

Amendments of the German Copyright Act in Order to Strengthen the Contractual Position of Authors and Performers

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The Situation Under Previous German Law

§§ 31 *et seq* CA:

- General rules on authors' contracts

§§ 88 *et seq* CA:

- Specific rules on film contracts

VerlG (1901):

- Act on publishing contracts

As a general rule, all provisions in previous German copyright law concerning authors' contracts were non-binding and were frequently abrogated in practice.

Typical Remedies Against Disadvantages Resulting From Imbalance of Power

- collective agreements negotiated by authors' organisations (§ 12a TVG)
- control of unfair terms in standard contracts ("AGB")
- Adjustment of unjust or inappropriate clauses in individual contracts (§ 36 CA)
- All these possibilities have been tried and have proven to be ineffective in German (court) practice.

The "Professors' Draft"

Underlying considerations

- "big" versus "small" solution
- comparative law aspects
- unalienable remuneration claim in the rental and lending directive as a model of reference

Main elements of the draft

- § 32 – legal claim to equitable remuneration
- § 36 – Common remuneration standards, if necessary handed down in mandatory and binding arbitration procedure

Reactions – Main Points of Criticism

- Statistical data not sufficient/false interpretation of available data
- Oversimplified picture of “poor authors against big bad companies”; reality is more complex (particularly in the film industry)
- Lack of legal security
- Severe encroachment upon the freedom to conclude contracts (alleged breach of constitution/antitrust law)
- proposal is rather in favour of collecting societies than of authors.

Individual Provisions of the Present Proposal (selected)

§ 31 – basic guidelines for interpreting copyright contracts

- Para 4: transfer of rights does not encompass new, unknown forms of use
- New, restrictive wording was proposed in the professors’ draft
- Alternative proposal by the media industry: rights to new forms of use shall be comprised by transfer, with a right to remuneration resulting
- Final solution: Para 4 has remained unchanged until now (but is currently under consideration in the “2nd basket” of German copyright legislation)

§ 32 (new) – right to equitable remuneration

professors' draft

Author is legally entitled to claim remuneration with respect to every economically relevant use of the work

Payment complying with agreed rules (§ 36) is *presumed* to be equitable

claim against every (authorized) user

claim cannot be waived in advance and can only be assigned in advance to a collecting society

termination right after 30 years

Final text

contract prevails in principle
payment complying with common remuneration rules (§ 36) is *always considered* to be fair

definition of what is considered to be equitable remuneration; assessment *ex ante*

“Linux-clause“

claim only against contracting party

termination right dismissed

§ 32 a – the (new) bestseller clause

- specific provision superfluous according to professors' draft; re-installation after material changes in proposed § 32
- less restrictive wording than previously: “conspicuous imbalance“ instead of “gross imbalance“
- immaterial whether economic success is unexpected or not
- claim may be directed against any authorized user deriving profit from the work

§ 32 b (new) – PIL clause

Application of §§ 32, 36 is mandatory

- if, but for a choice of law, the use agreement would be governed by German law; or
- In so far as the contract concerns substantial use in the territory governed by German law.
- (Scope of application in practice is still unclear cf. Hilty & Peukert, GRUR Int. 2002, 643-668)

§ 34 – rights in case of transfer

- transfer of right is possible without the consent of the author, (only) if the enterprise is transferred as a whole or in part
- however, the author is entitled to withdraw from the contract if continuation is unacceptable for reasons of equity ("Treu und Glauben"). The same applies in case of material changes taking place with respect to shareholders.
- the person acquiring the right is liable for fulfilment of (financial) contract obligations alongside with the previous right-holder, unless the author has expressly consented to the transfer in the individual case.
- The principles mentioned previously cannot be set aside by contract.

§§ 36, 36a – common remuneration standards; mediation panel (new)

- mediation panel (Schlichtungsstelle) is established (permanently or ad-hoc)
- mediation process is mandatory under certain circumstances
- decision taken by the mediation panel is not legally binding on the parties
- however, even non-binding statements will have considerable impact in practice

Further provisions

- § 63 a (new): assignability of rights to legal remuneration arising in the future (to collecting societies only) – what about the publishers?
- § 75: applicability of inter alia §§ 32, 36 in favour of performing artists
- § 88: comprehensive presumption for acquisition of author's rights by film producers (to be changed into "real transfer" under the 2nd basket ?)
- § 90: (in)applicability of certain provisions with regard to film contracts
- § 132: entry into force – in principle, agreements concluded under the old law are not comprised