

**LYDORF, CLAUDIA**

**Legal online-databases as subject of the law  
and as instruments of legal professionals**

Introduction

In the digital environment of law legal databases are important instruments in the work of lawyers, scientists, judges and state attorneys as well as in the work of state authorities. Their use is common in every legal employment and in every focus of legal activity. Even the interested public is using legal databases for their own information needs, especially in the times of the corona pandemic.

The focus of the paper will be on legal online-databases in Germany as they are representative for the main online information sources for legal professionals. Offline-databases, available as physical embodiment on CD, DVD or CD-Rom, are not included in this context as they have been superseded by online databases. The following paper intends to give an overview of the legal framework that applies to German online-databases, mainly determined by the Act on copyright and ancillary copyright (Gesetz über das Urheberrecht und verwandte Schutzrechte (UrhG); hereafter: Copyright Act), whereby the influence of the European law on the German law is likewise considered. The paper ends with giving a short overview how the expected future development of legal databases in Germany is driven by the field of tensions between the needs of the legal professions and new possible uses of databases offered by technical progress.

Access to legal information

Let's start with a definition of the term digital environment: Digital environments are all information environments that are mediated via the World Wide Web or similar mobile devices. They include in particular those environments that facilitate the discovery of and the search for information, people and resources.<sup>1</sup>

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<sup>1</sup> <https://www.igi-global.com/dictionary/toward-a-working-definition-of-digital-literacy/42879> (30.05.2022).

The access to information in general is a valuable asset but the access to legal information is indispensable for legal professionals. Therefore the right to access information held by public authorities is regulated inter alia in article 5 Grundgesetz, in the Informationsfreiheitsgesetz and the Datennutzungsgesetz. For the same reason the right to access effective legislative texts is not inhibited by restrictive rules and legislative texts are not protected by the German copyright law. As everybody needs to access and use them free of charge and restrictions section 5 Copyright Act regulates that “*Acts, statutory instruments, official decrees and official notices, as well as court decisions and official head notes of court decisions do not enjoy copyright protection.*” As legal databases are expensive commodities when it comes to the instruments of legal business one might expect that the manufacturers of legal databases would leave the legislative texts to the world wide web and concentrate their whole effort on copyright protected works to cover the immense costs of providing a database by charging the user for expensive content.

Let’s take a look on broadly known legal databases.<sup>2</sup> One large legal database is Eur-Lex – the database of the European Union. Among other things one can search here for the Official Journal – the Journal of Laws for the EU – which includes among other things the whole of the applicable law but one can also search for court decisions, agreements with states not part of the EU and preparatory legal acts. In Hungary the CompLex publishing house (CompLex Kiadó Kft.) is not only publishing professional literature for jurists, but also distributes digital information in the form of a legal database. It belongs to the Wolter Kluwer Group and so has a close link to the developments in Germany.<sup>3</sup>

To describe the situation in Germany let’s start with C.H. Beck GmbH, which has multiple links to many countries of Central and Eastern Europe. Beck was founded 1763 and belongs to the oldest German institutions in the publishing industry. It is still run by the Beck-family, who gave it its name. The publishing house splits in two operational sections: one deals with publications concerning Law – Taxes – Economy (= Recht – Steuern – Wirtschaft) and the other concerns the disciplines Literature – Non-Fiction Literature – Science (Literatur – Sachbuch – Wissenschaft). The publishing houses C.H.Beck Warschau and C.H.Beck Prag exist since 1993, to be later followed by C.H.Beck Bukarest. Having started in the 18th century first as a printing house and now coming from a long history as a publisher, Beck launched the platform beck-online in 2001. The platform offers access to digital materials like German law, German court decisions and the digital available product range of the publishing house Beck, namely their legal journals.<sup>4</sup>

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<sup>2</sup> For the legal protection of databases created by scientists in the context of their research projects see: KUSCHEL, Linda: Urheberrecht und Forschungsdaten. *Ordnung der Wissenschaft* 1 (2020) 43.

<sup>3</sup> SZILAGYI, Emese: *Leistungsschutzrecht für Verleger? Eine rechts-tatsächliche Untersuchung zur zur Wiederherstellung des Interessenausgleichs zwischen Verlegern, Urhebern und Allgemeinheit.* Herbert Utz Verlag, München, 2010. 18.

<sup>4</sup> <https://www.chbeck.de/verlag/über-uns/> (30.05.2022).

The juris GmbH was founded in 1985 by the federation (“dem Bund” as opposed to the German states which in their entirety form the Föderation). In contrast zu Beck – a fact which can not be stressed enough in this context – juris started from the first as a legal database. With its creation the federation’s aim was it to supply a modern and extensive legal information system, which should serve the needs of German legal institutions, namely state authorities, courts and universities. In 2001 decided the federation to partially privatize juris, to allow the GmbH to develop further into a business enterprise and as of today into one of the leading providers of digital legal information in the German legal information market. juris itself founded the jurisAllianz, in which it gives a structure for many of German legal publishing houses to work, thrive and supply digital access to their products. Today it offers access to a wide range of products – for legal professionals these would be still the German and the EU-Law, court decisions and legal literature, like legal journals.<sup>5</sup> But juris has in addition developed its own publishing side: it publishes books in print, especially the so called jurisPraxisKommentare but also code of law books – on the one hand a very interesting move for a comparatively younger company that one could look at as a digital native, on the other hand only the logical consequence of the user-demand for digital products that can be published in print on demand.

This very limited overview over available legal databases shows that expensive content created by the manufacturers of the database stands on equal terms with the free content consisting especially in legislative texts but also for example in the texts of court decisions.

#### Protection of databases by the Copyright Act

Beforehand: not legally protectable are structures and classification systems on which the database is based. The reason why these elements at the heart of the database are not included in the protection given by the Copyright Act is that the protection of this basis elements would lead to a monopolisation – no one else would be able to design another database guided by the same structures and classification system.<sup>6</sup>

German copyright law differentiates between the legal database as ancillary copyright (Leistungsschutzrecht) and the database as copyright work (Datenbankwerk). The term database is a subset of the term anthology/collection (Sammelwerke) and the legal term database is defined in section 4 I 1 and in section 87a I 1 Copyright Act:

#### *Section 4*

#### *Collections and database works*

*(1) Collections of works, data or other independent elements which by reason of the selection or arrangement of the elements constitute the author’s own intellectual creation (anthology) are protected as independent works irrespective of an existing copyright or ancillary copyright in one of the individual elements.*

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<sup>5</sup> <https://www.juris.de/jportal/nav/index.jsp/> (30.05.2022).

<sup>6</sup> <https://www.uni-bremen.de/urheberrecht/wissensplattform/9-schutz-von-datenbanken> (30.05.2022).

(2) For the purposes of this act, database work is a collection whose elements are arranged systematically or methodically and the individual elements of which are individually accessible by electronic or other means. A computer program (section 69a) used in the creation of the database work or to offer access to its elements does not constitute an integral part of the database work.

#### Section 87a

##### Definitions

(1) For the purposes of this act, database is a collection of works, data or other independent elements arranged in a systematic or methodical way and individually accessible by electronic or other means and whose obtaining, verification or presentation requires a substantial qualitative or quantitative investment. A database whose content has been changed in a qualitatively or quantitatively substantial manner is deemed to be a new database insofar as the change requires a substantial qualitative or quantitative investment.

(2) For the purposes of this act, producer of a database is whoever has made the investment within the meaning of subsection (1).

As one can see: the definition of the database does not change, but the legal qualification shows distinctive differences. The twofold protection of the database in the Copyright Act is the result of the transformation of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996<sup>7</sup> on the legal protection of databases into German law which has led to the additional regulations of sections 87a ff in the Copyright Act.<sup>8</sup>

#### Database as copyright work

A database which qualifies as a copyright work enjoys the full protection of the Copyright Act. To be deemed a copyright work the database has to fulfill the qualifying conditions according to section 4 in connection with section 2 Copyright Act. First and foremost the database has to be a personal, intellectual creation (“persönliche, geistige Schöpfung”) according to section 2 I, II Copyright Act. The database falls in the category of literary works (section 2 I no 1 Copyright Act). The law does not require the database to fulfill high prerequisites to be deemed a “creation” (section 2 II Copyright Act). It is enough that

<sup>7</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996. Official Journal of the European Communities L 77/20 of 27.3.96. An assessment of the directive offers: LEISTNER, Matthias: „Last exit” withdrawal? Die Zukunft des Europäischen Datenbankschutzes nach der EuGH-Entscheidung in Sachen BHB v. Hill und dem Evaluierungsbericht der Kommission. *Kommunikation & Recht*, 9 (2007) 457–465; in detail: LEISTNER, Matthias: *Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht. Eine Untersuchung zur Richtlinie 96/9/EG und zu ihrer Umsetzung in das deutsche Urheberrechtsgesetz*. Beck, München, 2000.; WIEBE, Andreas: Der Schutz von Datenbanken – ungeliebtes Stiefkind des Immaterialgüterrecht. Eine Zwischenbilanz sechzehn Jahre nach Einführung der §§ 87a ff. UrhG. *Computer und Recht*, 30 (2014) 1.

<sup>8</sup> KINDLER, Peter: Leistungsschutz für Datenbanken ohne Werkcharakter – Eine Zwischenbilanz. *Kommunikation & Recht*, 6 (2000) 265–266.

the database shows individual character – die legal term of the so called »Kleine Münze« is to be noted. As a rule, online-databases are to be classified as copyright work, based on the creative possibilities they offer to access and research their content.<sup>9</sup> Astonishingly is that the extent of work, effort and expert knowledge are not taken into consideration for the assessment of the protectability of the database as copyright work.<sup>10</sup> But on second glance the aforementioned aspects will be important for the question if the database is protected in the form of an ancillary copyright and provide thereby important criteria to distinguish between a database as copyright work or as ancillary copyright.<sup>11</sup>

As this classification as copyright work applies to the database, the copyright of the database belongs to the creator as defined in section 7 Copyright Act: Creator of the database is the person, who decides the chosen materials and the structure or composition of the database elements. Therefore only humans – not legal entities or the state – can be the creator. The companies behind legal online-databases in Germany therefore exercise the rights over the database not as creators. But as the creation of the database mostly is part of an employment relationship or a service contract, the rights concerning the use of the database belong as a rule to the employer of the creator (section 43).<sup>12</sup>

#### Ancillary copyright for the database producer

Not only the creator but also the producer of the database is protected by the Copyright Act. The producer owns the rights of an ancillary copyright.

##### *Section 87b*

##### *Rights of producer of database*

*(1) The producer of the database has the exclusive right to reproduce and distribute the database as a whole or a qualitatively or quantitatively substantial part of the database and to make it available to the public. (...)*

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<sup>9</sup> MILBRADT, Claudia: Urheberrechtsschutz von Datenbanken. Im Spannungsverhältnis zwischen Informationsfreiheit und Schutz des Datenbankherstellers. *Computer und Recht*, 10 (2002) 710–711.

<sup>10</sup> WELLER, Michael: Voraussetzungen für den Schutz von Datenbanken. Anmerkung zu EuGH 3. Kammer, Urteil vom 01.03.2012 – C-604/10 *juris Praxisreport IT-Recht* 14 (2012) Anm. 3.

<sup>11</sup> Representative for the question if the „know-how“ of the database producer might also find legal protection: GÖRÖG, Márta: Das geschützte Wissen und seine rechtliche Absicherung im Hinblick auf den Entwurf eines Vorschlags für neue Regeln für den Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb, sowie rechtswidriger Nutzung und Offenlegung. <https://dfk-online.sze.hu/images/egyedi/lenkovics%20kötet/görög.pdf> (2022.05.30); GÖRÖG, Márta: Know-How-Schutz im nationalen Recht und im Europarecht. *JurPC Web-Dok* 51 (2014). Abs. 42 <https://www.jurpc.de/jurpc/show?id=20140051> (30.05.2022).

<sup>12</sup> WIEMANN, Esther Maria: *Der Arbeitnehmerurheber in Deutschland und Australien* (Schriften zum deutschen, europäischen und internationalen Recht des Geistigen Eigentums und des Wettbewerbs Bd 27) JWV Jenaer Wissenschaftliche Verlagsgesellschaft, Jena. 2020; KOTTHOFF, Jost: § 43 *Urheber in Arbeits- oder Dienstverhältnissen*. In: Dreyer, Gunda et alia (eds): *Urheberrecht*. C.F. Müller, Heidelberg. 4. Aufl. 2018. point 12.

Thereby the manufacturer is the institution, that started the initiative to produce the database, it is the institution, that manages the risk of the production as well as it manages the costs and the use of the used technical, financial and human resources.<sup>13</sup> As a rule with legal databases the producer does not only handle this aspects in the production phase of the database's formation but also in the ongoing production with its demands of advancement, checking and presenting its contents.<sup>14</sup> The reason producers of databases are protected by the copyright act therefore lies in the great financial risks they undertake to offer the framework in the form of a database to guarantee the data researchability and data availability for the users.<sup>15</sup> But of course as this is an ancillary copyright this protection goes not so far as that of the creator and the creators protected position is independent of the position of the database manufacturer (section 87b Copyright Act).

As both legal positions – that of creator and that of producer – can be obtained via different legal preconditions of the Copyright Act both positions are not exclusive but exist side by side.<sup>16</sup> As long as the database is qualified as a copyright work the producer of the database can hold the rights of producer as well as the rights of the creator, if the creator is his employee.

#### Use of the legal database

Principally the access and the use of the aforementioned legal databases is not freely available to every interested person and furthermore it is not free of charge. Therefore the legal regulations concerning the access and the use of databases in the Copyright Act are in the context of this study not relevant. The legal databases regulate the access to their content via licences (section 31 Copyright Act), which can be acquired by contract. There is a wide spectrum of possible contracts – ranging for the licenses for state authorities, the licence for the library of an university, the licence for large law firms and the licence as starter package for students. The quantity of the users need for information provided by the database decides to what extend the user requires access to the databases' content: the more information he needs the larger the licence he will require.

And at this point the conflict between the two aims – the free access to legal information as a whole and the need of the legal professional to get precisely and completely the information he is looking for – converges. The producer of the database has to ensure that the content of the legal database contains information as complete as possible but at the same time the producer has to ensure that the contents searchability is guaranteed

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<sup>13</sup> With a vivid example that presents the extent of the infrastructure needed for databases that cope with a great amount of data to offer precise research finds: WIEBE, 2014. 1.

<sup>14</sup> BECKER, Helmut: Juristische Arbeit mit persönlichen Datenbanken (II). *Computer und Recht*, 4 (1989) 339.

<sup>15</sup> EISENMANN, Hartmut – JAUTZ, Ulrich – WECHSLER, Andrea: *Grundriss Gewerblicher Rechtsschutz und Urheberrecht*. C.F.Müller, Heidelberg, 2022. 21 Rn. 49f. and 62 Rn. 173.

<sup>16</sup> <https://www.uni-bremen.de/urheberrecht/wissensplattform/9-schutz-von-datenbanken> (30.05.2022).

so that search requests provide the user exactly with the legislative text, commentary and court decision that answers the users informational need. The compromise between the right to access all available legal information and the important need of the user to find in all the available information exactly that piece of information that the user requires for work purposes, is solved by the providers in two ways: first and as aforementioned they leave the choice to the extent of the access to the database to the user. The user decides if he needs full access to the database or if he requires a customized access with information concerning only the specific field of his field of work. No matter if the user chooses full or customized access in a second step the producer provides a structure in the database as a first step to look systematically for information and in addition the producer provides search instruments which allow the user to even further narrow or widen the approach in the systematically search for information. Here the legal databases show that they are willing to undertake responsibility as important instruments in the state under the rule of law: a legal database can not exclude information from its content solely because the information is not deemed profitable or simply because the information is available elsewhere. The already high and still growing amount of available legal information forces legal databases to grow steadily. New technical possibilities and new user behaviour forces them to evolve permanently.

In addition there is a further challenge which influences the possibilities of free access to legal information: The protection of the database and the protection of the content behind the so called paywall have to be very well developed. This originates from the need of the producer to protect the database and its content against all sorts of cybercrime and data losses through technical accidents.

Furthermore the question into which of the two above mentioned copyright categories a database falls has to be distinguished from the question of the copyright protection of the single elements that form the content of the database. The copyright protection of the database and the copyright protection of the single element are independent of each other. The user of a legal database – no matter under which of the above mentioned categories of the Copyright Act the database falls – is allowed to use copyright protected elements behind the paywall as long as the producer has the right to provide them and the user acquired a licence from the database manufacturer.

The user is also allowed – again no matter with which database is used – to use all elements that are not protected for free. That is why many databases allow users to make a research and to see a “sneak peak” of what results this research might issue, but they establish the paywall in front of the more precious content of the database. So for example a research after section 97 Copyright Act in beck-online or juris might result in the effective legislative text of section 97 Copyright Act in full, but the enhanced connections with further in the database available information concerning the dataset, like past or oncoming amendments of the section, would not be accessible unless the user holds a corresponding licence. Likewise only visible but not accessible via a free research result list would be as a rule copyright protected material like commentaries, essays in

legal journals and collections of forms (Formularsammlungen), which are published or acquired in accordance with the Copyright Act by the database producer.

In the inventory of legal databases legislative texts play an important role. They present an element the user could access even for free without the database but nevertheless they are included in the database. One reason for this is that legislative texts are a major and important part of the database as those texts are the foundation to the understanding for every other law text. Another reason they will always be included in legal databases is the user experience: no database producer wants a dissatisfied user who has to switch databases to look at two equally important texts – for example the legislative text and the corresponding commentary – for his work in two different databases. And the most important reason is that all legal databases strive to provide not only access to their content but further features to simplify, refine and enhance the users work with the database's content. A major part of the effort to provide an enhanced work place for the legal professional in the database is the possibility to connect content through links that further the accessibility of content elements that are only together provide a complete picture for the user that enables the legal professional to understanding and solve legal problems.

Outlook – expected future developments

Open data

Currently the federation is planning to change the existent structures concerning the access to legal information focussing on legislative texts and court decisions. This change is part of the new federal government's Open Governance Policy.<sup>17</sup> This includes the future formation of a new online-portal which shall be offering access to legal information, which will be limited to anonymized, machine-readable and free-of-charge elements consisting solely of court decisions and legislative texts. The ministry of Justice will be the responsible ministry for this online-portal. Until now the federation already offers a free of charge presentation of its laws, court decisions and administrative regulation: Gesetz-im-Internet, Rechtsprechung-im-Internet und Verwaltungsvorschriften-im-Internet. The new federal online-plattform shall unify this three presentations and shall up-date them with new and more metadata to achieve a better searchability. This new online-portal offers thereby Open Data. The juris GmbH, which presently is the backbone of the legal information system of the federation, shall further allocate in this new context research services. This online-portal shall be furthermore a means to strengthen the position of the federal documentation centers – located for example at the superior courts – and to allow a stronger participation of the inhabitants of Germany in their entirety via the federal access-plattform for legal information. This federal project is one of the requirements that will make the implementation of the „Rechtsanspruch auf Open Data“ possible – thereby it is political important because this implementation is a part of the coalition agreement of the current Government. Legally this aim of the Government has its basis

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<sup>17</sup> [https://www.bmj.de/DE/Ministerium/Transparenz/Rechtsinformationsportal/Rechtsinformationsportal\\_node.html](https://www.bmj.de/DE/Ministerium/Transparenz/Rechtsinformationsportal/Rechtsinformationsportal_node.html) (30.05.2022).

in the *Datennutzungsgesetz*. Furthermore this project is part of the further development towards more electronic services that shall be in the future provided by state authorities and towards the planned digitalisation of the public authorities. It is also considered as one step towards the digitalisation of the legislative procedure, which its parts consisting first of the digital legislative procedure itself and secondly of the digital promulgation of new laws.<sup>18</sup>

As the federation plans to develop this open-data online-portal into a database that aims for completeness and simple searchabilities, it might be, that the intended database might not fulfill the term “personal intellectual creation” in its early stages. Furthermore the federation intends to keep its legal information portal as an open-data offer for its citizenz – thereby renouncing parts of the protection the Copyright Act is offering the provider of a database.

#### Future developments

There are three new technical possibilities that will play a large part in the future of legal work and thereby influence what legal databases will have to offer their users.<sup>19</sup> The times, when a lawyer opened the database and was content when he could researched the content of the legal database for court decisions etc. are over. The legal professional expects that the high amount of information available is not only structured and prefiltered for him by the database, but he expects an easy and technically/digitally integration in his or her work tools and workflow. Legal Analytics, Predictive Analytics und Prescriptive Analytics are perceived as the digital future.

To start with the most advanced concept, which is technically a long term project, when it should come to its implementation, let's beginn with Prescriptive Analytics shall be able to technically develop proposals for the legal user, by which arguments and procedure strategie he will be able to achieve a given goal, for example to win in court. In this phase the database will be able to recommend to the lawyer arguments and argumentation strategies for the lawyers specific case. Then it rests solely on the lawyer to evaluate and put the material together.

But also Predictive Analytics goes already way beyond that, what an old-fashioned database has offered as functions. Predictive Analytics is the databased effort to predict out of the existing data the result of future events, for example court decisions.

Last but not least Legal Analytics describes a process that automatically analyses data after useful information – the example given by Wolters Kluwer is the data based evaluation which courts in Germany very often deal with a topic the user in question is very often concerned with, let's say as an example ebook-licencing. Legal Analytics shall enable the database to search for similiar content and offer its results user-specific.

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<sup>18</sup> Id (30.05.2022).

<sup>19</sup> KLOSTERMANN, Johannes – HARTZ, Christian: *Die Zukunft der juristischen Datenbankrecherche*. <https://www.wolterskluwer.com/de-de/expert-insights/die-zukunft-der-juristischen-datenbankrecherche> (30.05.2022).

Additionally to the just outlined thoughts there are many further recent considerations for which the following shall be only one example: legal databases may support the implementation of legal principles by means of new functionalities. One of these legal principles, that could be advanced in this way, is the principle of just sentencing – the same criminal act should be punished with the same sentencing no matter in which court's competence the sentencing falls. As judges are human and there is no national data collection in which judges could form an opinion about the severity of penalties they impose in comparison to other judges, it is not to be avoided that courts differ moderately in the severity of the penalties for equivalent criminal acts. The example of foreign solutions like the Commonwealth Sentencing Database, which offers statistical information on sentences by courts for federal offences<sup>20</sup>, is discussed as a future possibility to further a more harmonized sentencing of criminal acts by German courts while simultaneously avoiding any interference with the independence of the judge and the judiciary.<sup>21</sup>

### Conclusion

Producers of legal databases are called upon by the aforementioned expected future developments to provide the growing amount of legal data in a way that forms the best user experience for the legal professional. To supply answers for all those different and diverse needs the database producer has to constantly and sharply observe the developments in legal education and profession to be able to react to this with specialist offers to all groups of potential users. This encourages the producers to enhance the database to a level at which it is protected as a copyright work and at the same point it encourages them to make major investments into the database. Thereby strengthening exactly those characteristics of the database that ensures its protectability according to the two different options regulated in sections 4, 2 and 87a ff. of the Copyright Act.

With the growing amount of available legal information the user of the database is likewise challenged to rethink the user patterns with which legal professionals work when they are using legal databases. It is no longer possible to get satisfying results by using legal databases as one would use google or a digital legal general commentary. The maximum benefit of the use of a legal database is not only achieved by a big research result but in most cases it is achieved by a most precise research result that relieves the user of a time consuming own evaluation of the result list. Also the planned federal database – as its declared goal is to achieve completeness regarding legislative texts and court decisions while being a free of charge offer – will have to handle the conflict between its strive for completeness and its strive to provide specific research results to its users.

Modern, already established legal databases offer a lot of possibilities to personalize their research options to get customized research results, but that simultaneously challenges the user to take the time to learn about these options and to make the

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<sup>20</sup> <https://csd.njca.com.au/> (30.05.2022).

<sup>21</sup> <https://www.libra-rechtsbriefing.de/L/gerechter-strafen-mit-ki/> (30.05.2022).

necessary modifications in the user interface<sup>22</sup>. This are rewarding efforts – especially as legal databases strive to meet the needs of the legal professional by providing more and stronger possibilities to integrate the content of the database in the legal professionals other digital work instruments, be it the phone or the desktop.

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<sup>22</sup> ZUNKER, Nora: Finden statt suchen: Juristische Datenbanken. *AnwBl*, (2022) 340.; KRAFT, Matthias: Juristische Online Datenbanken bieten viel – aber nicht alles für jeden. *AnwBl*, (2007) 415–417.