may be the organizer her/himself (Nordemann et al. 2018:§ 71 marginal no. 29). However, insofar as her/his performance is limited to a purely publisher-like activity, it can also be the person who makes the bequeathed work available (Lauber-Rönsberg et al. 2022d:§ 71 UrhG, marginal no. 30). However, in view of the far-reaching legal consequences, in the case of communication to the public, the ownership of the rights will have to be decided on a case-by-case basis according to the weighting of the individual contributions (Thum et al. 2022d:§ 71 UrhG, marginal no. 32a).

In this respect, the establishment of a property right for the Sound Archive should depend on whether the respective broadcasters or exhibitors merely take on activities like those of a publisher when broadcasting the recordings. In that case, the performance right of § 71 UrhG would lie with the Sound Archive, since, as a publisher and "request source," it can decisively "cause" the public reproduction with the sole "dominion" over the transfer of the sound recordings and the prior examination of interests (Meckel et al. 2018:§ 71 marginal no. 13). The reward function of § 71 UrhG speaks in favor of this creation of protection for the respective viewing institutions, which can regularly be regarded as upstream "initiators" of the communication to the public from the publishers or broadcasting organizations. This is because the respective publisher, performer, or organizer, whose activity gives rise to the property right in the first place, regularly only performs her/his usual publishing or organizing service (Thum et al 2022d:§ 71 marginal no. 32a).

dd) Public reproduction "by permission" and duration of exploitation right

If the Sound Archive can, thus, decisively cause public reproduction, the work itself must still have been published "by permission" for the first time or publicly reproduced. The respective copies of the work should, therefore, not have been obtained by the Sound Archive in violation of ownership and possession rights (Wiebe et al. 2019:§ 71 Marginal no. 2), which should be assumed here. Finally, it should be noted that according to § 71 (3) sentence

1 UrhG, the right expires 25 years after the publication of the work or, if its first communication to the public occurred earlier, after that publication.

ee) Exploitation right of the BPhA

Considering the aforementioned conditions, the BPhA is, thus, also likely to have acquired a performance protection right pursuant to § 71 (1) UrhG through the public reproduction of individual sound recordings in the context of the exhibition "Listening to the World." However, this is subject to the assumption that individual recordings were made available to the unrestricted circle of visitors within the framework of the exhibition in the sense of the public domain, since it is assumed that museum access was available to anyone without access restriction. In this case, however, a specific search is also necessary and important to determine whether the recording in question has never been published. However, these questions are not the subject of this legal investigation, since a specific public reproduction of the recordings of the prisoners of war in question by the BPhA cannot be determined with certainty here.

b) Legal consequences following the reception of the right of exploitation according to § 71 (1) UrhG

Under the narrow conditions outlined above, the respective viewing institution under § 71 UrhG, thus, receives the same property rights as an author (Thum et al. 2022b:§ 71 UrhG, marginal no. 29). In terms of property rights, the ancillary copyright, thus, corresponds to the author's rights (Lauber-Rönsberg et al. 2022b:§ 71 UrhG marginal no. 27). The latter also extend to exploitation of the work in an edited form and are subject to the same restrictions as copyright under §§ 44a-63 UrhG (Thum et al. 2022b:§ 71 UrhG marginal no. 29).

The acquired ancillary copyright of § 71 UrhG is by no means an exception or limitation of copyright, but rather "rewards" the work and expense of the publisher or the person who publicly reproduces the recording. An incentive is created with § 71 UrhG to publish or publicly reproduce previously unknown works (Schmidt-Hensel 2012:3–4, 192, 193). Additionally, as dis-

cussed, the performance rightsholder receives the same rights as the author, with only the exception of the moral rights from §§ 12–14 UrhG, since no creative performance of the author's own has been made (Lauber-Rönsberg et al. 2022c:§ 71 UrhG Rn. 28).

Furthermore, the right to performance under § 71 UrhG is transferable in accordance with § 71 (2) UrhG, whereas the right to name under § 13 UrhG, the right of access under § 25 UrhG, and the claim for damages under § 97 (2) sentence 3 UrhG do not exist for this type of neighboring right (cf. Thum et al. 2022c:§ 71 marginal no. 31).

Protection comes into consideration in the case of old folk songs or fairy tales and similar content that was completely inaccessible in Germany. Since making the content available to the public is sufficient for this purpose, it can be assumed that this only applies to content that is unknown in the respective country of origin, since recordings should otherwise be found on video platforms or in documentaries. This means that in the case of "lost" or "missing" content, protection can be established, at least, if the scope of protection is essentially the same as under copyright law. In this respect, the fact that a work is considered lost could provide an indication that it has not been published (Götting & Lauber-Rönsberg 2006:643). This can be countered with a waiver of rights or a declaration of public domain.

c) Ancillary copyright as a scientific edition according to § 70 UrhG?

Furthermore, the question arises as to whether the archiving of the individual recordings can also be protected as scientific editions under § 70 UrhG. According to this, works or texts that are not protected by copyright are protected if they represent the result of scientific examination and differ substantially from the editions of the works or texts known previously. The prerequisite for protection is, thus, that the voice recordings are the result of scientific viewing activity. However, this, in turn, presupposes the use of scientific, particularly source-critical methods. The mere publication of found material without examination, even after prior selection according to certain aspects of order, is not included (Thum et al. 2022a:§ 70 marginal no. 9).

Protection would only be conceivable in cases where, for example, a folk song is reconstructed by comparing several recordings in an earlier or regional version. However, this would then also have to differ "substantially" from a previously known edition, which is not likely to be the case here.

The following interim results can be noted at this stage: The protection of recordings in the form of scientific editions under § 70 UrhG is not sustainable due to the lack of sufficient "substantial" distinction from the original recordings. Under narrow conditions, however, protection of the institutions under § 71 UrhG is possible.

Conclusion

On the one hand, there are probably no rights of the performing artists and sound recording producers, as the respective protection period for this expired on 31 December 2015. On the other hand, if individual items on the sound recordings can be classified as a work eligible for copyright protection, it may be that this protection has not yet expired. In that case, institutions using the recordings today have only limited possibilities of use under the limitations applicable. Archives, museums, and libraries, for example, at least have the option of digitizing the recordings at the respective terminals in accordance with §§ 60f, 60e UrhG without publishing them in their entirety. In addition, § 60c (1) no. 1, (3) var. 3 UrhG allows institutions to make the recordings publicly accessible to certain groups of people if this serves non-commercial, scientific research.

That being said, it is quite conceivable that scientific institutions in Germany have acquired their own related rights by way of bequeathed written works from § 71 UrhG by first appearing or arranging for the public reproduction of the recordings, for example, by means of radio broadcasts. They correspond to the author's rights in terms of property rights with a duration of 25 years after the first publication but exclude moral rights. In this context, however, which activity the organizer undertakes and whether a possible work has not already been published somewhere or otherwise publicly reproduced must always be examined in detail for each individual case. In

this respect, however, possible scientific cooperation with linguists from the respective home countries of the prisoners is also conceivable.

A further perspective: Moral issues

If one concludes that many uses are permissible with the recordings examined, even if there may be individual forms of use that would remain prohibited without further regulation – probably in exceptional cases – a stale aftertaste remains. Morally, such use without further agreements seems rather questionable. This also applies especially against the background of the current cultural-political discussion about the return of works of art from former colonies. The idea of reviving the rights also results from the possibility of digitization and faster dissemination of the recordings. By sending and publishing the highly sensitive sound recordings, there is always a risk of misuse and denigration of cultures, even if the greatest possible care is taken in the selection and verification of recipients.

One should, therefore, broaden the copyright view:

There are comparable issues in the case of rightsholders whose rights have expired due to external influences. The term of protection in the former Soviet Union, for example, was extended from 70 years to a further four years after the death of authors who had worked during World War II (Hoeren 2008:561; Savelyeva 1993:799).

Germany should consider reviving these rights on moral grounds, but, if so, to what extent? In view of the growing interest in research and teaching in other cultural areas as well as coming to terms with German history and the responsibility that goes with it, however, a revival of copyright could not undo the injustice that has been committed. Considering the precarious circumstances under which the recordings were made, a revival of the rights could represent one instrument of considerate and responsible handling of the recordings by the institutions, which must be supplemented by constant and comprehensive research into the circumstances surrounding the respective recordings. In this respect, it would also be conceivable to assign these related rights of protection to an institution that serves the cul-

tural exchange with the states concerned. In this way, it would be possible to enter into contact and exchange with civil society and the states, on these often psychologically charged issues. It certainly does not make matters any easier that there are probably legal situations in individual states, such as Egypt, which regard cultural heritage as state property (cf. Anton 2010:1132), so that state institutions must be involved in the exploitation. In any case, however, the very openness to such a dialogue can go some way to righting the wrongs that have been done and lead to a conversation at eye level. That alone should be worth the effort.

References

Ahlberg, Hartwig

2022 "§ 2 *UrhG (Marginal No. 8).*" In *BeckOK Urheberrecht*. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Ahlberg, Hartwig, & Anne Lauber-Rönsberg (eds.)

2022 "§ 6 UrhG (Marginal No. 29)." In *BeckOK Urheberrecht*. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Anton, Michael

2010 "*Rechtshandbuch Kulturgüterschutz und Kunstrestitutionsrecht.*" Vol. 2, Berlin: Walter de Gruyter.

Dreier, Thomas

2022 "§ 6 UrhG (Marginal no. 11)" In *Urheberrechtsgesetz*. Thomas Dreier and Gernot Schulze, eds. 7th Ed. Munich: C.H.Beck oHG.

Dreyer, Gunda

2018 "§ 2 Geschützte Werke (marginal no. 51)" In *Urheberrecht, Urheberrechtsgesetz, Verwertungsgesellschaftengesetz, Kunsturhebergesetz*. Gunda Dreyer, Jost Kotthoff, Astrid Meckel and Christian-Henner Hentsch, eds. 4th Ed. Heidelberg: C.F. Müller.

Federal Constitutional Court (1st Senate)
1972 "Schallplatten." In *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, Munich: C.H. BECK oHG, 491–96.

Freudenberg, Christian
2022 "§ 135a UrhG (Marginal No. 2)." In *BeckOK Urheberrecht*. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

German Federal Court of Justice
1962 "Rundfunkempfang im Hotelzimmer." In *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR), Munich: C.H. BECK oHG, 201–5.

German Federal Court of Justice
1968 "Haselnuß." In *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, Munich: C.H. BECK oHG, 321–9.

German Federal Court of Justice
1977 "Der 7. Sinn." In *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR), Munich: C.H. BECK oHG, 543–7.

German Federal Court of Justice
2009 "Motezuma." In *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, Munich: C.H. BECK oHG, 942–5.

German Federal Court of Justice
2015 "Goldrapper." In *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, Munich: C.H. BECK oHG, 1189–98.

German Federal Court of Justice
2016 "Evening with Marlene Dietrich." In *Wettbewerb in Recht und Praxis* (WRP), Frankfurt (am Main): Deutscher Fachverlag GmbH, 1114–23.

German Federal Government
1962 "Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)." In *Bundestags-Drucksache IV/270*, Bonn, 1–180.

German Federal Government
1995 "Entwurf eines Vierten Gesetzes zur Änderung des Urheberrechtsgesetzes." In *Bundestags-Drucksache 13/781*, Bonn: Bundesanzeiger Verlagsgesellschaft mbH, 1–17.

German Federal Government
2017 "Entwurf eines Gesetzes zur Angleichung des Urheberrechts an die aktuellen Erfordernisse der Wissensgesellschaft (Urheberrechts-Wissensgesellschafts-Gesetz – UrhWissG)." In *Bundestags-Drucksache 18/12329*, Berlin: Bundesanzeiger Verlag GmbH, 1–64.

Götting, Horst-Peter and Anne Lauber-Rönsberg
2006 "Der Schutz nachgelassener Werke." In *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR), Munich: C.H. BECK oHG, 638–47.

Grübler, Ulrike
2022 "§ 60c UrhG (Marginal no. 15)." In *Beck*OK *Urheberrecht*. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Grünberger, Michael
2020 "§ 73 UrhG (Marginal no. 37)" In *Urheberrecht*. Ulrich Loewenheim, Matthias Leistner, Ansgar Ohly, eds. 6th ed. Munich: C.H.Beck.

Hanseatic Higher Regional Court
1995 "Urheberschutz für Musikstücke vor dem 1. 1. 1966." In *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* (NJW-RR), Munich: C.H. Beck oHG, 744–5.

Hertin, Paul W.
2018 "§ 49 Grundlagen des Musikurheberrechts (marginal no. 58)" In *Handbuch der Musikwirtschaft*. Rolf Moser, Andreas Scheuermann and Florian Drücke, eds. 7th Ed. Munich: C.H. Beck oHG.

Hoeren, Thomas

2008 "Das neue russische Urheberrecht." In *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* (*GRUR Int*), Munich: C.H. Beck oHG, 557–63.

Humboldt

n.d.a *Possible Uses*. Humboldt-Universität of Berlin and Sound Archive Berlin. URL: https://www.lautarchiv.hu-berlin.de/einfuehrung/nutzungsmoeglichkeiten/. Accessed 5 December 2024.

Humboldt

n.d.b *History and Prospects*. Humboldt-Universität of Berlin and Sound Archive Berlin. URL: https://www.lautarchiv.hu-berlin.de/einfuehrung/geschichte-und-perspektive/#:~:text=Obwohl%20das%20Lautarchiv%20erst%20im%20Jahr,des%20zehn%20Jahre%20zuvor%20erfundenen%20Phonographen.&text=Obwohl%20das%20Lautarchiv%20erst,Jahre%20zuvor%20erfundenen%20Phonographen.&text=Lautarchiv%20erst%20im%20Jahr,des%20zehn%20Jahre%20zuvor. Accessed 5 December 2024.

Humboldt

n.d.c *Collections*. Humboldt-Universität of Berlin and Sound Archive Berlin. URL: https://www.sammlungen.hu-berlin.de/sammlungen/forschung/u-berlin.de. Accessed 5 December 2024.

Humboldt

n.d.d *Exhibition "Listening to the World."* Phonogram Archive Berlin. URL: https://www.smb.museum/ausstellungen/detail/laut-die-welt-hoeren/. Accessed 5 December 2024.

Humboldt

n.d.e *Exhibition "Listening Space."* Phonogram Archive Berlin. URL: https://www.humboldtforum.org/en/programm/dauerangebot/must-see-2/listening-room-43364/ (V). Accessed 5 December 2024.

Kleine, Heinz
1960 "Die Urteile des Bundesgerichtshofs zum Leistungsschutzrecht für die ausübenden Künstler." In *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR), Munich: C.H. Beck oHG, 577–82.

Lauber-Rönsberg, Anne
2022a "§ 71 UrhG (Marginal No. 13)." In *BeckOK Urheberrecht*. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. Beck oHG.

Lauber-Rönsberg, Anne
2022b "§ 71 UrhG (Marginal No. 27)." In BeckOK Urheberrecht. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Lauber-Rönsberg, Anne
2022c "§ 71 UrhG (Marginal No. 28)." In BeckOK Urheberrecht. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Lauber-Rönsberg, Anne
2022d "§ 71 UrhG (Marginal No. 30)." In BeckOK Urheberrecht. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Lauber-Rönsberg, Anne
2022e "§ 129 UrhG (Marginal No. 7)." In BeckOK Urheberrecht. Hartwig Ahlberg, Horst-Peter Götting and Anne Lauber-Rönsberg, eds. 35th Ed., Munich: C.H. BECK oHG.

Loewenheim, Ulrich and Matthias Leistner
2020a "§ 2 UrhG (Marginal no. 26)" In *Kommentar Urheberrecht*. Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly, eds. 6th Ed. Munich: C.H. Beck oHG.

Loewenheim, Ulrich and Matthias Leistner
2020b "§ 2 UrhG (Marginal no. 146)" In *Kommentar Urheberrecht*. Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly, eds. 6th Ed. Munich: C.H. Beck oHG.

Loewenheim, Ulrich
2020 "§ 71 UrhG (Marginal no. 14)" In *Kommentar Urheberrecht*. Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly, eds. 6th Ed. Munich: C.H. Beck oHG.

Lüft, Stefan
2022 "§ 60c UrhG (Marginal no. 12)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Marquardt, Malte C. G.
2022 "§ 6 UrhG (Marginal no. 27)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Meckel, Astrid
2018 "§ 71 Nachgelassene Werke (marginal no. 13)" In *Urheberrecht, Urheberrechtsgesetz, Verwertungsgesellschaftengesetz, Kunsturhebergesetz*. Gunda Dreyer, Jost Kotthoff, Astrid Meckel and Christian-Henner Hentsch, eds. 4th Ed. Heidelberg: C.F. Müller.

Nordemann, Axel
2018 "§ 71 Nachgelassene Werke (marginal no. 29)." In *Kommentar zum Urheberrechtsgesetz, Verlagsgesetz, Einigungsvertrag (Urheberrecht)*. Friedrich Karl Fromm and Wilhelm Nordemann, eds., 12th Ed., Stuttgart: Kohlhammer.

Peukert, Alexander
2020 "§ 13 UrhG (Marginal no. 3)" In *Kommentar Urheberrecht*. Ulrich Loewenheim, Matthias Leistner and Ansgar Ohly, eds. 6th Ed. Munich: C.H. Beck oHG.

Savelyeva, I. V.
1993 "Die zweite Geburt des Urheberrechts in Rußland." In *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* (GRUR Int), Munich: C.H. Beck oHG, 799– 811.

Schaefer, Martin
2022 "§ 129 UrhG (Marginal no. 2)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Schmidt-Hensel, Roland Dieter
2012 "Urheberrecht und musikbibliothekarische Praxis." In *Zeitschrift für Bibliothekswesen und Bibliographie* (ZfBB). Klaus Ceynowa, Barbara Schneider-Kempf and Frank Scholze, eds. Frankfurt am Main: Vittorio Klostermann GmbH, 59 (2012) 3–4, 192–200.

Schulze, Gernot
2022a "§ 2 UrhG (Marginal no. 83)" In *Urheberrechtsgesetz*. Thomas Dreier and Gernot Schulze, eds. 7th Ed. Munich: C.H. Beck oHG.

Schulze, Gernot
2022b "§ 85 UrhG (Marginal no. 1)" In *Urheberrechtsgesetz*. Thomas Dreier and Gernot Schulze, eds. 7th Ed. Munich: C.H. Beck oHG.

Stieper, Malte
2012 "Geistiges Eigentum an Kulturgütern." In *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR), Munich: C.H. Beck oHG, 1083–91.

Thum, Dorothee
2022a "§ 70 UrhG (Marginal no. 9)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Thum, Dorothee
2022b "§ 71 UrhG (Marginal no. 29)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Thum, Dorothee
2022c "§ 71 UrhG (Marginal no. 31)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Thum, Dorothee
2022d "§ 71 UrhG (Marginal no. 32a)." In *Praxiskommentar Urheberrecht*. Artur-Axel Wandtke and Winfried Bullinger, eds. 6th Ed. Munich: C.H. Beck oHG.

Timurgalieva, Olga, Valentin Peitz, Julia Weitzel
2015 "Open Access: Vor- und Nachteile für das HU-Lautarchiv." In *Du hast mein Wort. Juristische und kulturethische Kriterien für die Nutzung der Aufnahmen aus dem Lautarchiv der Humboldt-Universität zu Berlin.* Thomas Hartmann, Britta Lange and Jochen Hennig, eds. Humboldt-University of Berlin, 34–8.

Wiebe, Andreas
2019 "§ 71 UrhG Nachgelassene Werke (Marginal no. 2)" In *Recht der elektronischen Medien*. Gerald Spindler and Fabian Schuster, eds. 4th Ed., Munich: C.H. Beck oHG.

Zweibrücken Higher Regional Court
1997 "Jüdische Friedhöfe." In *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR), Munich: C.H. Beck oHG, 363–4.

Notes

1. See judgment of the Hanseatic Higher Regional Court of 27 October 1994 (1995:745).

2. See decision of the Federal Constitutional Court of 8 July 1971 (1st Senate) (1972:491).

3. See judgment of the German Federal Court of Justice of 28 November 1961 (1962:202).

4. See judgment of the German Federal Court of Justice of 25 February 1977 (1977:545). Cf. the remarks by Nadde about the relation of copyright and originality in this themed issue.

5. See judgment of the German Federal Court of Justice of 3 November 1967 (1968:324).
6. See judgment of the German Federal Court of Justice of 16 April 2015 (2015:1193).
7. See Parliamentary Paper of the German Federal Government of 15 May 2017 (2017:35).
8. See judgment of the German Federal Court of Justice of 22 January 2009 (2009:943).
9. See judgment of the Zweibrücken Higher Regional Court of 21 February 1997 (1997:364).
10. See judgments of the German Federal Court of Justice of 21 April 2016 (2016:1117) and of 22 January 2009 (2009:945).
11. See Parliamentary Paper of the German Federal Government of 23 March 1962 (1962:40).
12. See Parliamentary Paper of the German Federal Government of 13 March 1995 (1995:14).

About the authors

Christian Czychowski is an expert in all technology-based areas of contract law, whether that be IT law, patent law and licensing law or the technology-related parts of copyright law. For some years, a particular focus of Christian's expertise has been advising technology companies and IT service providers and guiding them in their implementation of M&A projects and R&D projects, as well as with licensing issues. As a pioneer in data law, he also has extensive expertise in all issues concerning the handling of non-personal data. Christian also advises and supports leading research organizations, as well as higher education institutions, in R&D cooperations and contracts. He also uses his related expertise, not least to contribute as a member of the respective working group at the German Federal Ministry for Economic Affairs and Energy. In addition to law, Christian Czychowski studied musicology. In light of that background, he also takes time to advise orchestras, musicians and artists, many of whom are of global renown. His affinity with science can be seen not least in the honorary professorship bestowed upon him by the Law Faculty at the University of Potsdam, as well as in the lectures he gives, including one of the first MOOCs on IT law at the Hasso Plattner Institute.

Lea Riechers works in public service and completed her first state examination in law, specializing in media and economic law. Before passing her second state examination in law, she spent the majority of her two-year legal clerkship in the field of intellectual property with specializations in licensing law, copyright and unfair competition law.