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Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers

Introduction

On July 1, 2002, a new Amendment of the German Copyright Law of 1995,[1] dated March 22, 2002, entered into force ("Amendment 2002"); the Amendment is entitled "Law on Strengthening the Contractual Position of Authors and Performers".[2] As its title clearly indicates, the intention of this Amendment, which resulted from a fierce debate between lobbyists for authors and performers, on the one hand, and for cultural and media industries, on the other hand, was to strengthen the bargaining power of - mainly freelance - authors and performers. The Amendment consists of a number of partly substantive, partly procedural provisions (mediation procedure) in that sense, the interrelationship of which represents a true innovation in German law.

The Government draft of that Amendment[3] was based upon - but is by far not identical with - the so-called "professors' draft" of an amendment that already had the same title.[4] The final version of the new law was adopted first by the Legal Committee on January 23, 2002[5] and eventually by the Plenum of the lower house of Parliament (*Bundestag)* on January 25, 2002; without further debate it passed the Second Chamber (*Bundesrat)* on March 1, 2002.[6] From a more political point of view it appears important to state that, in spite of many controversial positions taken by groups and individuals during the legislative process inside and outside the *Bundestag*, the final text of the new law represents a number of compromises and

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1 Law on Authors' Rights and Neighbouring Rights of September 9, 1965 (as last amended by Law of December 13, 2001); English translation of the Law (as amended through July 16, 1998), in WIPO (ed.), "Intellectual Property Laws and Treaties", Germany, Text 1-01 (April 1999).

2 *See* BGBl. I, No. 21, March 28, 2002, at 1155. For a consolidated English translation of the provisions of the new law, *see* this issue of IIC at [illegible].

3 *See* Bundestags-Drucks. 14/6433, June 26, 2001, and Bundestags-Drucks. 14/7564, November 23, 2001.

4 *See*, as far as the second of a total of three versions of that Draft is concerned, 2000 GRUR 765 (with preface by Ms. Herta Däubler-Gmelin, Federal Minister of Justice). The professors' group comprised Profs. Loewenheim, Nordemann, Schricker and Dr. Vogel, as well as the author of this article.

5 *See* Bundestags-Drucks. 14/8058, January 23, 2002.

6 For further details of the legislative history, *see* JACOBS, "Das neue Urhebervertragsrecht", 2002 NJW 1905 *et seq*.; ORY, "Das neue Urhebervertragsrecht", 2002 Archiv für Presserecht (AfP) 93 *et seq*.

could thus be adopted by a majority from all factions in the *Bundestag* with only a relatively small number of individual opposing votes of deputies from several parties. This is certainly a guarantee that the law will not easily be changed again in the near future.

It should also be mentioned that, without the personal courage and comprehension of the German Minister of Justice, Ms. H. Däubler-Gmelin, this Amendment would never have found its way into the statute book.

Since one of the main objectives of the new law is to allow the establishment of common standards of remuneration for authors and performers through negotiation and/or mediation between associations of authors and associations of users of works or individual users, it is absolutely clear that it will only be possible to know whether the new law has really achieved that objective after a number of years have passed. Then, it is hoped, several such "common remuneration standards" according to the new Sec. 36 (plus Sec. 36a) will have been negotiated or otherwise achieved.

Historic Background to the Amendment 2002

In order to understand the innovative character of the new law, we must recognize that it represents an Amendment to the German Copyright Law (Law on Authors' Rights and Neighbouring Rights) of September 9, 1965.[7] Of course, from the beginning, the latter already contained a number of provisions of a contractual nature, in particular, provisions regulating the grant of (exclusive or non-exclusive) rights of use (Secs. 31 and 32) whereby, according to the express provision in Sec. 29, an assignment of copyright as such was not and is still not possible under German copyright law. However, such and other contractual provisions in Secs. 31-44 of the previous text of the Copyright Law were of a rather rudimentary nature, essentially concerning all types of copyright contracts. They were rudimentary because, as stated in the Government draft dated 1962,[8] of the Law of 1965, it was planned "to complete the new copyright law by a comprehensive copyright contract law, which shall contain provisions for all kinds of contracts in the field of copyright".[9] That often quoted announcement, or rather legislative pledge, was eventually fulfilled 40 years later by the Amendment mentioned above.

Of course, the debate on whether and how such a comprehensive copyright contract law should and could be adopted never totally ended during the past 40 years. For instance, in 1977, Prof. Ulmer, nestor of copyright theory in post-war Germany, at the request of the then German Minister of Justice, prepared a legal expertise on copyright contract law.[10] Nordemann published a detailed reform proposal at the beginning of 1991.[11] Finally, a comprehensive collection of studies on all aspects of copyright contract law (legal, political, systematic and comparative) was published in

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7 *See supra* note 1.

8 See Bundestags-Drucks. IV/270, March 23, 1962.

9 *Idem* at 28, *see also* at 56.

0[10] *See* ULMER, "Urhebervertragsrecht" (Bonn 1977).

a book in honour of Gerhard Schricker in 1995.[12] Consequently, when the "group of professors", at the request of the Ms. Däubler-Gmelin, drafted a regulation on copyright contracts,[13] they could elaborate, to a large extent, on these and other proposals and discussions already available.

In addition, in 1974, an important partial aspect of the problem, namely how to enable the use of binding collective agreements on remunerations in the field of freelance authors and performers, had seemingly been resolved by the adoption of Sec. 12a of the Collective Labor Agreements Law (*Tarifvertragsgesetz*[14]). That provision indeed expressly allowed certain groups of freelancers, namely those who are "economically dependent and socially in need of protection similar to employees" (*arbeitnehmer-ähnliche Personen*) to conclude, under certain conditions, collective labor agreements with their partners, who are mainly from the culture and media industries. In spite of certain initial achievements, for example in the field of public broadcasters,[15] in other fields success could not be achieved, since important parts of the culture and media industries, especially in the private sector, simply did not want to enter into negotiations on remuneration agreements. In the long run, therefore, the model of 1974 could not be regarded as a sufficiently successful solution to the problems posed in the field of copyright contract law.

It was indeed one of the most crucial and most debated questions, after the recent reform proposals had been published, how such an attitude of "negotiation boycott" of the contractual partners of freelance authors and performers could be overcome. How could it be assured that collective agreements on terms of use of works, in particular on remunerations for such use, could be obtained within a reasonable amount of time? As we will see, with the Amendment 2002 a big step forward has been made here, based, it is true, on a number of compromises, which both interested groups, the creative people and the industries, were willing to accept.

From a theoretical point of view that solution was, and is, also important, because freelance authors and other creative people are often regarded as entrepreneurs in the sense of antitrust law so that negotiations and agreements on contractual terms, and in particular on remunerations between groups of such entrepreneurs and their partners, could easily be interpreted as forbidden agreements, in particular as forbidden price-fixing, under antitrust law. Here, Sec. 12a of the Collective Labor Agreements Law had already partly cleared the way but was still not a comprehensive solution. With the Amendment 2002 it is at least clear that

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1[1] *See* 1991 GRUR 1 *et seq*.

2[12] *See* BEIER, GÖTTING, LEHMANN & MOUFANG (eds.), "Urhebervertragsrecht. Festgabe für Gerhard Schricker" (Munich 1995).

3[13] *See supra* note 4.

4[14] German text of Sec. 12a reproduced in HILLIG (ed.), "Urheber- und Verlagsrecht" 166, Collection of legal texts (8th ed. 2001).

5[15] *See* examples of such collective labour agreements under Sec. 12a of that Law in HILLIG (ed.), *op.cit*. at 118 *et seq*.

negotiations and agreements on common remuneration standards for whole branches and sub-branches of the culture and media industries are now legally permitted.

By the way, earlier Federal Governments had also underlined, in particular in two reports stemming from 1989[16] and 1994,[17] that opening the possibility of collective agreements by freeing them from certain antitrust provisions (as already proposed by Eugen Ulmer) now appeared generally accepted, and that legal provisions could not replace collectively negotiated rules. The conceptual basis for one important aspect of the proposals of the "group of professors", and also for the ensuing Government draft thus already existed and could be taken up when the time was - politically - ripe at the beginning of this century.

Philosophical and Constitutional Background to the Amendment 2002

The full title of the German Copyright Law of 1965,[18] namely "Law on Authors' Rights and Neighbouring Rights", already indicates that modern German - and, indeed, continental European - copyright law must be understood as a complex system of regulation. It comprises much more regulative matter than just copyright (authors' rights) protection in the traditional sense, *e.g.* from the Berne Convention (even in its most recent text of Paris of 1971) or from its material continuation in the WIPO Copyright Treaty (WCT) of 1996. Indeed, one important additional subsystem is concerned with neighbouring rights or related rights, corresponding mainly, but not totally, to the subject matter as regulated by the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) of 1961. In addition, since the TRIPS Agreement of 1994, particularly Part III (Art. 41 *et seq.*) on "Enforcement of Intellectual Property Rights", enforcement chapters of national copyright laws are now much more elaborate, also in Germany, so that it can justly be said that civil, criminal and administrative enforcement of copyright has developed into an important part or subsystem of modern copyright legislation.

But that is not all. Even if contractual relations between authors and performers, on the one hand, and users of works and performances, on the other hand, as well as the activities of collecting societies (collective rights management) have until now found almost no systematic international regulation, their importance as a subject matter of regulation on the national level has grown enormously in recent years. It cannot be doubted, therefore, that these two fields, namely copyright contract law and the law of collecting societies, at least in continental Europe and particularly also in Germany, have developed into two additional, relatively independent and comprehensively regulated parts or subsystems of modern copyright legislation.

6[16] *See* "Bericht der Bundesregierung über die Auswirkungen der Urheberrechtsnovelle 1985 und Fragen des Urheber- und Leistungsschutzrechts", Bundestags-Drucks. 11/4920, July 7, 1989, at 59.

7[17] *See* "Bericht der Bundesregierung über die Entwicklung des Urhebervertragsrechts", Bundestags-Drucks. 12/7489, May 6, 1994, at 14.

8[18] *See supra* note 1.

Also, the new accent laid on strengthening the contractual position of authors and performers, characterizing the Amendment of 2002, is the result of an increasing awareness of the fact that simply granting more and more protection rights to authors and performers in the field of traditional or "substantive" copyright law is far from a sufficient answer to actual and professional protection needs. Under the sole conditions of free market and freedom of contract, in the large majority of cases, an increasing extent of "substantive" protection leads to the paradox result that what is given to the author or performer by the right hand (or the legislators) is often taken from him at a ridiculous consideration by the left hand (or his contractual partner).

That such a situation could no longer be tolerated was one of the basic ideas directing the preparation of the German copyright contract amendment of 2002. That is true, in particular, from the perspective of certain human rights and constitutional guarantees such as Art. 27(2) of the Universal Declaration of Human Rights of 1948[19] or the almost identical guarantee in Art. 15 of the International Covenant on Economic, Social and Cultural Rights of 1966. In addition, the German Constitutional Court when applying the guarantee of property as contained in Art. 14 of the German Constitution (*Grundgesetz*) of 1949 has always used a special formulation, according to which one of the essential features of copyright (authors' right) as a property right is the "fundamental allocation of the pecuniary results of the creative achievement to the author".[20]

If all that is true, such constitutional guarantees should also have an economic relevance; consequently, legislators have to see to it that authors and performers, who are normally not capable and not willing to exploit their works and achievements themselves, get some specific protection as the structurally weaker side of a deal. From that point of view it appears only natural that authors and performers are at least guaranteed an "equitable remuneration" for use of their works or performances, apart, perhaps, from special situations where such a remuneration is unusual (such as in certain cases of publication of scientific monographs) and is not justified even by equity considerations.

Interestingly enough, this is all confirmed by rather sweeping statements found in some recitals of the recent Copyright Directive of the EU,[21] which, in addition to their being authentic interpretations of the provisions of the Directive, often have the character of more general political statements concerning the legislative aims behind the Directive. From that perspective it is of great political importance, indeed, when

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9[19] "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

0[20] *See, e.g.*, the four basic decisions of the Constitutional Court of July 7, 1971, published in 1972 GRUR 481, 485, 487 and 488, respectively; *see* for more details SCHRICKER, in: SCHRICKER (ed.), "Urheberrecht. Kommentar" 7 *et seq.* "Einleitung" (2nd ed. 1999); SCHACK, "Urheber- und Urhebervertragsrecht" 40 (2nd ed. 2001).

1[21] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

the Council, representing the 15 governments of the Member States of the EU, and the European Parliament, the legislators of the Copyright Directive, have agreed amongst other things on the following statements:

> (9) Any harmonization of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognized as an integral part of property.
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> (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

By the way, the German term corresponding to "appropriate reward", namely "*angemessene Vergütung*" as used in the German text of the Directive, is precisely the same central term as used in a number of provisions of the Amendment 2002; German legislators have thus only transposed a common European political statement into a rule of law.

The Main Elements of the Amendment 2002

1. The Basic Principle - A Right to Equitable Remuneration

Hucko, one of the ministerial drafters of the new law and, at the same time, one of its first commentators,[22] characterizes the basic idea of the "professors' draft" - which is finally also true of the Amendment itself - that it essentially consists of two new provisions, namely that work users have to pay authors equitably and that associations of authors and of work users shall negotiate and agree on the "equity" of that remuneration.

Also Jacobs,[23] in an introductory article to the new law, summarizes it very succinctly in the following way:

2[2] *See* HUCKO, "Das neue Urhebervertragsrecht" 8 (2002); *see also* generally NORDEMANN, "Das neue Urhebervertragsrecht" (2002); as well as JACOBS, *supra* note 6; ORY, *supra* note 6; SCHIPPAN, "Codification of Contract Rules for Copyright Owners - The Recent Amendment of the German Copyright Act", 2002 EIPR 171 *et seq*.; *see also* the information entitled: "Germany. Government Strengthens Rights for Authors', Artists' Pay", 16 World Intellectual Property Report No. 4, at 5 *et seq*. (2002).

3[23] *Loc.cit.* at 1905.

> The new Copyright Contract Law follows the aim to let authors and performers equitably share in the returns and advantages from the use of their works. For that purpose, the legislator has introduced claims which shall correct a remuneration not equitable from the beginning or shall compensate for a conspicuous disproportion resulting from later uses of the works. In addition to that, through common remuneration standards agreed between authors and performers, on the one hand, and work users, on the other hand, standards for equitable remunerations shall be established for the future.

The basic principle of the law can therefore be best understood as a systematic interrelationship of two new provisions, namely, Sec. 32 which introduces the general claim to equitable remuneration and Sec. 36 (plus Sec. 36a) which provides for a regulated framework for negotiations on common remuneration standards.

The concept of "equitable remuneration" is thus the cornerstone of the reform; it is therefore no surprise that, in addition to the more concrete regulation of the claim to equitable remuneration and its standards in Sec. 32 *et seq.* of the amended law, the principle of equitable (or adequate, reasonable, or appropriate[24]) remuneration is already expressed in Sec. 11 of the Copyright Law. Together with Secs. 1 and 7, the latter provision, in view of its succinctness, could be called the "legal-philosophical" sections of the Copyright Law, whereby the original text of Sec. 11 prior to the Amendment 2002 was the following: "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".

If "protection with respect to utilization of his work" could reasonably be understood already in the sense of guaranteeing an adequate share of the profits of utilization of a work, that implicit meaning has now been made explicit, since the Amendment 2002 added the following second sentence to Sec.11: "At the same time it serves to secure an equitable remuneration for utilization of his work".

By the way, the above must be understood against the background of the general concept of transfer/grant of rights of use under German copyright law which, on the basis of what is traditionally called the "monistic interpretation" of copyright protection,[25] excludes assignment of copyright as such and only allows the grant of exploitation rights (licences), which may be exclusive or non-exclusive. The principle of non-assignability of copyright as such, which had already been laid down in the original text of Sec. 29, has been made even clearer by the Amendment 2002 simply by changing the order of rule and exception within Sec. 29. The principle of non-assignment already demonstrates that the bond existing between the author and the work shall last until expiration of copyright protection. In economic terms this means that whenever - under market conditions - use of a work takes place, the author shall reasonably participate in the returns or advantages resulting from that use.

4[24] All these terms would basically correspond to the German term of *angemessen*.

5[25] *See* DIETZ, in: SCHRICKER (ed.), *op.cit*. at 245 *et seq*.; DIETZ, "Legal Principles of Moral Rights (Civil Law). General report", in: ALAI (ed.), "The moral right of the author", Congress of Antwerp (1993), at 54 *et seq.*, 61 *et seq*. (Paris 1994).

2. Concretization of the Claim to Equitable Remuneration and Its Interrelationship with the Establishment of Common Remuneration Standards

Constructively, the new provision of Sec. 32(1) concerning the author's claim to equitable remuneration has opted for a somewhat indirect solution starting with the contractually agreed remuneration to which the author is entitled. If the latter seems to be a legal triviality, it is nevertheless already a reminder that such – it is hoped equitable - remuneration shall be agreed. If the rate of remuneration is not settled, it shall be at an equitable level. Finally, if the agreed remuneration is not equitable, the author may require assent by his contracting partner to alter the contract so that the author is indeed assured an equitable remuneration. The latter part of that provision, of course, is the true innovation. Still, in contrast to the so-called “professors’ draft” which had foreseen a direct, but subsidiary, legal right to equitable remuneration for any use of the work, the Amendment 2002 has thus opted for a somewhat weaker right, namely a claim to alteration of the contract.

In addition, this claim is granted from an *ex-ante* perspective since, as is clarified in Sec. 32(2), second sentence, equity at the time of contracting is relevant, according to certain criteria. That provision, however, is completed by Sec. 32a where - from an *ex-post* perspective - the author is, once again, granted a right to alteration of the contract such as will secure some further equitable participation for the author in case of a conspicuous disproportion between what has been paid originally to the author (even if at the time of contracting it may have been equitable) and the returns and advantages for his contractual partner from further uses of the work.[26]

Since the very term "equitable remuneration" is admittedly relatively vague and difficult to apply, perhaps the most important provision is laid down in Sec. 32(2), first sentence, according to which a remuneration under Sec. 32(1) is equitable if it is determined by a common remuneration standard as regulated in Sec. 36. This reference to Sec. 36 (like the cross-reference to Sec. 32 in Sec. 36) certainly forms that element of interrelationship between individual rights to equitable remuneration and collectively negotiated standards for such remunerations, which is so typical for the approach of the Amendment 2002. Consequently, according to Sec. 36(1), in order to settle the equity of remunerations provided under Sec. 32, associations of authors are entitled to conclude common remuneration standards with associations of users of works or individual users. The common remuneration standards shall take account of the current circumstances in the field to be regulated, in particular the structure and size of the user organization.

To fall under Sec. 36(1), associations must be representative, independent and authorized to settle such common remuneration standards. It might well be that this cumulative condition of representativity, independence and authorization as a preliminary question may create some problems of interpretation for the courts before they can apply a commonly agreed remuneration standard in the sense of an irrebuttable presumption of equity according to Sec. 32(2), first sentence, to an individual case.

6[26] For more details, *see infra* at 5.

3. Mediation Procedure

Since group negotiations on such common standards can fail from the beginning or can remain unsuccessful, the third important element of the solution introduced by the German legislators of the Amendment 2002 is the mediation procedure as regulated in Sec. 36(3) and (4), as well as in Sec. 36a. Of course - as Sec. 36(3) expressly states - a mediation procedure to settle common remuneration standards before a mediation panel can always be initiated on the basis of an agreement between the parties. This is quite natural, so that the real innovation is contained in Sec. 36(3), second sentence. According to that provision, such a procedure, under certain conditions, must also take place upon the written request of only one party, if negotiations had not commenced within three months or remain without result one year after their commencement or have - according to the declaration of a party - wholly failed.

The important point here is that the other party (probably, in the majority of cases, it will be the association of users or an individual user) cannot obstruct initiation of such a procedure before a mediation panel, the establishment of which as well as its membership, etc., is regulated in more detail in the new Sec. 36a of the law.

If the parties indeed cannot escape the mediation procedure, when one party makes a written request, the other important element of the big compromise, characterizing the whole solution, consists in the fact that the settlement proposal for an agreement to be made by the mediation panel is binding for the parties only if both of them accept it. Nevertheless, acceptance is presumed if the proposal is not rejected in writing by at least one party within three months of its receipt.

One could rightly ask the question why such a complicated regulation has been introduced by the Amendment 2002, if the binding nature of a mediation proposal still ultimately depends on the will of both parties. The “professors’ draft” had indeed gone a step further here, since it had made such mediation, or rather arbitration, proposals binding in case an individual work user (such as a publisher or other media enterprises) rather then an association of users were concerned. On the contrary, associations of work users would always have been allowed to declare that they were not authorized to enter the procedure of establishing common remuneration standards.[27]

Under the new Amendment, the situation is different, of course. But, even in case negotiations fail and the mediation panel proposal is not accepted, such a proposal still exists; it could even be officially published and would certainly have a de-facto effect that should not be underestimated. It would serve as evidence for the equity of a remuneration claim in individual law suits based on Sec. 32(1), even if their legal effect as an irrebuttable presumption of equity according to Sec. 32(2), first sentence, were not present here. Such an expectation is clearly expressed in the legal reasoning for Sec. 36 given by the Legal Commission of the German *Bundestag*.[28]

7[27] *See* Professors’ Draft, *supra* note 4, at Sec. 36.

8[28] *See* Bundestag-Drucks. 14/8058, January 23, 2002, at 49.

That expectation is certainly not without justification, since, precisely in law suits concerning equitable remuneration, the courts will have to look for evidence in all directions when deciding whether a right to have the contract altered to assure the author an equitable remuneration exists under Sec. 32(1).

4. The Criterion of "Customary and Fair in Business"

As already mentioned, the full significance of the Amendment 2002 will only become apparent after some years of negotiation and/or mediation, when common remuneration standards in a number of branches or sub-branches of the culture and media industries exist. In the meantime, however, the provision in Sec. 32(1) guaranteeing equitable remuneration to authors (and performers) shall of course be applied - and this is also true for those fields of use of protected works and performances where such standards will or can never be established. How will "equity of remuneration" be determined in those situations? An answer to this is given in Sec. 32(2), second sentence, according to which remuneration is equitable if it conforms at the time of contracting to what was 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 to all other circumstances.

That provision represents a further element of the "big compromise" which has finally led to the Amendment 2002. Of course, the work users' organizations who fiercely opposed the Amendment always tried to convince the legislators that what they pay is already reasonable or equitable under market conditions; consequently, the standard for reasonableness or equity should be what is customarily paid in the individual branches of the copyright industries.

It is true, in many cases (for example in the field of fiction publishing) where royalties are paid on the basis of certain traditional rules (such as the rule of 10% of the sale price of a book), the equation of "customary is equitable" might indeed be correct. But, as the legal reasoning of the Legal Commission of the *Bundestag* also clearly stated,[29] there are cases, such as in the field of literary translation, where that equation is simply not correct. Customary remunerations are thus not always equitable or fair, which, by the way, has been confirmed by a recent decision of the German Federal Supreme Court in a case concerning the extremely successful marketing of audio plays for children, where a number of "musical fragments" delivered by a student composer were used.[30] That is the reason why the relevant new provision in Sec. 32(2), second sentence, has introduced a combined criterion, namely that a remuneration must conform to what is regarded as "customary and fair in business" at the time of contracting.

9[29] *See loc.cit.* at 43.

0[30] *See* German Federal Supreme Court (*Bundesgerichtshof*), decision of December 13, 2001 - *Musikfragmente*, 2002 GRUR 602, 604: Even if the payment of a certain fee corresponds to a general custom existing in a branch of industry, this does not necessarily mean that such a fee is equitable.

Realistically, it can be assumed of course, that in view of the cost of a law suit authors will not easily base a remuneration claim solely on the latter provision. It can rather be expected that the various associations of creative people (writers, translators, film authors, photographers, and performers, etc.) will try to use the alternative instrument as much as possible, namely the establishment of commonly agreed remuneration standards together with the users. That is why the interrelationship between Secs. 32 and 36 (plus 36a) is so important and can still be regarded as the core element of the new contractual law.

5. Additional Participation of the Author from an *Ex-Post* Perspective (the so-called "Bestseller Provision")

The German Copyright Law, since its adoption in 1965, has always contained a special provision (the old Sec. 36) concerning the right of an author to an equitable share in the income from the use of a work, in case of a gross disproportion between the agreed consideration to the author and that income. Constructively, once again, that right was granted in the form of a right to require the other party to assent to a relevant change in the underlying agreement. In German practice, the provision was called the "bestseller provision".[31]

For a number of reasons[32] that provision was rarely tested by the courts; in one recent and rather spectacular case,[33] a claim by an author to a share under the old Sec. 36(1) failed since it was relevant that the contracting parties did not foresee or could not have foreseen the level of later income. This was a paradox, indeed, since it meant that only "naive" authors could profit from the bestseller provision. Where an informed author clearly foresaw the later success of a work, but was not strong enough to negotiate a corresponding remuneration, reference to the bestseller provision was useless.

This paradox has now been repaired by the Amendment 2002, since the bestseller provision, originally contained in Sec. 36 of the Law, was reformulated as the new Sec. 32a. According to its somewhat mitigated formulation, the right to alteration of the contract is now granted in case of only "conspicuous" disproportion (instead of the previous concept of "gross disproportion"); in addition to that, it is no longer relevant whether the contracting parties foresaw or could have foreseen the level of the later returns or advantages.

Another clarification, as compared to the previous provision, is contained in the new subsec. 2 of Sec. 32a, according to which in cases where the original author has transferred the exploitation right and the conspicuous disproportion results from

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1[31] In German: *Bestsellerparagraph*.

2[32] One of the reasons stems from the transitional provision in Sec. 132(1) according to which the (previous) provision of Sec. 36 (the "bestseller provision") was not applied to "old" contracts, *i.e.* contracts concluded before January 1, 1966, the date of entry into force of the original text of the Copyright Law.

3[3] *See* Federal Supreme Court, decision of January 22, 1998 - *Comic-Übersetzungen*, 1998 GRUR 680.

returns or advantages to a third party, the latter is directly responsible to the author under subsec. 1. The liability of the original contracting party, of course, then ceases.

It should also be noted that no claim under Sec. 32(1) is granted where the remuneration is determined by a common remuneration standard or a collective (labour) agreement if further equitable participation is expressly provided therein for that situation. This and other provisions[34] show a preference for common remuneration standards and/or collective labour agreements.

According to the transitional provision in the new Sec. 132(3), second sentence, the amended "bestseller provision" (Sec. 32a) only applies to factual situations after March 28, 2002, the date when the Amendment 2002 was published. This means that conspicuous disproportion will have to arise after that date, but the provision also applies to "old" contracts concluded before that date. Still, in cases where the conspicuous disproportion already existed before the publication date of the Amendment 2002, this new provision is not applied; insofar, the previous version of that provision (the original Sec. 36 operating with "gross disproportion") is still applied. In view of the previous transition rule,[35] that still means that contracts concluded prior to January 1, 1966, are not covered.

By the way, as far as Sec. 32 (the new equitable right to remuneration) is concerned, there is no retroactivity at all, since it is generally not applied to "old" contracts; the one minor exception concerns such contracts which were concluded between June 1, 2001 and March 28, 2002, to which the new provision is already applied in the same way as to truly "new" contracts as concluded after the publication date of March 28, 2002. In all cases, however, in order to trigger the remuneration right, the permitted use must take place after that date.

6. Conflict-of-Laws Provisions

Surprisingly, even for the original drafters of the proposal, the Legal Committee of the *Bundestag* has added a clear-cut provision of a conflict-of-laws character, according to which Secs. 32 and 32a have mandatory application irrespective of the contractual choice of another law, if, in the absence of a choice of law, the use agreement were governed by German law or insofar as the contract concerns substantial use in the territory governed by the German Copyright Law. According to the legal reasoning behind that provision as given by the Legal Committee of the *Bundestag*,[36] most situations will be governed by the second alternative, namely that Secs. 32 and 32a of the Amendment 2002 mandatorily apply when substantial use of a work is made in Germany. Of course, that will have a number of consequences for international copyright contracts since, based on the rule of national treatment under Convention law (Art. 5 Berne Convention and Art. 3 TRIPS Agreement), foreign authors (Convention authors) will also profit from the new contractual provisions that favour authors in general.

4[34] *See* Sec. 32(4) and Sec. 36(1) at the end.

5[35] *See supra* note 32.

6[36] *See supra* note 5, at 48.

7. Other Provisions

Without doubt, the new provisions in Secs. 32, 32a, 32b, 36 and 36a are the most important provisions that realize the legislative intention to strengthen the contractual position of authors and performers, whereby the application of these provisions to performers is directly laid down in the new Sec. 75(4) of the Law.

There are a number of additional provisions of only marginal importance in the new Law which I will not discuss in detail here. Since the consolidated text of all the new contractual provisions of the German Copyright Law is published below,[37] let me mention only a few of them.

According to Sec. 34, under normal circumstances further transfer of exploitation rights by the contractual partner of the author can only be made with the author's consent; that consent, however, is not necessary if the transfer is included in the sale of the whole of an enterprise or of parts of it. Since such transfers of exploitation rights together with an enterprise sometimes have an important effect - at least psychologically - on relations between the parties concerned, the new Sec. 34(3), second sentence, has introduced a termination right in favour of the author. It is available when it is (morally) unacceptable to the author that the exploitation right is realized by the acquirer of the transferred right. This termination right is thus granted only under relatively restrictive conditions; it will probably be applied very rarely in future practice, particularly since, according to the amended Sec. 90 of the Law, it does not apply to film works.

Another new provision, namely Sec. 63a, concerns legal remuneration rights (legal licences) as they are provided in a number of cases in the limitations chapter of the Copyright Law (Sec. 45 *et seq.*), in particular in Sec. 46 (collections for religious, school and instructional use), Sec. 47 (video or audio recordings for instructional purposes), Sec. 49 (so-called "press mirror remuneration"), Sec. 52 (certain cases of free communication to the public), Sec. 54 *et seq*. (private copying and reprography). In these cases, according to the new Sec. 63a, the legal remuneration rights cannot be waived by the author in advance; they can be assigned in advance only to a collecting society. In view of the fact that some of the legal remuneration rights, in particular those concerning private copying and reprography, have considerable economic importance, that provision is also an important element of strengthening the economic position of authors.

Finally, it should be mentioned that - apart from the fact that the core provisions (Secs. 32, 32a, 32b, 36 and 36a) of course also apply to contracts in the film sector - a number of provisions in the contractual chapter of the Law (Secs. 34, 35, 41 and 42), as previously, do not apply to film works. In addition to that, the previous provisions, particularly concerning the presumption of grant of exploitation rights in favor of film producers (Secs. 88 and 89), remain almost unchanged, whereby the legal situation of authors of preexisting works (Sec. 88) and of true film authors (Sec. 89) is now regulated in an almost identical manner.

7[37] *See* this issue of IIC at [illegible].

Conclusion

Without doubt, after 40 years of discussions and only partial and sometimes ineffective solutions, German copyright legislation has made a big step forward in strengthening the contractual position of authors and performers. Much, however, will depend on the outcome of negotiations between the interested groups on both sides. First steps of initiating such negotiations have already been made, whereby it is certainly no surprise that initial proposals and drafts of “common remuneration standards” stem from authors’ associations.

There are already certain indications that the German reform of the contractual provisions within the Copyright Law has found an echo in foreign countries, and this is also no surprise. In almost all countries in the world, copyright contract law as the historically more recent and underdeveloped part or subsystem of copyright law needs adaptation and amelioration. This is true at least if one can accept that the preamble of the old and venerable Berne Convention, originally stemming from 1886 and unchanged until the latest text of Paris 1971, shall be taken at face value, namely that the countries of the Union are *equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.* I think that effective protection, in economic terms, can only mean that the extremely long protection granted to authors under that Convention and, more generally, under international and national copyright law must have a participatory character.