

Legislation

German Law on Strengthening the Contractual Position of Authors and Performers*

Preliminary Remark

The German Law on Strengthening the Contractual Position of Authors and Performers of March 22, 2002, published in the Official Journal (*Bundesgesetzblatt*) Part I, No. 21 of March 28, 2002 and, according to its Art. 3, effective on July 1, 2002, essentially forms an Amendment of the German Copyright Law of September 9, 1965 (as amended through December 13, 2001). In order fully to understand the legal meaning and importance of this Amendment, the following English translation renders the text of the new law in consolidated form, *i.e.* in the context of the full text of the amended provisions of the original Copyright Law. Those parts of the relevant provisions which are amended or entirely new are italicized, in order to enable the reader to easily distinguish amended from non-amended provisions of the Copyright Law. In addition to the changes in the provisions of the Copyright Law itself made by Art. 1, Art. 2 of the Amendment has repealed Sec. 28 of the Law on Publishing Contracts (*Verlagsgesetz*) of June 18, 1901 (as amended through September 9, 1965). That provision of the Amendment has been omitted here.

The English translation is made in conformity with the WIPO translation of the German Copyright Law (Intellectual Property Laws and Treaties – April 1999, Germany, Text 1-01) from which also the non-amended parts of the relevant provisions of the Copyright Law have been extracted. The translation of a number of entirely new provisions (Secs. 32, 32a, 32b, 36, 36a, and 75) has kindly been made available by Prof. William R. Cornish, Cambridge, England.

PART I COPYRIGHT

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Chapter IV Scope of Copyright

1. General

Sec. 11.

Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilization of his work. *At the same time it serves to secure an equitable remuneration for utilization of his work.*

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Chapter V Dealings with Rights in Copyright

1. Succession to Copyright

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Sec. 29. Contractual Agreements on Copyright

(1) Copyright is not transferable, unless it is transferred in execution of a testamentary disposition or to co-heirs as part of the partition of an estate.

(2) The granting of exploitation rights (Sec. 31), purely contractual authorizations and agreements on exploitation rights as well as contracts

⁰ Of March 22, 2002.

on moral rights of authors as regulated in Sec. 39 are permitted.

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2. Exploitation Rights

Sec. 31. Granting of Exploitation Rights

(1) The author may grant a right to another to use the work in a particular manner or in any manner (exploitation right). An exploitation right may be granted as a non-exclusive right or as an exclusive right and may be limited in respect to place, time, or purpose.

(2) A non-exclusive exploitation right shall entitle the right holder to use the work, without excluding other persons, in the manner permitted to him.

(3) An exclusive exploitation right shall entitle the right holder to use the work, to the exclusion of all other persons, in the manner permitted to him, and to grant non-exclusive exploitation rights. It may be agreed that utilization by the author is reserved. Section 35 remains unaffected.

(4) The grant of an exploitation right for as yet unknown types of use and any obligation in that respect shall have no legal effect.

(5) 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, and how far the exploitation right shall be limited.

Sec. 32. Equitable Remuneration

(1) For the grant of exploitation rights and permission to use a work the author is entitled to the remuneration contractually agreed. If the rate of remuneration is not settled, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract so that the author is assured an equitable remuneration.

(2) Remuneration is equitable if it is determined by a common remuneration standard (Sec. 36). Otherwise, remuneration is equitable if it conforms at the time of contracting to what is regarded as customary and fair in business having regard to the type and scope of the permitted uses, and in particular their length and timing, as well as to all other circumstances.

(3) Where an agreement fails to meet the conditions of subsections (1) and (2) to the disadvantage of the author, the other party may not rely upon it. The provisions designated in sentence 1 also apply even where they would be circumvented by countervailing clauses. The author may, however, grant a non-exclusive exploitation right without consideration to the world at large.

(4) The author has no claim under subsection (1), sentence 3, where the remuneration for use of his work is settled by collective (labour) agreement.

Sec. 32a. Additional Participation of the Author

(1) If an author has granted an exploitation right to another party on conditions which cause the agreed consideration to be conspicuously

disproportionate to the returns and advantages from the use of the work, having regard to the whole of the relationship between the author and the other party, the latter shall be required, at the demand of the author, to assent to a change in the agreement such as will secure for the author some further equitable participation having regard to the circumstances. It is not relevant whether the contracting parties foresaw or could have foreseen the level of such returns or advantages.

(2) Where the other party has transferred the exploitation right or granted further exploitation rights and the conspicuous disproportion results from returns or advantages to a third party, the latter is directly liable to the author under Subsection (1), having regard to the contractual relations in the licence chain. The liability of the other contracting party then ceases.

(3) The claims under subsections (1) and (2) may not be waived in advance. The entitlement to which they may give rise is not subject to execution of judgment; a disposition of the entitlement is ineffective.

(4) The author has no claim under subsection (1) where the remuneration is determined by a common remuneration standard or a collective (labour) agreement and further equitable participation is expressly provided therein for the case within subsection (1).

Sec. 32b. Mandatory Application

Sections 32 and 32a have mandatory application

- 1. if, in the absence of a choice of law, the use agreement were governed by German law; or**

- 2. in so far as the contract concerns substantial use in the territory governed by this Law.*

Sec. 33. Continuing Effect of Non-exclusive Exploitation Rights

Exclusive and non-exclusive exploitation rights shall remain effective with respect to exploitation rights granted later. The same rule shall apply, if the holder of the right who has granted the exploitation right changes or if he waives his right.

Sec. 34. Transfer of Exploitation Rights

(1) An exploitation right may be transferred only with the author's consent. The author may not unreasonably refuse his consent.

(2) If exploitation rights in the individual works contained in a collection are transferred together with the exploitation right in the collection (Sec. 4), the consent of the author of the collection shall be sufficient.

(3) An exploitation right may be transferred without the author's consent if the transfer is comprised in the sale of the whole of an enterprise or the sale of parts of an enterprise. The author may revoke the exploitation right, if exercise of the exploitation right by the transferee may not be reasonably demanded of the author. Sentence 2 shall also apply when the shareholder relations with respect to the enterprise of the holder of the exploitation rights are substantially changed.

(4) The transferee shall have joint liability for the discharge of the transferor's obligations under his agreement with the author, if the author has not expressly consented to the transfer of the exploitation right in the individual case.

(5) The author cannot waive the right of revocation and the liability of the transferee in advance. Otherwise, the holder of the exploitation right and the author may agree on different terms.

Sec. 35. Grant of Further Exploitation Rights

(1) The holder of an exclusive exploitation right may grant further exploitation rights only with the author's consent. No consent shall be required, if the exclusive exploitation right was granted exclusively for the administration of the author's interests.

(2) The provision of Sec. 34(1), sentence 2, (2) and (5), sentence 2, shall apply *mutatis mutandis*.

Sec. 36. Common Remuneration Standards

(1) In order to settle the equity of remunerations under Sec. 32, associations of authors may establish common remuneration standards with associations of users of works or individual users of works. The common remuneration standards should take account of the circumstances in the current field to be regulated, in particular the structure and size of the user organisation. Collective (labour) agreements shall prevail over common remuneration standards.

(2) To fall within subsection (1), associations must be representative, independent and authorised to settle common remuneration standards.

(3) A procedure to settle common remuneration standards before a mediation panel (Sec. 36a) takes place when the parties agree. The procedure must also take place upon the written request of one party, if

1. the other party has not commenced negotiations over common remuneration standards within three months after the first party has requested the negotiations in writing,
2. the negotiations over common remuneration standards remain without result one year after their commencement has been requested in writing or
3. a party declares that the negotiations have wholly failed.

(4) The mediation panel must make a reasoned settlement proposal for an agreement containing the general remuneration standards to the parties. The proposal will be taken to be accepted if within three months of its receipt it is not rejected in writing.

Sec. 36a. Mediation Panel

(1) For the determination of common remuneration standards, associations of authors and associations of users of works or individual users of works may establish mediation panels, when the parties agree or one party requires the conduct of a mediation procedure.

(2) The mediation panel will consist of an equal number of panelists chosen by each party and an independent chairperson who should be agreed by both parties.

(3) When the chairperson cannot be agreed, the appointment will be made by the competent *Oberlandesgericht* (Court of Appeal) under the Civil Procedure Ordinance, Sec. 1062. Equally if there is a disagreement over the number of panelists, the *Oberlandesgericht* will determine the matter. The procedure before the *Oberlandesgericht* is governed by the Civil Procedure Ordinance, Secs. 1063, 1065.

(4) *The request for institution of a mediation procedure under Sec. 36(3), sentence 2, must contain a proposal for the establishment of common remuneration standards.*

(5) *The mediation panel will reach its conclusion by a majority after oral discussions. In the first instance the conclusions will be reached by the panellists; if no majority agreement can be reached, the chairperson will participate, after further discussion in reaching the conclusions. If one party nominates no panellists or if the members nominated by one party failed to attend despite formal invitation, the chairperson and the members attending will decide the matter alone in accordance with the measures in sentences 1 and 2. The conclusions of the mediation panel must be recorded in writing, signed by the chairperson, and sent to both parties.*

(6) *In the absence of other agreement between the parties, the costs of the mediation procedure will be borne by the instituting party.*

(7) *The parties may settle the details of procedure before the mediation panel by agreement.*

(8) *The Federal Minister of Justice has power to make orders without the agreement of the Bundesrat concerning further details of the procedure before the mediation panel and rules for the costs of the procedure and the indemnification of the members of the mediation panel.*

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Chapter VI Limitations on Copyright

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Sec. 63a. Legal Remuneration Rights

Legal remuneration rights as provided in Chapter VI may not be waived by the author in advance. They may be assigned in advance only to a collecting society.

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Part II Neighboring Rights

Chapter I Protection of Certain Editions

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Sec. 71. Posthumous Works

(1) Any person who, after the expiry of copyright, for the first time lawfully publishes or lawfully communicates a previously unpublished work shall have the exclusive right to exploit that work. The same shall apply to unpublished works that have never enjoyed protection within the territory in which this law applies and whose authors have already been dead for more than 70 years. *Sections 5, 15 to 24, 26, 27, 45 to 63, and 88 shall apply mutatis mutandis.*

(2) The rights shall be transferable.

(3) The rights shall expire 25 years after the publication of the work or after its communication to the public where such event took place at an earlier date.

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Chaper III Protection of Performers

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Sec. 75. Recording, Reproduction and Distribution

(1) The recording of a performance on a video or audio medium shall require the consent of the performer.

(2) The performer shall have the exclusive right to reproduce and distribute the video or audio medium.

(3) Section 27 shall apply *mutatis mutandis* to performers' claims to remuneration for the rental and lending of video or audio mediums.

(4) *Section 31(5) as well as Sections 32, 32a, 36, 36a, and 39 shall apply mutatis mutandis.*

(5) *Where several performers give a performance together, and their respective contributions cannot be separately exploited, they may decide before the performance to authorise one person to pursue their claims under Secs. 32 and 32a. Section 80 remains unaffected.*

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Part III Special Provisions on Films

Chapter I Cinematographic Works

Sec. 88. The Right of Cinematographic Adaptation

(1) If an author permits another person to make a cinematographic adaptation of his work, he shall be deemed, in doubt, to have granted the exclusive exploitation right to use the work in its original form or as an adaptation or transformation for the purpose of producing a cinematographic work and to utilize the cinematographic work as also translations and other cinematographic adaptations of it in any known manner.

(2) In doubt, the rights referred to in subsection (1) shall not be deemed to include the right to remake the cinematographic work. In doubt, the author shall be deemed to have the right, after the

expiration of 10 years from the conclusion of the contract, to utilise his work otherwise for cinematographic purposes.

(3) *[repealed]*

Sec. 89. Rights in Cinematographic Works

(1) Any person who undertakes to participate in the production of a film shall be deemed, in doubt, to have granted, should he acquire a copyright in the cinematographic work, to the producer of the film an exclusive right to utilize the cinematographic work as also translations and other adaptations or transformations of the cinematographic work in any known manner.

(2) If the author of the cinematographic work has in advance granted to another person the exploitation right referred to in subsection (1), he shall nevertheless remain entitled to grant that right to the film producer, with or without limitation.

(3) Authors' rights in works used to produce the cinematographic work, such as novels, screenplay, and film music, shall remain unaffected.

(4) Concerning the rights of cinematographic exploitation in photographs and photographic works which are taken in connection with the production of a cinematographic work, subsections (1) and (2) shall apply mutatis mutandis.

Sec. 90. Limitation of Rights

The provisions on the transfer of exploitation rights (Sec. 34) and the grant of further exploitation rights (Sec. 35) as well as on the right of revocation for non-exercise (Sec. 41) and for changed

conviction (Sec. 42) shall not apply to the rights referred to in Sec. 88(1) and Sec. 89(1). Sentence 1 shall not be applied to the right of cinematographic adaptation until the commencement of the shooting of the film.

Sec. 91. Rights in Photographs

*[Repealed]**

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Chapter II Moving Pictures

Sec. 95.

Sections 88, 89(4), 90, 93, and 94 shall apply mutatis mutandis to sequences of images and to sequences of images and sounds which are not protected as cinematographic works.

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Part V

Scope of Application.

Transitional and Final Provisions

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Chapter II Transitional Provisions

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Sec. 132. Contracts

(1) The provisions of this Law, with the exception of Secs. 42, 43, and 79, shall not apply to contracts concluded prior to January 1, 1966. Secs. 40 and 41 shall apply to such contracts, except that the periods mentioned in Sec. 40(1), sentence 2, and Sec. 41(2) shall begin not earlier than January 1, 1966.

(2) Dispositions taken prior to January 1, 1966, shall remain effective.

(3) Subject to sentences 2 and 3, the provisions of this Law shall further apply in the version of the Law in force on March 28, 2002 to contracts or other situations, concluded or, respectively, having come into being prior to July 1, 2002. Sec. 32a shall apply to situations having come into being after March 28, 2002. Sec. 32 shall also apply to contracts concluded between June 1, 2001 and March 28, 2002, where the right as granted or the permission has been used after March 28, 2002.

(4) Subsection (3) shall be applied to performers mutatis mutandis.

*Arranged and translated by
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* *Translator's note: See now Sec. 89(4).*

