"EQUITABLE REMUNERATION" IN COPYRIGHT LAW: THE AMENDED GERMAN COPYRIGHT ACT AS A TRAP FOR THE ENTERTAINMENT INDUSTRY IN THE U.S.?

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± [Editor's Note: In an effort to expand the scope of this journal and include articles of interest to our readership, we are very excited about including this article dealing with an international comparative copyright issue. However, due to the difficulties that arise in collecting and translating foreign sources, we apologize in advance for any errors or inconsistencies that may appear below. We also apologize to the authors again for the time it has taken to bring this article to production, but thank them for their patience and willingness to work with us.]

ABSTRACT

This article is a survey of two amendments (2002/2003) of German copyright law with respect to contractual issues and reveals the impact of these amendments on the U.S. entertainment industry, which is the market leader in Germany. It focuses on the 2002 amendment that limits private autonomy to freely stipulate the compensation for a transfer of rights. Authors and performers now have a right to claim modification of a copyright agreement that does not provide for equitable remuneration. Following an introduction that outlines the background of the 2002 amendment, basic principles of German copyright law are briefly summarized (Part II). The article then details the new claims for equitable remuneration. It describes the history and purpose of the amendment (Part III), and explains how equitable remuneration may be established (Part IV). Finally, the article analyzes a provision that makes the respective rules internationally mandatory (Part V). To elucidate the practical relevance of this conflicts of law rule for the U.S. entertainment industry, the article considers jurisdiction of German courts over U.S. defendants in a suit for equitable remuneration. It also examines conditions for recognition and enforcement of German judgments that grant equitable remuneration in the U.S. Additionally, the article investigates whether authors and performing artists from the U.S. are also entitled to the new claims.

INTRODUCTION

Authors and performing artists are usually unable to exploit their creative products on their own. They need publishers, music companies and film producers to offer their books, music, and creative works to the public. Although the Internet has introduced new ways to exploit works and performances,[1] the traditional me-

[1] New ways to exploit works and performances without music companies and other branches of the entertainment industry are evolving on the Internet. These means give authors the opportunity to publish their works on their own, using standardized license agreements and technological protection measures on different levels of their choice. *See, e.g.*, Creative Commons, *at* http://www.creativecommons.org (last visited Oct. 24, 2004).

dia or cultural industry will continue to play a vital role in the future dissemination of creative works. Unless a work is considered a work made for hire under the U.S. Copyright Act, 17 U.S.C. § 201 (b),[2] authors have to grant producers rights in their work to legalize the use of it. Thus, the contractual relationship between authors and producers is essential for the dissemination of works and performances.[3] If such a contract has foreign elements, such as the exploitation covers more than one country or if the parties of the agreement are citizens of different countries, one important question must be resolved: which national law is applicable to this agreement?[4]

This situation is common practice in the U.S. entertainment industry, which disseminates its products worldwide. Hollywood, in particular, as a symbol for this cultural industry, is not only a leading market participant in the United States but also in Europe.[5] Current statistics of market shares reveal this dominance. American motion picture productions accounted for 46% of European box office returns in 1980, 69% in 1991, 80% in 1994,[6] and 73.7% in 2000,[7] whereas European films accounted for only 1% of the American market in 1995,[8] and 3.6% in 2000.[9] Large cinemas in Europe play Hollywood blockbusters, whereas European movies

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2 17 U.S.C. § 201(b) (2004). *See generally* Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136 (9th Cir. 2003).

3 *See* John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects – Response of the United States to the ALAI Questionnaire, ALAI Congress, Paris, Sept. 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 379, 383-84 (1996) (remarking that:

> [t]he United States copyright law does not insist on any particular scheme of allocating those rights and (except in limited cases relating to unique works of visual art or to termination) they are subject to transfer or waiver by contract. It is because of these considerations that contracts are the most important means of establishing ownership of a film and the distributions of rights in its component parts.).

4 *See* PAUL EDWARD GELLER, *International Copyright: An Introduction in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 6[2] (Paul Edward Geller ed., Matthew Bender 2003).

5 *See* David H. Horowitz & Peter J. Davey, *Financing American Films at Home and Abroad*, 20 COLUM.-VLA J.L. & ARTS 461 (1996) (stating:

> For better or worse, motion pictures produced in the United States have long dominated the global film market, having attained the status of truly universal entertainment products. Despite the efforts of several European nations and the European Union to bolster indigenous motion picture production, American hegemony over the international film market is greater than ever.).

6 *Id.* at 478.

7 EUROPEAN AUDIOVISUAL OBSERVATORY, STATISTICAL YEARBOOK 2002, FILM, TELEVISION, VIDEO AND MULTIMEDIA IN EUROPE (2002), *available at* http://www.obs.coe.int/about/oea/pr/desequilibre.html.en (last visited Oct. 24, 2004). *See* Reto M. Hilty, *Eldred v. Ashcroft: Die Schutzfrist im Urheberrecht - eine Diskussion, die auch Europäer interessieren sollte*, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil [GRUR Int.] 201, 202 (2003).

8 Horowitz & Davey, *supra* note 5, at 479.

9 Reto M. Hilty, *Eldred v. Ashcroft: Die Schutzfrist im Urheberrecht - eine Diskussion, die auch Europäer interessieren sollte*, GRUR Int. 201, 202 (2003).

lead a shadowy existence. The same phenomenon can be observed with regard to music played on the radio or films broadcast on TV.[10]

This worldwide dissemination raises complex questions of international copyright. In this respect, two different issues have to be distinguished. First, producers should be aware that protection against infringement in any country depends on the national laws of that country (*lex loci protectionis*).[11] For example, German law governs the use of a motion picture in Germany with regard to the subject matter of copyright, duration,[12] the scope of exclusive rights, limitations, and remedies. Even choice of law rules on ownership of copyright diverge between Germany and the United States. Whereas German courts strictly follow the *lex loci protectionis* rule, U.S. courts apply the law of the state with the most significant relationship to the copyright and the parties.[13] If Germany is the country of copyright protection, parties may not derogate the applicable German copyright law.[14]

Second, the parties of an international copyright contract should know that this copyright-conflicts regime differs from the

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[10] Of all the imported fiction programs (film and TV fiction) transmitted by 101 European Union Networks in 2000, 68.7% originated in the U.S. *See* EUROPEAN AUDIOVISUAL OBSERVATORY, *supra* note 7.

[11] *See* Lauritzen v. Larsen, 345 U.S. 571, 583 (1953); *see also* Itar-Tass v. Russian Kurier, Inc., 153 F.3d 82, 91 (2d Cir. 1998). *See generally* GELLER, *supra* note 4, § 1[1], § 3[1][a]; William Patry, *Choice of Law and International Copyright*, 48 Am. J. Comp. L. 383 (2000). For German law, see GRUR Int. [Supreme Court] 470, 471 (2003) - Sender Felsberg; Paul Katzenberger, *in* URHEBERRECHT before §§ 120 German CA Nos. 120-28 (Gerhard Schricker ed., 2d ed., C. H. Beck 1999); Paul Katzenberger, *Urheberrechtsverträge im Internationalen Privatrecht und Konventionsrecht, in* URHEBERVERTRAGSRECHT, FESTGABE SCHRICKER 225, 238 (Friedrich-Karl Beier et al. eds., C. H. Beck 1995); Claus Hinrich Hartmann, *in* URHEBERRECHTSGESETZ, KOMMENTAR before §§ 120 German CA Nos. 9-38 (Philipp Möhring & Käte Nicolini eds., 2d ed., Vahlen 2000); EUGEN ULMER, URHEBER- UND VERLAGSRECHT 82 (3d ed., Springer 1980)); Stefan Mäger, DER SCHUTZ DES URHEBERS IM INTERNATIONALEN VERTRAGSRECHT 33, Berlin-Verlag Spitz (1995); Kaspar Spoendlin, *Der internationale Schutz des Urhebers*, 107 Archiv für Urheber- und Medienrecht [UFITA] 11-54 (1988); Kurt Siehr, *Das Urheberrecht in neueren IPR-Kodifikationen*, 108 UFITA 9-25 (1988); Thomas Hoeren, *IPR und EDV-Recht. Kollisionsrechtliche Anknüpfungen bei internationalen EDV-Vertägen*, Computer und Recht [CR] 129, 130 (1993); Frank Vischer, *Das Internationale Privatrecht des Immaterialgüterechts nach dem schweizerischen IPR-Gesetzentwurf*, GRUR Int. 670, 676-79 (1987); Jane C. Ginsburg, *Die Rolle des nationalen Urheberrechts im Zeitalter der internationalen Urheberrechtsnormen*, GRUR Int. 97, 107 (2000); Haimo Schack, *Urheberrechtsverletzung im internationalen Privatrecht aus der Sicht des Kollisionsrechts*, GRUR Int. 523 (1985).

[12] For the German/American relationship, see Josef Drexl, *Zur Dauer des US-amerikanischen Urhebern gewährten Schutzes in der Bundesrepublik Deutschland*, GRUR Int. 35 (1990).

[13] *See Itar-Tass*, 153 F.3d 82; Films by Jove, Inc. v. Berov, 154 F. Supp. 2d 432 (E.D.N.Y. 2001); Shaw v. Rizzoli Int'l Publ'ng., Inc., 1999 WL 160084 (S.D.N.Y. March 23, 1999); Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp.2d 421, (S.D.N.Y. 1998); *see also* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 12.8 (3rd ed., Matthew Bender 1999).

[14] Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] [Supreme Court] 118, 395, 397 - Alf; GRUR Int. [Supreme Court] 427, 429 (1998) - Spielbankaffaire.

contract-conflicts regime. In this article, we only discuss the latter issue. Contractual compensation for a transfer of rights unquestionably follows the choice of law rules that apply to contracts. It is not subject to the *lex loci protectionis.* Parties are free to choose the law that governs disputes of a contractual nature. Thus, they have a reliable basis for their relationship that does not depend on the place of exploitation.[15] But this is only the basic principle and, as always, exceptions must be taken into account. As Leaffer puts it with reference to U.S. law, "[m]any countries are much more paternalistic in their view of contracts concerning the use and ownership of copyright."[16]

This is the case with regard to the new claims for equitable remuneration under German law that have been in force since July 1, 2002, as part of the "act on strengthening the contractual situation of authors and performing artists."[17] The claims are inalienable. Moreover, section 32b of the German Copyright Act ("German CA")[18] states that a party's choice of law that derogates German law is, under certain conditions, not enforceable. As a result, authors and performing artists may claim a higher compensation than the agreed amount, relying on the new German law, even if the parties stipulated, for example, California law. Obviously, it is this provision that gives rise to the question of the impact the 2002 amendment will have on U.S. entertainment companies.

I. Basics of German Copyright Law

German copyright contract law is not comprehensible without some background information about the German copyright system in general. In the following section, this article will give a short survey of these basic principles.[19]

A. *"Monist" Approach*

German copyright law follows the *droit d'auteur* approach that differs substantially from the approach in the Anglo-Saxon legal

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15 *See* Geller, *supra* note 4, § 6[2][b]; Reuben Stone, *Problems of International Film Distribution: Assignment and Licensing of Copyright and the Conflict of Laws,* 7 Ent. L. Rev. 62 (1996); Mario Fabiani, *Conflicts of Law in International Copyright Assignment Contracts,* 9 Ent. L. Rev. 157 (1998).

16 Leaffer, *supra* note 13, § 12.8 [C]; Paul Goldstein, Copyright § 4.6.2 (2d ed. Supp., Aspen 2002); Paul Katzenberger, *Protection of the Author as the Weaker Party to a Contract under International Copyright Contract Law,* 19 Int'l Rev. of Indus. Prop. and Copyright L. (IIC) 731 (1988).

17 Amendment, v. 2002 (Bundesgesetzblatt [BGBl.] I S.1155).

18 Law on Copyright and Neighboring Rights (Copyright Act), v. 9.9.1965 (BGBl. I S.1273) (as revised on September 10, 2003) [hereinafter German CA].

19 For a more detailed depiction, see Adolf Dietz, *in* 2 International Copyright Law and Practice Germany (Paul Edward Geller ed., Matthew Bender 2000).

system.[20] The *droit d'auteur* system is based on the rights of authors to reap the fruits of their creations, to obtain rewards for their contributions to society and to protect the integrity of their creations. Justification of copyright is, according to the classic copyright doctrine, primarily based on these arguments, which focus on the protection of the author.[21] Promotion of the progress of science and arts[22] or the incentive to stimulate artistic and scientific creativity for the public good[23] are also cited as justifications for copyright law, but only with secondary significance.[24]

As the core feature in a *droit d'auteur* system, § 7 of the German CA declares that "the person who creates the work shall be deemed the author."[25] The concept of "works made for hire"[26] is not established under German copyright law. Even in the case of a work prepared by an employee within the scope of his or her employment, or when a work is specially ordered or commissioned, the author is vested with the copyright.[27] Therefore, producers ab-

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[20] *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001) ("The copyright is not a natural right inherent in authorship. If it were, the impact of market values would be irrelevant; any unauthorized taking would be obnoxious.") (citing Pierre N. Leval, *Towards a Fair Use Standard*, 105 HARV. L. REV. 1105, 1124 (1990)).

[21] § 11(1) German CA ("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.")

[22] U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); *see Suntrust Bank*, 268 F.3d at 1260; Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546, 558 (1985); Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02-08 (Matthew Bender 2002); CRAIG JOYCE ET AL., COPYRIGHT LAW § 1.03 (4th ed., Matthew Bender 1998); LEAFFER, *supra* note 13, § 1.6-1.9; ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY 285 (3rd ed., West Publishing 2000); ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 13 (Michie Company 1993); PETER WAND, TECHNISCHE SCHUTZMAßNAHMEN UND URHEBERRECHT 191 (C.H. Beck 2001); PHILIPP WITTGENSTEIN, DIE DIGITALE AGENDA DER NEUEN WIPO-VERTRÄGE 22 (Stämpfli 2000).

[23] *Twentieth Century Music Corp.*, 422 U.S. at 156.

[24] Gerhard Schricker, *in* URHEBERRECHT, *supra* note 11, Einleitung, Nos. 1-30; Alexander Peukert, *USA: Ende der Expansion des Copyright?*, GRUR Int. 1012, 1019-21 (2002).

[25] § 7 German CA.

[26] 17 U.S.C. § 201(b) (2004).

[27] With respect to computer programs and motion pictures, German law provides that if in doubt, the economic rights are due to the producer or employer. *See* § 69b(1) German CA ("Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all the economic rights in the program, unless otherwise agreed."); § 88(1) German CA (stating:

> 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 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 use the work and translations and other cinematographic adaptations in any known manner.)

§ 89(1) German CA (stating:

solutely depend on a contractual granting of rights.

Moreover, even after implementing all EC directives on copyright, German copyright law occupies a unique position with regard to the nature of copyright. According to the monistic theory, economic and moral rights are considered thoroughly intertwined so that both aspects of copyright cannot be dissociated from each other. While the majority of EU member states[28] make a clear dogmatic distinction between economic rights and moral rights, Germany follows a "monist" approach.[29] Ulmer formulated the famous "tree-theory."[30] The economic and moral interests of the author stand for the different roots of a tree and the trunk symbolizes copyright. The rights to which the author is entitled are the branches and twigs that draw their nourishment from one root or another.[31] Following this view, the German CA does not permit a transfer of ownership, except by testamentary disposition.[32] Instead, the author may grant an economic right[33] to another to use

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> 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.).

On the legal situation with regard to works prepared by employees, see Sabine Rojahn, *in* URHEBERRECHT, *supra* note 11, § 43 German CA No. 1-136.

28 *See, e.g.*, Arts. 20, 22, 107 Italian Copyright Act.

29 Note, however, that the economic rights of the performing artist are assignable, § 79(1) German CA. It follows that the rules of the German CA governing the rights of the performing artist are based upon a dualist structure. *See* ALEXANDER PEUKERT, DIE LEISTUNGSSCHUTZRECHTE DES AUSÜBENDEN KÜNSTLERS NACH DEM TODE 35-50, Nomos (1999); Alexander Peukert, *Leistungsschutz des ausübenden Künstlers de lege lata und de lege ferenda unter besonderer Berücksichtigung der postmortalen Rechtslage*, 138 UFITA 63 (1999).

30 ULMER, *supra* note 11, at 116.

31 *Id.*

32 *See* § 29 German CA. According to 17 U.S.C. §§ 101, 201(d) (2004), copyright in a work may be transferred in whole or in part. Czech, Hungarian and Greek copyright laws also provide that copyright is not assignable. *See* Adolf Dietz, *Das neue tschechische Urheberrechtsgesetz – ein europäisches Spitzenprodukt, in* FESTSCHRIFT FÜR MANFRED REHBINDER 214, 217 (Jürgen Becker et al. eds., Stämpfli 2002); Achilles Koutsouradis, *Familienrecht und Urheberrech, in* FESTSCHRIFT FÜR MANFRED REHBINDER, *id.* at 285, 299; Péter Gyertyánfy, *Expansion des Urheberrechts und kein Ende?*, GRUR Int. 557, 558 (2002). The rationale of the monistic approach is not only a philosophical, but also a political one. As a general right of personality was not recognized in Germany before the 1950s, one could protect authors against exploiters best if copyright was not assignable. *See* CYRILL P. RIGAMONTI, GEISTIGES EIGENTUM ALS BEGRIFF UND THEORIE DES URHEBERRECHTS 64-67 (Nomos 2001).

33 Moral rights are also not assignable. To what extent moral rights may be granted to third parties is still an unsolved question. The dominant opinion holds that a granting of moral rights that touches upon the core of the rights is not enforceable. However, it remains vague what kind of situation interferes with this not assignable core of moral rights. Others suggest that a grant of moral rights is only valid if the author is able to foresee the consequences of the contract. *See* AXEL METZGER, RECHTSGESCHÄFTE ÜBER DAS DROIT MORAL IM DEUTSCHEN UND FRANZÖSISCHEN URHEBERRECHT (C.H. Beck 2002); Gerhard Schricker, *Zum neuen deutschen Urhebervertragsrecht*, GRUR Int. 797, 799 (2002). For Swiss law *see* Reto M. Hilty, *Urhebervertragsrecht: Schweiz im Zugzwang?, in* URHEBERRECHT AM SCHEIDEWEG? 87, 89 (Reto M. Hilty & Mathis Berger eds., Stämpfli 2002).

the work in a particular manner. An exploitation right may be granted as a non-exclusive or exclusive right and may be limited in respect to time, place or purpose.[34] But these exploitation rights still remain secondary, so-called "daughter" rights, that are always bound to "mother" rights that stay with the author.[35] All rights revert to the author upon termination of an exploitation contract.

B. *Mandatory Provisions on Copyright Contract Law*

According to U.S. law, the phrase "copyright contract law" merely prescribes an intersection between copyright and contract law.[36] The law on contracts also governs copyright contracts.[37] According to this body of law, contract terms can only be declared void in individual cases if the contract came into being due to deceit, duress, fraudulent misrepresentation, undue influence, or if the terms are unconscionable.[38] Contract law principally is a matter for the state legislatures. This fact hinders the development of federal law on copyright contracts substantially, even if the federal legislature wanted to enact respective rules.[39] These more formal aspects may be one reason the U.S. legal system does not contain an act concerning the law of publication comparable to the German *Verlagsgesetz*.[40] More importantly, the lack of a coherent law on copyright contract seems to be a consequence of the premium placed on freedom of contract in the United States.[41] As far as possible, it shall always be the parties that decide their contractual

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[34] § 31(1) German CA.

[35] §§ 31, 32 German CA No. 2; Schricker, *supra* note 11.

[36] Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1605 (1995); JENS WEICHE, US-AMERIKANISCHES URHEBERVERTRAGSRECHT 15-65 (Nomos 2002); Theo Bodewig, *Urhebervetragsrecht in den USA*, *in* URHEBERVERTRAGSRECHT, FESTGABE SCHRICKER, *supra* note 11, at 833; Christian Pleister, *Buchverlagsverträge in den Vereinigten Staaten - ein Vergleich zu Recht und Praxis Deutschlands*, GRUR Int. 673, 674 (2000). On acts against so-called "blind bidding," see Charles H. Grant, *Anti-Competitive Practices in the Motion Picture Industry and Judicial Support of Anti-Blind Bidding Statutes*, 13 COLUM.-VLA J.L. & Arts 349, 368 (1989).

[37] *See* GOLDSTEIN, *supra* note 16, § 4.6.2; *see, e.g.*, Kennedy v. Nat'l Juvenile Det. Ass'n, 187 F.3d 690, 694 (7th Cir. 1999); P.C. Films Corp. v. Turner Entm't Co., 954 F. Supp. 711, 714 n.6 (S.D.N.Y. 1997), *aff'd sub nom.*; P.C. Films Corp. v. MGM/UA Home Video, Inc., 138 F.3d 453 (2d Cir. 1998).

[38] *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 3-6 (3d. ed. Aspen 1999); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 306-92 (4th ed. 1998); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 295 (1975); Phillip W. Hall Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189 (2002); Buchwald v. Paramount Pictures Corp., No. 706083, 1992 WL 1462910 (Ca. Super. Ct. March 16, 1992); *see also* ALEXANDER LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 6:101 (2d. ed. West 1999).

[39] *See generally* NIMMER, *supra* note 22, § 1.01[B]; GOLDSTEIN, *supra* note 16, § 4.6.1.1.

[40] *See* Pleister, *supra* note 36, at 674. The German federal government has jurisdiction over copyright as well as contract law. *See* Art. 73 at 9 (copyright), Art. 74(1) at 1 (civil law) Grundgesetz [GG] [Constitution] art. 74(1) at 1 (F.R.G.); WEICHE, *supra* note 36, at 20-65.

[41] GOLDSTEIN, *supra* note 16, § 4.6.2. Compare *Maryland-National Capital Park and Plan-*

relationships without interference of the law. Courts therefore usually assume that authors can and must look after their rights.

Not surprisingly, U.S. copyright law contains only a few provisions that grant authors the right to influence the use of their work after the copyright has been transferred. The writing requirement[42] only ensures that the copyright owner will not inadvertently give away his or her copyright, and additionally serves as a guidepost to resolve disputes over the transfer of the copyright.[43] However, the purpose of the right to terminate a contract[44] follows paternalistic intentions. The renewal provisions incorporated into the 1909 Copyright Act were intended to benefit authors by enabling them or their families to have a second opportunity to market their works after an original sale of copyright.[45] The right to terminate a contract according to the 1976 Act also follows this rationale. Congress acknowledged the necessity of "safeguarding authors against unremunerative transfers . . . needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's prior value until it has been exploited."[46] In spite of various exceptions to this termination right, for example, it does not apply to works made for hire,[47] this rationale at its heart resembles the essence of the 2002 amendment in Germany.[48]

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ning Commission v. Washington National Arena, 386 A.2d 1216 (Md. 1978) where the court wrote as follows:

> This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.

Id. at 1228; *see also* Wolf v. Ford, 644 A.2d 522 (1994).

42 17 U.S.C. § 204(a) (2004).

43 LEAFFER, *supra* note 13, § 5.11; GOLDSTEIN, *supra* note 16, § 4.5.1.1.

44 17 U.S.C. §§ 203, 304(c) (2004); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 284 (2d Cir. 2002); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994); GOLDSTEIN, *supra* note 16, § 4.10; NIMMER, *supra* note 22, §§ 10.03, 11.

45 H.R. REP. NO. 60-2222, at 14 (2d Sess. 1907); White-Smith Music Publ'g Co. v. Goff, 187 F. 247, 251 (1st Cir. 1911); Woods v. Bourne Co., 60 F.3d 978, 982 (2d Cir. 1995); Marvel Characters, Inc. v. Simon, 310 F.3d 280, 282-83 (2d Cir. 2002). However, the benefit of a second chance was largely frustrated by the Supreme Court decision in *Fisher v. Witmark*, 318 U.S. 643 (1943), which recognized the validity of assignments of renewal rights prior to their vesting. *See* NIMMER, *supra* note 22, § 9.06[B].

46 H.R. REP. NO. 94-1476, at 124 (1976); *see* Rano v. Sipa Press, Inc., 987 F.2d 580 (9th Cir. 1993); Walthal v. Rusk, 172 F.3d 481, 483 (7th Cir. 1999); Korman v. HBC Fla., Inc., 182 F.3d 1291, 1296 (11th Cir. 1999); *Marvel Characters*, 310 F.3d at 287-92.

47 *See* 17 U.S.C. §§ 203(a), 304(c) (2004); *Marvel Characters*, 310 F.3d at 287-92; NIMMER, *supra* note 22, § 11.02 (additional limitations).

48 However, the problem of valuation of copyrights prior to their exploitation has never been raised as a rationale for the 2002 amendment in Germany that initially contained a similar termination right. *See infra* note 76.

As already indicated, German copyright law takes a much more paternalistic position. Aside from the exceptional features of copyright discussed above, quite a few imperative provisions of copyright contract law have been in force since 1965. They are meant to prevent a complete buy-out of rights[49] and to shelter authors against the structurally superior and more powerful copyright and media industry. This is illustrated by the following:

(1) The grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect.[50]

(2) 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 exclusive exploitation right, how far the right to use and the right to forbid extend and how far the exploitation right shall be limited.[51] Courts construed this provision in favor of the author, holding that authors grant rights only insofar as it is necessary to fulfill the purpose of the contract.[52]

(3) Section 40 of the German Copyright Act provides that agreements by which an author undertakes to grant exploitation rights in future works which are in no way specified or only re-

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[49] *See infra* Part IV.B.

[50] § 31(4) German CA. This extremely important limitation of the possibility to assign rights and to establish a secure legal position for producers did not, according to a recent decision of the Federal Supreme Court, apply to performing artists. *See* Zeitschrift für Urheber- und Medienrecht [ZUM] [Supreme Court] 229 (2003) - EROC III. After the amendment of 2003, § 79(2) expressly excludes § 31(4) from the rights of the performing artist. *See* Willi Erdmann, *Urhebervetragsrecht im Meinungsstreit,* Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 923, 929 (2002). Therefore, in contracts with performing artists, a clause that assigns all economic rights also with respect to yet unknown types of use will be enforceable. *See also* NIMMER, *supra* note 22, § 10.10 (discussing U.S. law on this issue).

[51] § 31(5) German CA. This so-called "Zweckübertragungsregel" underwent a slight change in the course of the 2002 amendment, but only towards clarifying the scope of the provision without any substantial changes. *See* WILHELM NORDEMANN, DAS NEUE URHEBERVERTRAGSRECHT § 31 German CA No. 1, (C.H. Beck 2002); Haimo Schack, *Urhebervertragsrecht im Meinungsstreit,* GRUR 853, 854 (2002).

[52] GRUR [Supreme Court] 637, 639 (1979) - White Christmas; Schricker, *supra* note 11, §§ 31, 32 German CA No. 31-48. However, this one-sided interpretation is increasingly criticized because it interferes with the general rule that says that contracts have to be construed in the interest of all parties concerned. *See Federal Supreme Court, in* RECHTSPRECHUNG ZUM URHEBERRECHT (Schulze ed.), BGHZ 494 - Rücktrittsrecht, with comments by Alexander Peukert; Reto M. Hilty, *Unübertragbarkeit urheberrechtlicher Befugnisse: Schutz des Urhebers oder dogmatisches Ammenmärchen?, in* FESTSCHRIFT FÜR MANFRED REHBINDER, *supra* note 32, at 259, 273-74. *See* NIMMER, *supra* note 22, § 10.08 (discussing U.S. law on this issue.).

ferred to by type shall be in writing. In the absence of an instrument in writing, the agreement is null and void.[53]

(4) The author may revoke the exploitation right if the holder of an exclusive exploitation right does not exercise such right or exercises it insufficiently, and if thereby serious injury is caused to the author's legitimate interests[54] or if the work no longer reflects the author's conviction.[55]

(5) As dispositive rules, sections 34 and 35 of the German Copyright Act declare that an exploitation right may be transferred and the holder of an exclusive exploitation right may grant non-exclusive rights only with the author's consent. The author may not refuse consent unreasonably. An exploitation right may be transferred without the author's consent if the transfer is made in the sale of the whole, or any part, of an enterprise. In the latter case, the 2002 amendment introduced a new, mandatory right of revocation where the exercise of the exploitation right by the transferee may not be reasonably demanded of the author if the shares in the entity, which holds the exploitation rights, have substantially changed.[56]

(6) It is important to notice that the 2002 amendment limits the scope of these provisions with regard to motion pictures. Section 90 of the German Copyright Act states that the rights of revocation[57] and the requirements of the author's consent according to sections 34 and 35 of the German Copyright Act do not apply to motion pictures after the start of shooting.

II. THE CHALLENGE OF THE AMENDMENT

A. *Background Information on the History and Purpose of the Amendment*

According to U.S. law, inadequate compensation alone does not render a contract unenforceable. Although a promise is only valid and irrevocable with consideration, the courts usually do not second guess the agreed remuneration, even if a gross discrepancy exists between the promise and the consideration. As with other contracts, the parties are free in an assignment contract or license to specify any royalty or other consideration, which they find mutu-

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53 The transfer of rights in future works is not limited *per se* under U.S. law. *See* NIMMER, *supra* note 22, § 5.03[B].

54 § 41 German CA.

55 § 42 German CA.

56 § 34(3) German CA; Schack, *supra* note 51, at 858. See NIMMER, *supra* note 22, § 10.01[C][4] with further references for the legal situation under U.S. law.

57 §§ 41-42 German CA.

ally agreeable.[58] In *Rose v. Bourne*, the court held that inadequate consideration stemming from an event occurring after conclusion of the contract cannot render the original agreement invalid, as long as the consideration was adequate at the time of execution of the contract or the transfer of rights.[59] However, if a contract or the consideration for the promise is so unfair as to be inordinately detrimental to one of the parties such that it shocks the court's sense of propriety, the court may declare it unenforceable.[60] However, rendering a contract unenforceable does not entitle the claimant to equitable remuneration.

Despite attempts to safeguard authors against the prevailing bargaining power of producers, private autonomy as the basic principle of German contract law remained unaffected when it comes to stipulated compensation.[61] Only in extremely rare cases did courts find a remuneration clause to be contrary to public policy with the effect that it was null and void.[62] Besides, the 1965 Copyright Act had already introduced a so-called "best-seller clause"[63] that gave authors the right to ask for a modification of the copyright agreement if there was a gross imbalance between the sum originally paid to the author and the profits made from the work.[64]

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[58] *See generally* FARNSWORTH, *supra* note 38, §§ 2.2-2.3, 4.27; CALAMARI & PERILLO, *supra* note 38, § 4.4; Gladys Music, Inc. v. Arch Music Co., 150 U.S.P.Q. 26 (S.D.N.Y. 1966); Landon v. Twentieth Century Fox Film Corp., 348 F. Supp. 450, 459 (S.D.N.Y. 1974); Cresci v. Music Publ'g Holding Corp., 210 F. Supp. 253, 258 (S.D.N.Y. 1962).

[59] Rose v. Bourne, Inc. 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd* 279 F.2d 79 (2d Cir. 1960); Larry Spier, Inc. v. Bourne Co., 953 F.2d 774, 778 (2d Cir. 1992).

[60] Cal. Grocers Assoc. v. Bank of America, 22 Cal. App. 4th 205, 27 Cal. Rptr. 2d 396, 403 (Ct. App. 1994); Marin Storage & Trucking, Inc. v. Benco Contracting and Eng'g, Inc., 89 Cal. App. 4th 1042, 1049, 107 Cal. Rptr.2d 645 (Ct. App. 2001). The doctrine of unconscionability, under which a court can refuse to enforce an unconscionable provision in a contract, is codified in § 670.5 of the California Civil Code. The statute provides in pertinent part:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

CAL. CIV. CODE § 670.5 (West 2004). *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (2004); U.C.C. § 2-302 (2004); CALAMARI & PERILLO, *supra* note 38, § 9.37; FARNSWORTH, *supra* note 38, § 5.

[61] Schack, *supra* note 51, at 855; Government Draft of the 2002 amendment, Bundestags-Drucksache [BT-Drucks.] 14/6433, 11.

[62] § 138 German Civil Code [BGB]. *See, e.g.*, GRUR [Supreme Court] 438 (1989) – Künstlerverträge (holding that a remuneration of 1% of the revenues for a musical composition was acceptable and voiding a clause that stated that the author had to pay the production costs). *See also* ARTHUR AXEL WANDTKE & WILHELM GRUNERT, *in* URHEBERRECHT – PRAXISKOMMENTAR before § 31 German CA No. 111-112 (Arthur Axel Wandtke & Winfried Bullinger eds., C.H. Beck 2002).

[63] § 36 German CA (amended 2002).

[64] This does not apply to authors of motion pictures. *See* § 90(2) German CA 1965; *see also* NORDEMANN, *supra* note 51, § 90 German CA No. 1.

Nevertheless, this provision imposed very high hurdles for an *ex post* modification of the agreed remuneration and thus the courts rarely confirmed this provision.[65]

As early as 1930, the Supreme Court of the German Reich (*Reichsgericht*) imposed the concept that authors should always participate in the economic exploitation of their work.[66] After World War II, the Federal Supreme Court followed this view.[67] The 2002 amendment incorporated this doctrine into the Copyright Act. Section 11(2) of the German CA declares that copyright serves to secure an equitable remuneration for utilization of works.[68]

Nevertheless, it had long been recognized that these measures, and even the monist approach of German copyright law, accompanied by imperative rules on copyright contract law,[69] did not lead to a significantly higher payment of freelance authors and performing artists than in countries that do not provide these protective measures.[70] Many scholars criticized the rules of the 1965 Copyright Act on copyright contracts as insufficiently protecting authors.[71] In 1991, Nordemann submitted a draft of an amendment of the German CA, which contained a provision entitling authors to ask for equitable remuneration for every use of the work, regardless of an existing or envisaged contractual relationship between author and user.[72]

But it was only after the change of government in 1998 that the new Minister of Justice, Herta Däubler-Gmelin, declared that improving the contractual situation of authors and performing artists was a main political goal during the following parliamentary term.[73] The legislator was of the opinion that the unequal bargain-

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65 *See* ZUM [Supreme Court] 497 (1998) - Comic-Übersetzungen; GRUR [Supreme Court] 602 (2002) - Musikfragmente; Schricker, *supra* note 11, § 36 German CA No. 2.

66 128 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] [Supreme Court of the German Reich] 113 - Schlagerliederbuch; 153 RGZ [Supreme Court of the German Reich] 1 - Schallplattensendung.

67 11 BGHZ [Supreme Court] 143 – Lautsprecherübertragungen; 129 BGHZ 72 - Mauerbilder.

68 Schack, *supra* note 51, at 854; Erdmann, *supra* note 50, at 924; LOTHAR HAAS, DAS NEUE URHEBERVERTRAGSRECHT No. 135-36, (C.H. Beck 2002).

69 *See supra* Part II.B.

70 Hilty, *supra* note 52, at 259, 279-80; RIGAMONTI, *supra* note 32, at 85.

71 Adolf Dietz, *Das Urhebervertragsrecht in seiner rechtspolitischen Bedeutung, in* URHEBERVERTRAGSRECHT, FESTGABE SCHRICKER, *supra* note 11, at 1; MANFRED REHBINDER, URHEBERRECHT No. 248 (12th ed. C. H. Beck 2002); HAIMO SCHACK, URHEBER- UND URHEBERVERTRAGSRECHT No. 952 (2d ed. Mohr Siebeck 2001); Schricker, *supra* note 11, before § 28 German CA No. 1-3. See Adolf Dietz, *Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers*, 33 INT'L REV. INDUS. PROP. & COPYRIGHT L. (IIC) 828 (2002), for an overview.

72 Wilhelm Nordemann, *Vorschlag für ein Urhebervertragsgesetz*, GRUR 1 (1991).

73 Hertha Däubler-Gmelin, *Urheberrechtspolitik in der 14. Legislaturperiode*, ZUM 265 (1999).

ing power between authors and producers led to unbalanced contracts. While the copyright industry successfully manages to acquire as many rights as possible, authors are left with an insufficient remuneration after granting their rights.[74] In May 2000, five leading German copyright scholars published a draft of an Act for Reinforcement of the Contractual Situation of Authors and Artists,[75] which underwent only minimal changes in the government drafts of June 26 and November 11, 2001.[76]

To justify the conflict between this inalienable claim for equitable remuneration and the principle of freedom of contract,[77] the drafters referred to a decision of the German Federal Constitutional Court.[78] The court held that private autonomy in contractual relationships is a basic principle of the German legal system and is reflected in article 2(1) of the German constitution.[79] However, this principle of self-determination requires that both parties are able to act according to their free will and not according to the intention of the more powerful party. Therefore, the Federal Constitutional Court ruled that private law must provide for modifications of freedom of contract if the typical and structural inferiority of one party to a contract exceptionally burdens this party. Exceptions to private autonomy follow from the constitutional guarantee of the right of freedom of action[80] and from the social-state principle laid down in articles 20(1) and 28(1) of the German constitu-

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74 *See* Gerhard Schricker, *Zum Begriff der angemessenen Vergütung im Urheberrecht – 10% vom Umsatz als Maßstab?*, GRUR 737 (2002); HAAS, *supra* note 68, No. 1-41. During the course of discussion about the amendment, many criticized that the legislator did not propose sufficient empirical data for this view. *See* Norbert P. Flechsig & Kirsten Hendriks, *Konsensorientierte Streitschlichtung im Urhebervertragsrecht*, ZUM 423 (2002); Volker Hummel, *Volkswirtschaftliche Auswirkungen einer gesetzlichen Regelung des Urhebervertragsrechts*, ZUM 660 (2001).

75 Gerhard Schricker et al., *Entwurf eines Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, GRUR 765-78 (2000).

76 Government draft of the 2002 amendment, Entwurf eines Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern, June 26, 2001, BT-Drucks. 14/6433, 7. Section 32 of this draft contained a legal claim for equitable remuneration for every use of the work and additionally a right to terminate any copyright contract after 30 years if continuation on the existing basis was unreasonable. The drafters of this termination right referred to 17 U.S.C. §§ 203, 304(c) (2004) which allow the authors and their families a second chance to reap the benefits from the author's works. *See supra* Part II.B; *see also* Adolf Dietz, *supra* note 71; Nordemann, *supra* note 72, at 3.

77 *See* Thomas Hoeren, *Auf der Suche nach dem "iustum pretium." Der gesetzliche Vergütungsanspruch im Urhebervertragsrecht*, Multimedia und Recht (MMR) 449-50 (2000); Haimo Schack, *Neuregelung des Urhebervertragsrechts*, ZUM 453, 458 (2001) (with reference to the iustum pretium doctrine).

78 Neue Juristische Wochenschrift [NJW] [Constitutional Court] 36 (1994).

79 GG [Constitution] art. 2(1) (F.R.G.).

80 *Id.*

tion.[81] The drafters of the 2002 amendment argued that authors and performing artists typically are the weaker party to an exploitation contract and that it is therefore a constitutional duty of the legislature to effectively protect their right to reap the fruits of their work.[82]

These suggestions triggered an intense debate, not only in the intimate circle of copyright scholars but also in public, where copyright issues had not previously been debated in Germany.[83] Factions of the publishing and entertainment industry heavily opposed the amendment and issued notices in German newspapers that predicted the end of the German copyright industry if the proposals were enacted.[84] Several scholars also raised fears that the draft interfered with the German constitution and the EC Treaty.[85]

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81 *Id.* art. 20(1) and 28(1) (F.R.G.); Federal Constitutional Court, NJW [Constitutional Court] 36, 38 (1994).

82 Government Draft of the 2002 amendment, BT-Drucks. 14/6433, 7. Additionally, commentators refer to Recital 10 of the Copyright Directive of the EU which states that "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." Council Directive 2001/29/EC, 2001 O.J. (L 167) 10, *available at* http://cryptome.org/eu-copyright.htm (last visited Oct. 24, 2004). *See infra* note 105 and accompanying text; Dietz, *supra* note 76, at 828, 833 (2002).

83 *See* Adolf Dietz, *Die Pläne der Bundesregierung zu einer gesetzlichen Regelung des Urhebervertragsrechts*, ZUM 276-81 (2001); Adolf Dietz, *Der Entwurf zur Neuregelung des Urhebervertragsrechts*, Archiv für Presserecht [AfP] 261-65 (2001); Norbert P. Flechsig, *Der Entwurf eines Gesetzes zur Stärkung der vertragsrechtlichen Stellung von Urhebern und ausübenden Künstlern*, ZUM 484 (2000); Norbert P. Flechsig, *Gesamtvertrag versus Koalitionsfreiheit*, Zeitschrift für Rechtspolitik [ZRP] 529-33 (2000); Götz von Olenhusen, *Der Gesetzentwurf für ein Urhebervertragsrecht*, ZUM 736-39 (2000); Schack, *supra* note 77, at 453; Schack, *supra* note 51, at 853; Stephan Ory, *Gesamtverträge als Mittel des kollektiven Urhebervertragsrechts*, AfP 426-29 (2000); Nikolaus Reber, *Die Pläne der Bundesregierung zu einer gesetzlichen Regelung des Urhebervertragsrechts*, ZUM 282-89 (2001); Wolfgang Schimmel, *Die Pläne der Bundesregierung zu einer gesetzlichen Regelung des Urhebervertragsrechts*, ZUM 289-99 (2001); Johannes Kreile, *Die Pläne der Bundesregierung zu einer gesetzlichen Regelung des Urhebervertragsrechts*, ZUM 300-05 (2001); Günter Poll, *Die Pläne der Bundesregierung zu einer gesetzlichen Regelung des Urhebervertragsrechts*, ZUM 306-11 (2001); Peter Weber, *Die Pläne der Bundesregierung zu einer gesetzlichen Neuregelung des Urhebervertragsrechts*, ZUM 311-15 (2001); Martin Schäfer, *Einige Bemerkungen zum Professorenentwurf für ein Urhebervertragsrecht*, ZUM 315-16 (2001); Wolfgang Spautz, *Was sagt uns die Zauberflöte zum Urhebervertragsrecht?*, ZUM 317-19 (2001); Paul Katzenberger, *Neuregelung des Urhebervertragsrechts aus rechtsvergleichender Sicht*, AfP 265-71 (2001); Barbara Stickelbrock, *Ausgleich gestörter Vertragsparität durch das Urhebervertragsrecht?*, GRUR 1087-95 (2001); Meinhard Heinze, *Arbeits- und verfassungsrechtliche Aspekte des Gesetzes zur Reform des Urhebervertragsrechts*, Kommunikation & Recht [K&R] 1-7 (2002); Elmar Hucko, *Zum Sachstand in Sachen Urhebervertragsgesetz*, ZUM 273-75 (2001); Dieter Dörr, *Urheberrechtsnovelle versus Europarecht*, K&R 608-18 (2001).

84 Erdmann, *supra* note 50, at 923.

85 Stephan Ory, *Das neue Urhebervertragsrecht*, AfP 93, 104 (2002); Gregor Thüsing, *Tarifvertragliche Chimären - Verfassungsrechtliche und arbeitsrechtliche Überlegungen zu den gemeinsamen Vergütungsregeln nach § 36 UrhG n.F.*, GRUR 203 (2002). *Contra* Nordemann, *supra* note 72, § 32 German CA No. 1, § 36 German CA No. 1; Flechsig & Hendriks, *supra* note 74, at 426, 432; GEORGIOS GOUNALAKIS ET AL., URHEBERVERTRAGSRECHT, (2001); Schack, *supra* note 77, at 453. For discussion of internationally mandatory rules and fundamental freedoms in EU law, see RIW [European Court of Justice] 137 (2000). *See* Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 2000: Interlokales Privatrecht oder universelles*

B. *Survey of the Amendment*

This criticism substantially influenced the outcome of the legislative process. The termination right was deleted.[86] The claims for equitable remuneration set aside contractual remuneration if it is not equitable. These claims are not legal claims for every use of the work.[87] If someone uses the work without the author's consent, the author is only entitled to remedies for infringement of rights. The claims for equitable remuneration are regulated in sections 32, 32a, 36, 36a of the German CA.

Section 32(1)(1) of the German CA states that in exchange for the granting of exploitation rights and permission to use a work, the author is entitled to the remuneration agreed to in the contract. If the rate of remuneration is not settled, the remuneration shall be at an equitable level.[88] What makes this approach revolutionary[89] is sentence three of the provision:[90] if the agreed compensation is not equitable, the author may request his contracting partner to assent to alter the contract so that the author is assured an equitable remuneration. The claim applies even where it is circumvented by countervailing clauses.[91]

In section 32(2) the German CA defines "equitable."[92] If the

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Gemeinschaftsrecht, Praxis des Internationalen Privat- und Verfahrensrechts [IPRax] 454, 455 (2000).

86 *See supra* note 76.

87 The aim of the amendment is a better contractual bargaining position for authors and performers. Its provisions are systematically included in the chapter dealing with copyright contracts, §§ 31-44 German CA, and most importantly, they also modify a single contract. Dogmatic basis for this modification is the consent of the contracting partner of the author, not a statutory claim that stands separate from the agreed compensation. Finally, the former "best-seller clause" was also regarded as a contractual claim. *See* BGHZ [Supreme Court] 115, 63, 66 – Horoskop Kalender; BGHZ 137, 387, 397 - Comic Übersetzungen I; GRUR 602 (2002) - Musikfragmente; Schricker, *supra* note 11, § 36 German CA No. 3; OTTO-FRIEDRICH VON GAMM, URHEBERRECHTSGESETZ § 36 German CA No. 2 (C.H. Beck 1968); Paul Katzenberger, *Beteiligung des Urhebers an Ertrag und Ausmaß der Werkverwertung*, GRUR Int. 410, 418 (1983); Wolfgang Spautz, *in* URHEBERRECHTSGESETZ, KOMMENTAR, *supra* note 11, § 36 German CA No. 9; LOUIS HAGEN, DER BESTSELLERPARAGRAPH IM URHEBERRECHT 149 (Nomos 1990). Sections 32 and 32a of the German CA apply the structure of former section 36 of the German CA for a much broader area of use. BT-Drucks. 14/8058, 19. For a detailed discussion, see Reto M. Hilty & Alexander Peukert, *Das neue deutsche Urhebervertragsrecht im internationalen Kontext*, GRUR Int. 643, 645-47 (2002). CHRISTIAN BERGER, DAS NEUE URHEBERVERTRAGSRECHT No. 62 (Nomos 2003).

88 § 32(1)(2) German CA.

89 *See* ELMAR HUCKO, DAS NEUE URHEBERVERTRAGSRECHT 10 (2002). Hucko was in charge of the amendment in the German Ministry of Justice.

90 Licensees or assignees basically are not liable. However, note that the transferee of an exploitation right shall have joint liability for the discharge of the transferor's obligations under his agreement with the author. *See* § 34(4) German CA; *cf.* BERGER, *supra* note 87, No. 79-82.

91 § 32(3)(2) German CA; Schricker, *supra* note 33, at 808; Paul W. Hertin, *Urhebervertragsnovelle 2002: Up-Date von Urheberrechtsverträgen*, MMR 16 (2003); Erdmann, *supra* note 50, at 927.

92 § 32(2) German CA.

parties did not enter into or are bound by a collective bargaining agreement or "common remuneration standards,"[93] compensation is equitable if it conforms, at the time of contracting, to what is customary and fair in business, with regard to the type and scope of the permitted uses, in particular their length and timing, as well as to all other circumstances.[94]

Aside from this *ex ante* claim for equitable remuneration,[95] section 32a of the German CA intends to guarantee that an equitable part of the proceeds from the use of the work occurring after the contract is concluded goes to the authors (*ex post* view). The provision lowers the requirements for the right to request a change of the agreed upon remuneration because the contractual compensation is conspicuously out of proportion to the advantages or revenues from exploiting the work.[96] This "best-seller clause" was formerly laid down in section 36(1) German CA, which stated that if an author has granted an exploitation right to another party on conditions which cause the agreed consideration to be grossly disproportionate to the income from the use of the work, considering the whole of the relationship between the author and the other party, the latter shall be required, at the request of the author, to assent to a change in the agreement to secure the author an equitable share of the income under the circumstances.[97] After the amendment, the disproportion does not have to be gross, but only conspicuous (*auffällig*),[98] and all advantages for the exploiter have to be considered, for example merchandising. Additionally, it is irrelevant whether the contracting parties foresaw or could have foreseen the level of the actual returns or advantages. Authors are not entitled to ask for further remuneration if the compensation is

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93 §§ 36, 36(a) German CA.

94 *See infra* IV.B.

95 NORDEMANN, *supra* note 51, § 32 German CA No. 11; Erdmann, *supra* note 50, at 925; HAAS, *supra* note 68, No. 137-63. *But see* WANDTKE & GRUNERT, *supra* note 51, § 32 German CA No. 41-43 (if the court recognizes a significant increase in remuneration for compatible contracts after the parties entered into the contract, remuneration may even be rendered to be not equitable if it was common and honest at the time of the conclusion of the contract).

96 Christian Berger, *Grundfragen der "weiteren Beteiligung" des Urhebers gem. § 32a UrhG*, GRUR 675 (2003); Schack, *supra* note 51, at 855; Erdmann, *supra* note 50, at 927; HAAS, *supra* note 68, No. 276-329.

97 The court has to ask what amount of money would reflect an equitable remuneration if compensation was agreed upon when the additional proceeds occurred. *See* HUCKO, *supra* note 89, at 14.

98 There is no agreement on what level of disproportion is necessary to meet this prerequisite. *See* WANDTKE & GRUNERT, *supra* note 62, § 32a German CA No. 20 (stating that a disproportion is marked if the actual compensation is 20 to 30% lower than the equitable remuneration for this case). *But see* HAAS, *supra* note 68, No. 298 (50% lower); NORDEMANN, *supra* note 51, § 32a German CA No. 7 (2/3 lower); BERGER, *supra* note 87, No. 282 (100% lower).

stipulated in collective bargaining agreements or common remuneration standards that are applicable to the contract that is at stake.[99]

Legal successors to the contractor of the author or performer are liable for this claim, rather than their predecessors, if the income that causes the disproportion accrues with this third party.[100] A typical case may be that a U.S. entertainment company takes over a German production company and successfully exploits an old movie that was initially produced by German enterprise. In this case, only the U.S. assignee is liable for a possible claim for equitable remuneration.[101]

It is not only authors, such as writers, composers, motion picture directors, computer programmers, and their respective heirs[102] that are entitled to ask for equitable remuneration. According to the 2002 amendment, all of the above-mentioned rules also applied to exploitation contracts of performing artists.[103] However, the chapter on the rights of performing artists underwent a major change after the "act on copyright in the information society" of 2003,[104] which implemented the requirements of the WIPO treaties and the directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society.[105] Section 79(1)(1) of the German CA now states that the rights of performing artists are assignable. Paragraph 2 of this section points out that the performing artist may grant a right without assigning the right. Sentence 2 of this paragraph refers *inter alia* to the rules on equitable remuneration.[106] One could argue that the provisions on remuneration only apply to exploitation

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99 § 32a(4) German CA; *see infra* Part III.A.1.

100 § 32a(1), (2) German CA; NORDEMANN, *supra* note 51, § 32a German CA Nos. 11-18; Ory, *supra* note 85, at 99; BERGER, *supra* note 87, No. 300-04; HAAS, *supra* note 68, No. 310-16; Tim Reinhard & Julia Distelkötter, *Die Haftung des Dritten bei Bestsellerwerken nach § 32a Abs. 2 UrhG*, ZUM 269 (2003).

101 The contractor of the author, for example, transfers the right to make a cinematographic adaptation of a novel to a major U.S. company. The motion picture is extremely successful. The author initially received only an additional lump sum payment for the granting of the right of cinematographic adaptation. In this case, the U.S. company - and only this company - is liable for the claim for further compensation as far as it is definitely entitled to the revenues of the exploitation of the movie. For questions of conflicts of law and international jurisdiction, see *infra* Part IV.D.

102 Schricker, *supra* note 11, at 803; NORDEMANN, *supra* note 51, § 32 German CA No. 49; HUCKO, *supra* note 89, at 120, 121.

103 § 75(4) German CA (amended 2003).

104 Bundesgesetzblatt (BGBl.) I 2003, 1774 *et seq.* (2003 amendment).

105 Council Directive 2001/29/EC, 2001 O.J. (L 167) 10, *available at* http://cryptome.org/eu-copyright.htm (last visited Oct. 24, 2004). *See supra* note 82 and accompanying text.

106 §§ 32, 32a German CA.

contracts that contain a license or other grant of rights, but not to an assignment. However, this interpretation neglects the fact that Section 79 of the Copyright Act was only divided into two paragraphs to stress the possibility of an assignment, not to limit the applicability of sections 32-32b of the German CA to certain categories of exploitation contracts of performing artists.[107] Therefore, sections 32 and 32a of the German CA apply to every contract in which performing artists permit a third party to exploit their performance, regardless of whether the contract establishes an assignment, license or other transfer of rights.

Finally, even authors of scientific editions[108] and photographers, whose products are not protected by copyright,[109] are entitled to sue for equitable remuneration if a contract that governs their products does not reflect equitable compensation.[110] Nevertheless, the aim of the amendment, which is to strengthen the contractual situation of authors and performing artists, elucidates that the rules only apply if these persons are parties to the contract. A licensee may not ask for equitable remuneration if he or she is not the original creator of the product.

In general, claims for equitable remuneration may only be raised if the contract at stake has come into being after July 1, 2002.[111] However, certain exceptions should be considered. Section 32 of the German CA already applies to all contracts that were concluded on or after June 1, 2001, provided that the exploitation started after June 30, 2002.[112] Again, a different rule governs section 32a of the German CA. This claim is applicable to every contract concerning a work still under copyright, provided that the exploitation that caused the disproportion took place after March

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107 *See* BT-Drucks. 15/837, 35; BERGER, *supra* note 87, No. 84. According to the law heretofore in force, sections 31-44 of the German CA were basically not applicable to exploitation contracts of performing artists. GRUR [Supreme Court] 234 (2003) - EROC III. The dogmatic rationale for that decision was that the rights of performing artists were assignable - unlike the copyright of authors. *See supra* Part II.A. The concept of section 79 of the German CA shows that provisions of copyright contract law that are based on the principle that copyright is not assignable are only applicable to exploitation contracts of performing artists if the contract does not constitute an assignment of rights, but only a granting of rights. *See* BT-Drucks. 15/837, 35.

108 § 70 German CA.

109 Simple photographs regularly lack the minimum requirements for copyright protection, i.e. individuality. *See* § 72 German CA.

110 Schricker, *supra* note 33, at 803.

111 § 132(3)(1) German CA.

112 § 132(3)(1, 3) German CA. The 2003 amendment corrected an editorial mistake of the 2002 amendment in § 132(3)(3) German CA by replacing "March 28, 2002" with "June 30, 2002. *See* BT-Drucks. 15/837, 36; OLE JANI, DER BUY-OUT-VERTRAG IM URHEBERRECHT 911 (Berliner Wissenschafts-Verlag 2003); Schack, *supra* note 51, at 857; Formulierungshilfe zu BT-Drucks. 15/38, 10 (March 14, 2003), *available at* http://www.urheberrecht.org/topic/Info-RiLi/ent/FormulBMJ-Vorblatt.pdf (last visited Oct. 24, 2004).

28, 2002.[113] Thus, not only may a currently concluded contract undergo changes. The successful re-launch of old digitized audio-visual material that is still subject to copyright protection may trigger this claim independent of the time the parties entered into the exploitation contract permitting the respective use.

Within this framework, producers should be aware of the following specific issues. First, if the contract, including contracts of employment,[114] contains an effective permission to use the work,[115] the author may bring the new claims to bear even if the exploitation under the contract has not yet started.[116] Second, Plaintiffs may demand information to specify a sum in their claims if they lack sufficient knowledge about the revenues of the exploiter.[117] Third, to favor the Open Source community, a so-called "Linux clause" states that the author may nevertheless grant a non-exclusive exploitation right without consideration to the world at large.[118] Fourth, the claims become barred by the statute of limitations after three years. The limitation period begins when the cause of action accrues and the author has knowledge of the respective facts or his lack of knowledge is due to gross negligence.[119]

Finally, this concept does not have examples in other European copyright laws. A study on the conditions applicable to contracts relating to intellectual property in the EU commissioned by the European Commission reveals that "an *acquis communautaire* in

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[113] § 132(3)(2) German CA; *see* NORDEMANN, *supra* note 51, § 132 German CA No. 2; Schack, *supra* note 51, at 857; Erdmann, *supra* note 50, at 931; HAAS, *supra* note 68, No. 486-513.

[114] In our view, the claims also modify compensation clauses in employment contracts of authors and performing artists. According to section 43 of the German CA, the provisions of the relevant subsection shall also apply if the author has created the work in execution of his duties under a contract of employment or service provided nothing to the contrary transpires from the terms or nature of the contract of employment or service. It is our contention that this reference, and the prominent role of collective agreements in the concept of the amendment, see § 36(1)(3) German CA, establishes the applicability of these provisions to employment contracts. Others disagree, arguing that the act focused on freelancers and that its legislative history is somewhat ambiguous. *See* Hilty & Peukert, *supra* note 87, at 643; Schack, *supra* note 51, at 855; HAAS, *supra* note 68, No. 419-29; Thüsing, *supra* note 85, at 210; Flechsig & Hendriks, *supra* note 74, at 425. *Contra* Chrsitian Berger, *Zum Anspruch auf angemessene Vergütung (§ 32 UrhG) und weitere Beteiligung (§ 32a UrhG) bei Arbeitnehmer-Urhebern*, ZUM 173 (2003); Ory, *supra* note 85, at 95; Jörg Wimmers & Tibor Rode, *Der angestellte Softwareprogrammierer und die neuen urheberrechtlichen Vergütungsansprüche*, CR 399 (2003).

[115] Schricker, *supra* note 33, at 801. This also holds true where the contract establishes an effective permission to use moral rights. *See id.* at 802.

[116] Schricker, *supra* note 33, at 803.

[117] Schack, *supra* note 51, at 855; Erdmann, *supra* note 50, at 925.

[118] § 32(3)(3) German CA; Schricker, *supra* note 33, at 809.

[119] §§ 195, 197 BGB; Schack, *supra* note 51, at 855; BERGER, *supra* note 87, No. 97-100. According to § 202 of the German Civil Code (BGB), the parties may agree on a shorter limitation period. *See* Hertin, *supra* note 91, at 18.

this field hardly exists."[120] Protection measures differ substantially between Member States and one can conclude that Germany provides for the most far-reaching protection of authors and performers. The German approach of modifying the agreed remuneration is unique because even countries like Italy, which try to improve the chances of authors and performers to obtain a higher remuneration, show a noticeable reluctance to rely on the principle of equitable remuneration instead of dispositive rules on proportional remuneration or lump sum payments.[121]

III. How to Establish "Equitable Remuneration"

A. *Collective Measures*

Not surprisingly, there is uncertainty about how to establish equitable remuneration for the exploitation contracts of authors and performing artists.[122] To hinder costly legal proceedings, including expert opinions, the new rules encourage authors and performers on the one hand, and producers on the other, to negotiate collective bargaining agreements and "common remuneration standards" (*gemeinsame Vergütungsregeln*).[123] Perhaps one might be surprised to hear that in the course of discussion about the 2002 amendment, guilds and "basic agreements" in the U.S. entertainment industry were named as a model solution to the problem of low compensation for creative work.[124] Thus, a comparison of the Hollywood system with the basic principles of current German law is a useful and clarifying approach.

1. The U.S. Entertainment Industry

For decades, the entertainment industry in Hollywood has relied on basic agreements between several guilds and representa-

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120 Lucie Guibault & P. Bernt Hugenholtz, Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union 147 (2000), *at* http://www.ivir.nl/publications/other/final-report2002.pdf (last visited Oct. 24, 2004).

121 Alexander Peukert, *Protection of Authors and Performing Artists in International Law – Considering the Example of Claims for Equitable Remuneration under German and Italian Copyright Law* (forthcoming in 35 IIC 2004) (on file with the author). *See* Guibault & Hugenholtz, *supra* note 120, at 150; *see also* Katzenberger, *supra* note 83, at 265; Gounalakis et al., *supra* note 85, at 11, 141.

122 Hertin, *supra* note 91, at 16.

123 The reason is that claims for equitable remuneration and further participation are excluded if collective bargaining on remuneration is applicable to the contract that is at stake. *See* §§ 32(4), 32a(4) German CA; *see also* Government draft of the 2002 amendment, BT-Drucks. 14/6433, 16.

124 Government draft of the 2002 amendment, BT-Drucks. 14/6433, 9; Reber, *supra* note 83, at 282; Nikolaus Reber, *Die Redlichkeit der Vergütung (§ 32 UrhG) im Film- und Fernsehbereich*, GRUR 393, 396 (2003).

tives of the television and motion picture producers/studios.[125] Guilds are labor organizations representing artists and entertainers under the U.S. labor codes in the motion picture, broadcast, cable, interactive and new media industries. Writers are represented by the Writers Guild of America ("WGA"),[126] screen actors, by the Screen Actors Guild ("SAG"),[127] and directors by the Directors Guild of America("DGA").[128] Guilds collectively bargain with producers who are represented by the Alliance of Motion Picture and Television Producers (AMPTP).[129] Collective bargaining agreements determine minimum rates of payment, provide for residuals,[130] rules relating to credit (attribution), and to some extent the ability to separate rights, e.g. to reserve certain rights in a work,[131] as well as other matters. These union contracts set only minimum scales and conditions so that the individual author or performer is able to bargain for better payment or increased control over his or her creative product.[132] To ensure that nearly all entertainment industry workers belong to unions,[133] collective bargaining agree-

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125 See Jan Wilson, *Special Effects of Unions in Hollywood*, 12 LOY. L.A. ENT. L. REV. 403, 407-11 (1992), for a brief history of the Guilds. The importance of this long established system can be seen in the fact that § 4001 of the DMCA even provides for an assumption that certain obligations of a respective collective bargaining agreement are applicable in the case of a transfer of copyright ownership under U.S. law in a motion picture that is produced subject to one or more collective bargaining agreements. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

126 *See* Writers Guild of America, West, *at* http://www.wga.org (last visited Oct. 24, 2004). To be admitted to the WGA, one must prove enough units of credit as set forth on the Schedule of Units of Credit. These units are based upon work completed under contract of employment or upon the sale or licensing of previously unpublished and unproduced literary or dramatic material. This employment, sale or licensing must be with a company or other entity that is a signatory to the applicable WGA Collective Bargaining Agreement and must be within the jurisdiction of the Guild.

127 *See generally* Screen Actors Guild, *at* http://www.sag.org (last visited Oct. 24, 2004). To be eligible for membership in the SAG, proof of employment or prospective employment starting within two weeks with a SAG signatory company must be furnished. *See generally,* The American Federation of Television & Radio Artists (AFTRA), *at* http://www.aftra.org (last visited Oct. 24, 2004) (representing actors, other professional performers, and broadcasters in television, radio, sound recordings, non-broadcast/industrial programming and new technologies such as interactive programming and CD ROMs). AFTRA and SAG had active plans to unite for a long time, but have not yet done so.

128 *See generally* Directors Guild of America, *at* http://www.dga.org (last visited Oct. 24, 2004). Members have to obtain employment with a company that has signed a collective bargaining agreement with the DGA. However, associate directors and freelance stage managers may meet employment criteria under certain circumstances (30 days of employment, three years of production experience, minimum number of programs, etc.).

129 The AMPTP is the primary trade association with respect to labor issues in the motion picture and television industry. It includes all major companies, as well as numerous "mini-majors" and independent production companies. *See* NIKOLAUS REBER, FILM COPYRIGHT, CONTRACTS AND PROFIT PARTICIPATION 110, (WILEY-VCH 2000).

130 Residuals provide for additional compensation for the use of the work in another medium as well as repeated use in the same medium. *See* REBER, *supra* note 129, at 115.

131 *Id.*

132 Kernochan, *supra* note 3, at 413 *et seq.*

133 *Id.* at 396, 442 *et seq.* The WGA, West has more than 8500 members. *See supra* note

ments usually stipulate that anyone working for a producer (associated with the guilds) must be or become a member of his or her respective guild.[134] Collective bargaining agreements are binding on all guild members and on all producers/studios of the AMPTP. Furthermore, employment contracts and other agreements with respect to creative services state that the respective contract shall be subject to all of the terms and conditions of any applicable collective bargaining agreement.[135]

Since practically all workers in the motion picture industry are unionized, guilds have developed a remarkable power to protect and promote the interests of their members. The most important feature of this power is the threat to organize and carry out a strike if negotiations with producers fail. As each unionized group (directors, writers, actors etc.) is necessary for the production of motion pictures, television shows, and other products, a strike by even a relatively small number of union members may close down, not only the companies of movie producers, but also Hollywood itself.[136]

This system of unionized creative workers is part of labor law, not of intellectual property or general contract law. Collective labor activity in general is prohibited according to Section 1 of the Sherman Act,[137] but Congress has enacted several statutes restricting both the applicability of the Sherman Act to labor law and the power of federal courts to enjoin labor activity.[138] Therefore, union conduct that falls within either exemption (statutory or non statutory) is immune to challenge under the Sherman Act.[139] One

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126. The DGA, West has more than 12,000 members. *See supra* note 128. The largest guild is the SAG, which already had more than 105,000 members in 1989; Wilson, *supra* note 125, at 410.

134 REBER, *supra* note 129, at 110. *See* LINDEY, *supra* note 38, Form 6.03-1 at 2, Form 6.03-2 No. 20, Form 6.03-3 No. 13.

135 FARBER, 1 ENTERTAINMENT INDUSTRY CONTRACTS Form 7-1 No. 13 (2002); LINDEY, *supra* note 38, Form 5.01-1.5 No. 13.

136 *See* Wilson, *supra* note 125, at 429.

> When 9,000 members of the Writers Guild of America went on strike . . . they didn't just shut down all the major television and film studios; they shut down the city. Power restaurants like Spago and Le Dome sat empty as meetings went untaken. The dry cleaning business fell off as writers throughout Hollywood decided to wait that extra week. Some typing and messenger services closed altogether . . . the veterinary business went down fifty percent.

Id. (citing Carbonara, *Negotiating Peace with Honor in Hollywood*, AM. LAW., Jan./Feb. 1989, 43).

137 The Sherman Act, 15 U.S.C. § 1 ("[E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

138 Home Box Office v. Dirs. Guild of Am., 531 F. Supp. 578, 585 (S.D.N.Y. 1982), *aff'd* 708 F.2d 95 (2d Cir. 1983).

139 *Id.*; Local 210, Laborers' Int'l Union of N. Am. v. Labor Relations Div. Associated Gen. Contractors of Am., 844 F.2d 69, 79 (2d Cir. 1988).

of these statutes, the National Labor Relations Act (NLRA) expressly recognizes unorganized labor's disadvantage in bargaining power and promotes collective bargaining as the proper means for resolving disputes over terms of employment.[140]

Despite the fact that guilds are legally based on these principles of labor law, not all unionized authors and performing artists are permanent employees. For example, only about 50% of the WGA, West members are permanent employees, whereas the other members are freelancers who contract to work on individual programs rather than for a fixed period. Nevertheless, U.S. courts held that these freelancers are not independent contractors, but may become union members. This means that once engaged they perform as employees,[141] and the conduct of their unions does not violate antitrust law because of the applicability of statutory exemptions according to labor law.[142]

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[140] 29 U.S.C. § 151 states:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.
>
> It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[141] Kernochan, *supra* note 3, at 396.

[142] *Home Box Office*, 531 F. Supp. at 578. The court relied on *United States v. Hutcheson*, 312 U.S. 219, 231 (1941):

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

This far-reaching adoption of labor law principles to freelancers in the entertainment industry, however, does not cover all possible creative staff that participates in the production of a motion picture or television show. Composers and lyricists of film music, as well as authors of underlying works, other than screenplays, are not unionized and are thus deprived of the collective bargaining option.[143] In other branches and genres of creative work, no comparable system is in force. The National Writers Union, for example, represents freelance writers in all genres, formats and media, but has not yet entered into collective agreements that guarantee minimum payments.[144]

2. The German System

As already mentioned, entertainment guilds were named in the discussion about the 2002 amendment as a positive example of a system that effectively protects authors. Nevertheless, this reference to U.S. law and practice is well-founded only in part.

Before the 2002 amendment of the German CA was enacted, the only means to augment the income of authors were features of labor law that served the intention to protect employees against more powerful employers. The fundamental requirement for the applicability of these protection measures, however, remains the existence of a contract of employment and the employment status

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Id. It furthermore followed *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94 (1962), *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968), and *H. A. Artists & Assoc., Inc. v. Actors' Equity Ass'n.*, 41 U.S. 704, 717 (1981). In the latter cases, the Supreme Court reasoned that independent contractors may constitute a labor group because there is "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." *Am. Fed'n of Musicians*, 391 U.S. at 106.

In *Home Box Office*, 531 F. Supp. at 593, the court discussed in detail in how far freelance directors, loan-out companies (corporations that have as their sole asset the services of the individual director and are wholly owned by that director, that engage in no business activities other than renting out the services of the director-owners), producers-directors (directors that are designated producers as well as directors), and director-packagers (directors who produce and market programs themselves) are employees or at least whether there is actual or potential job or wage competition with employed directors who are union members. *Home Box Office*, 531 F. Supp. at 593. The court concluded that even if the named groups act as independent contractors, they actually provided the same or nearly the same services as staff directors, who were undoubtedly employees and thus possible members of unions. *See* Wilson, *supra* note 125, at 418 *et seq.*

143 *See* Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 980 (2d Cir. 1975); Maralee Buttery, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavour*, 83 Colum. L. Rev. 1245, 1253 (1983); Kernochan, *supra* note 3, at 398, 409 (with further references).

144 Services of the National Writers Union include grievance assistance, contract advice, a job hotline, insurance etc. *See generally* National Writers Union, *at* http://www.nwu.org (last visited Oct. 24, 2004).

of the author according to labor law.[145] Yet, just as in the U.S., many branches that use creative work do not rely on the fixed employment of authors or performing artists, but on freelancers who offer their services as independent contractors.[146] At least in branches that employ staff that create copyrightable subject matter, a number of important collective bargaining agreements have covered questions of remuneration.[147] The problem was that exploiters regularly relied on freelancers for creative work. Very similar to the situation in Hollywood, staff authors still were the exception and not the rule.[148]

The legislature addressed this problem in 1974 by incorporating a new provision (§ 12a) into the Collective Bargaining Act (*Tarifvertragsgesetz*).[149] This provision states that persons similar to employees (*arbeitnehmeränliche Personen*) may also sign collective bargaining agreements. Employers' instructions do not bind this group as strictly as they do employees. But these individuals economically depend on a regular salary, just as employees do, and are therefore no less worthy of protection.[150] Section 12a(3) of the *Tarifvertragsgesetz* declares that a person who offers artistic, literary or journalistic services may fall under this provision if he or she receives one third of his or her complete income from one single exploitation contract. Based on this statute, collective bargaining agreements have been made with freelance journalists, and freelancers in the television sector.[151] However, this concept was not regarded as a successful measure because important parts of the media industry did not want to enter into negotiations with their collective counterparts.[152]

If one compares guilds and basic agreements in the U.S. with

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145 The employee must be dependent upon the employer and be bound by his instructions. The courts apply a number of criteria to address this problem. *See generally* NJW [Federal Labor Court] 1982 (1967) - Kameramann; ZUM [Federal Labor Court] 621 (1995) - Statusbeurteilung eines Rundfunkmitarbeiters; WANDTKE & GRUNERT *supra* note 62, § 43 German CA at 4-5 (with further references).

146 Rojahn, *supra* note 27, § 43 German CA No. 10-20.

147 Basic agreements exist for employed journalists, theater staff, musicians of orchestras, and employees of television companies. *See* WANDTKE & GRUNERT, *supra* note 62, § 43 German CA No. 122 (with references).

148 *See Home Box Office*, 531 F. Supp. at 593 (stating:

> When television began making its own programs in the 1940s, directors were employed. But early in television's history the pattern of directors' employment began to change. Networks and other production entities, for a variety of reasons, began to employ freelance directors rather than fulltime employees for some categories of directorial work.).

149 Heimarbeitsänderungsgesetz v. 29.10.1974 (BGBl. I S.2879).

150 WANDTKE & GRUNERT, *supra* note 62, § 43 German CA No. 9-10; Rojahn, *supra* note 27, § 43 German CA No. 18.

151 *See* WANDTKE & GRUNERT, *supra* note 62, § 43 German CA No. 122.

152 *See* Dietz, *supra* note 71, at 830.

this statute, both approaches rely on similar assumptions when calling for freelance directors and other freelance authors to be eligible for collective bargaining. The court in *Home Box Office* expressly referred to how freelance directors actually do the same job that staff directors do and that they deserve the protection offered by the guilds.[153] Neither concept is derived from principles of copyright and, moreover, both are based exclusively on principles of labor law, which are aimed at balancing out the unequal bargaining power of employers and workers.[154]

The 2002 amendment goes far beyond this correspondence. The German legislature believed that the above-mentioned collective bargaining agreements had not been a sufficient means to guarantee adequate compensation for authors and performing artists, either because they were not applicable to freelancers, or because exploiters and unions of authors did not enter into collective bargaining agreements.[155] Additionally, authors and performers had not been in a position to organize and carry out concerted actions or even a strike. One reason may be that in the history of the German motion picture industry, let alone the general entertainment industry, there has never been a conglomeration of companies comparable to Hollywood. Berlin, Munich, Cologne and Hamburg still today compete with each other for the leading rank in motion picture and television productions within Germany. This geographical fragmentation already makes it much more difficult for directors, writers and actors to establish a powerful union and to settle debates amongst themselves. Therefore, the new and inalienable claims to modify agreements with exploiters is geared toward improving this situation and providing for minimum compensation standards for all freelancers.

Nevertheless, one problem remains unsolved. How can one instate collective measures to improve legal certainty if independent contractors are not eligible for collective bargaining? The German legislature's answer to this question breaks new ground in the German legal system. Sections 36 and 36a of the German CA state that associations of authors and associations of exploiters or single exploiters may negotiate so-called "common remuneration standards" (*gemeinsame Vergütungsregeln*).[156] Such an agreement ir-

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153 *See Home Box Office*, 531 F. Supp. at 593.

154 *See* REBER, *supra* note 129, at 111.

155 *See supra* Part III.A.

156 Provisions in collective bargaining agreements have priority compared to common remuneration standards. *See* § 36(1)(3) German CA; Thüsing, *supra* note 85, at 210. Sections 36 and 36a of the German CA, which regulate these common remuneration standards, adopt measures of labor law in spite of the fact that this specific situation is beyond

refutably predetermines the amount of money that is equitable and thus minimizes the risk that authors will find that their compensation does not reflect equitable standards.[157] This interdependence between individual rights and collectively negotiated standards is a typical feature of the 2002 amendment.[158]

Associations that enter into common agreements have to be representative, independent, and authorized, to settle common remuneration standards.[159] Moreover, even individual exploiters (but not single authors) may become parties to such an agreement.[160] The presumption of what is equitable according to the agreement[161] applies to every exploitation contract of the respective branch. It does not matter whether the parties to the single exploitation contract are members of an association that negotiated the common remuneration standard or whether the contract explicitly refers to this standard. The standard thus even binds outsiders.[162]

If associations fail to reach an agreement, one party may request that a unique mediation procedure be instituted.[163] The other party cannot object to the commencement of the procedure. Apart from the fact that every association or individual exploiter has a right to be heard, the mediation panel may make a reasoned settlement proposal for an agreement containing general remuneration standards, even if one party does not make any comments

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the boundaries of labor law. Flechsig & Hendriks, *supra* note 74, at 424. *See generally* BERGER, *supra* note 87, No. 161-98.

157 *See* § 32(2)(1) German CA. If the common remuneration standard expressly regulates additional participation of the author, it also precludes a claim under section 32a(1) of the German CA. *See* § 32a(4) German CA.

158 Dietz, *supra* note 71, at 835.

159 § 36(2) German CA. Whether associations have to be free of opponents is an unresolved question. *See* Ory, *supra* note 85, at 101; Thüsing, *supra* note 85, at 204, 209; NORDEMANN, *supra* note 51, § 36 German CA No. 8. *Contra* Flechsig & Hendriks, *supra* note 74, at 425. An association is representative if it legitimately claims to speak for a certain branch of the cultural industry. *See* Hilty & Peukert, *supra* note 87, at 663; Thüsing, *supra* note 85, at 209; BERGER, *supra* note 87, No. 173. Associations that meet these requirements already exist in many branches, for example, the German Composers Association, the Playwrights-Union etc. *See* WANDTKE & GRUNERT, *supra* note 62, § 36 German CA No. 12; Flechsig & Hendriks, *supra* note 74, at 424.

160 § 36(1) German CA.

161 *See supra* note 156.

162 Schricker, *supra* note 33, at 804; HAAS, *supra* note 68, No. 166-78; Ory, *supra* note 85, at 96; WANDTKE & GRUNERT, *supra* note 62, § 36 German CA No. 21; NORDEMANN, *supra* note 51, § 32 German CA No. 9; BERGER, *supra* note 87, No. 145; Flechsig & Hendriks, *supra* note 74, at 425, 431; Hertin, *supra* note 91, at 17. *Contra* Schack, *supra* note 51, at 857; Erdmann, *supra* note 50, at 925; HUCKO, *supra* note 89, at 12; Thüsing, *supra* note 85, at 210; JANI, *supra* note 112, at 296 (parties must agree upon the applicability of the common remuneration standard or have to be a member of the respective associations of authors or producers).

163 Each party bears its own costs; additional costs are shared between the parties. *See* § 36a(6) German CA.

during the procedure. The mediation panel has to send its decision to both parties. A legal fiction provides that the proposal will be taken as accepted if within three months of its receipt, it is not rejected in writing. If one party objects to the proposal, the agreement does not come into existence.[164] However, even in this case, the rejected proposal may be an indication of what is equitable in a subsequent legal proceeding.[165]

To sum up, this approach differs substantially from collective bargaining agreements under U.S. or German labor law. It is meant to be applicable to every independent contractor who exploits copyrightable subject matter, not only to employees and certain categories of freelancers. Besides that, sections 36 and 36a of the German CA establish a mandatory mediation procedure even for single exploiters. Not surprisingly, doubts have arisen as to whether this approach is compatible with European antitrust law.[166]

B. *"Equitable Remuneration" in the Absence of Collective Agreements and Common Remuneration Standards*

At the time this article was being prepared, its authors did not have knowledge of any already existing common remuneration standards.[167] It remains to be seen whether the respective branches accept and actually use these new collective measures[168] that may also involve foreign exploiters.[169] In the absence of applicable collective agreements or common remuneration standards,

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164 § 36(4) German CA.

165 BT-Drucks. 14/8058, 20; NORDEMANN, *supra* note 51, § 36 German CA No. 15; Flechsig & Hendriks, *supra* note 74, at 428; Rainer Jacobs, *Das neue Urhebervertragsrecht*, NJW 1905, 1908 (2002). *Contra* BERGER, *supra* note 87, No. 242.

166 Michael Schmitt, *Gemeinsame Vergütungsregelungen Europäisch gesehen*, GRUR 294 (2003); Schack, *supra* note 51, at 857. Sections 36 and 36a are an exception to German antitrust law, specifically to section 1 of the Act Against Restrictions of Competition ("Gesetz gegen Wettbewerbsbeschränkungen" [GWB]). *See* Government draft on the 2002 amendment, BT-Drucks. 14/6433, 12; Flechsig & Hendricks, *supra* note 74, at 425. However, German law shall be without prejudice to the provisions on European antitrust law. *See* EC TREATY art. 81-82.

167 Already on July 1, 2002, the day the 2002 amendment came into force, associations of German translators and writers proposed common remuneration standards that contain detailed provisions on different branches and genres. The proposal sets a minimum payment rate that is three times higher than the going rate. *See* Draft of a Common Remuneration Standard for Translators, Kunstrecht und Urheberrecht [KUR] 110 (2002).

168 *See* BERGER, *supra* note 87, No. 163; Schack, *supra* note 51, at 857.

169 *See* HAAS, *supra* note 68, No. 225. Since "basic agreements" in the U.S. entertainment industry are collective agreements according to labor law, see *supra* Part III.A.1, one could well argue that the claims for equitable remuneration are barred under sections 32(4) and 32a(4) of the German CA if the remuneration for the use of the respective work that gives rise to the claim for equitable remuneration is specified by such a basic agreement.

under which conditions is an agreed remuneration an "equitable" one?

Section 32(2)(2) of the German CA declares that compensation 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, in particular their duration and timing, as well as all other circumstances. Following this statutory definition, one must apply a two-step check. First, remuneration has to be customary in the particular branch. Second, remuneration has to be fair or honest.[170] To determine whether the agreed remuneration meets this standard, one has to consider not only the use of the work in Germany, but in all countries where the producer has contractual permission to exploit the work.[171]

Compensation is customary if it corresponds to the compensation that nearly all market participants pay for a comparable transfer of rights over a relevant period. In litigation, the court will have to call in experts to elucidate this issue. Only a few branches, for example photographers,[172] have established widely accepted tariffs of compensation that courts rely on without obtaining an expensive expert opinion.[173]

However, this is only the first step. Courts must also determine whether this common practice is fair and just.[174] This decision, of course, is extremely difficult and hardly predictable. Some hold that it is impossible to establish what share of the proceeds must be allocated to the author or performer according to equity.[175] The explanatory memorandum of the 2002 amendment

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170 *See* NORDEMANN, *supra* note 51, § 32a German CA No. 11 *et seq*; Schricker, *supra* note 33, at 805; Ory, *supra* note 85, at 95.

171 *See* § 32(2)(2) German CA ("all other circumstances"), § 32a(1) German CA ("having regard to the whole of the relationship between the author and the other party . . . ."); Hilty & Peukert, *supra* note 87, at 663. For example, if the producer realizes returns and advantages from the use in the U.S. but not in Germany, this income can result in a conspicuously disproportionate remuneration from an ex-post perspective.

172 *See* Gewerblicher Rechtsschutz und Urheberrecht-Rechtsprechungsreport [GRUR-RR] [District Court Berlin] 97 (2003) - MFM Empfehlungen; ZUM [District Court Berlin] 513 (2000).

173 HAAS, *supra* note 68, No. 147; BERGER, *supra* note 87, No. 121; Erdmann, *supra* note 50, at 926; NORDEMANN, *supra* note 51, § 32 German CA No. 25; WANDTKE & GRUNERT, *supra* note 62, § 32 German CA No. 27-30.

174 HAAS, *supra* note 68, No. 150-54; Schricker, *supra* note 33, at 805; Schricker, *supra* note 74, at 738; Erdmann, *supra* note 50, at 926; Reber, *supra* note 124, at 393-398; BT-Drucks. 14/8058, 18; WANDTKE & GRUNERT, *supra* note 62, § 32 German CA No. 31-35. *See* GRUR [Supreme Court] 604 (2002) – Musikfragmente (decision on the 1965 German CA).

175 *See supra* note 77. Schricker, *supra* note 33, at 807; Schricker, *supra* note 74, at 742 (relying on the common practice in the publishing sector, proposes a share of 25% of the gross revenue). Others suggest applying the plans of distribution of collecting societies. *See* NORDEMANN, *supra* note 51, § 32 German CA No. 26. Degressive remuneration schemes (the more copies are sold the less the author participates) are generally incompatible with

lists some relevant criteria that should be taken into account: market conditions, investment, risk-taking, accruing costs, number of copies produced and expected proceeds.[176] Legislative history expressly points to the current remuneration of literary translators as an example of a common, but not fair, practice.[177] Nevertheless, under certain conditions it will still be admissible to exploit a work without paying the author any compensation, for example in the case of publishing dissertations[178] or if the author furnishes his or her work pro bono.[179]

Although buy-out[180] contracts are an extremely common practice in the U.S. entertainment industry as well as in the German television and motion picture industry, or for free-lance journalists,[181] it is questionable whether this kind of agreement conforms to the new law. Whereas it is obvious that a lump sum payment for an extremely far-reaching grant of rights is a very useful feature for producers, it hardly provides an equitable remuneration in the long run. In contrast, proportional compensation ensures that the author can participate in case of increasing proceeds. Therefore, buy-out agreements have often been assessed as an example of a common but not equitable compensation scheme in the entertainment industry.[182] Commentators advise exploiters to redraft their contracts and to provide for proportional remuneration instead of lump sum payments in order to avoid claims for equitable remuneration.[183] Nevertheless, even after the 2002 amendment the prevailing opinion holds that a buy-out of rights does not, at least in principle, go against the statutory guarantee of equitable remuner-

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the intention of the 2002 amendment and therefore trigger a claim for equitable remuneration. NORDEMANN, *supra* note 51, § 32 German CA No. 23.

176 BT-Drucks. 14/8058, 18; Erdmann, *supra* note 50, at 926.

177 Bundestags-Drucksache (BT-Drucks.) 14/8058, 18; WANDTKE & GRUNERT, *supra* note 62, § 32 German CA No. 30. *See supra* note 167 (draft of a common remuneration standard for translators).

178 According to university regulations on doctoral degrees in Germany, every doctoral candidate has to publish a certain number of copies of his or her dissertation to obtain the degree of "doctor juris." As a common practice, candidates have to pay publishers a certain amount of money and do not receive any payments because sales are usually minimal.

179 BERGER, *supra* note 87, No. 54; WANDTKE & GRUNERT, *supra* note 62, § 32 German CA No. 34; NORDEMANN, *supra* note 51, § 32 German CA No. 34; Schricker, *supra* note 33, at 807.

180 Note that "buy-out" under German copyright law never means an assignment of copyright because copyright is not assignable. *See supra* Part I.A. Nevertheless, the term is common for an exclusive grant of all economic rights without any limitations in time and space, remunerated by a lump sum payment. *See* JANI, *supra* note 112, at 37, 286 *et seq.*

181 *See* JANI, *supra* note 112, at 51 *et seq.*

182 Government draft of the 2002 amendment, BT-Drucks. 14/6433, 11; REBER, *supra* note 83, at 287; NORDEMANN, *supra* note 51, § 32 German CA No. 27.

183 Hertin, *supra* note 91, at 17; WANDTKE & GRUNERT, *supra* note 62, § 32 German CA No. 38.

ation.[184] This is a concession to certain branches that absolutely rely on this contractual feature to organize the utilization of works that many different and important authors and performing artists create as a team. The more the producer depends upon lump sum payments in order to be able to realize a complex product like a motion picture, and the less decisive a creative contribution is for the success of the motion picture, for example background players, the more likely it is that a court will accept a complete buy-out of rights without altering the agreed remuneration. At any rate, the entertainment community awaits court decisions on this yet untested legal territory. Even if decisions are handed down, every ruling will focus on the individual relationship at issue. Thus, it will be very difficult to formulate reliable guidelines for compensation schemes.

IV. Issues of International Exploitation of Works and Performances: The Impact of the Amendments on the U.S. Entertainment Industry

Still, one might well ask, "Why think about these measures of German law if my contracts always contain a clause stating that the contract is governed by U.S. law?"[185]

The answer is simple and perhaps disturbing: because this clause may not be enforceable according to the new German CA.

In the following, we clarify an additional limitation of freedom of contract on an international level. We discuss a new choice of law provision, section 32b of the German CA, that declares the claims for equitable remuneration to be internationally mandatory rules that may not be derogated by stipulation of another applicable law. As this choice of law rule will generally be applied if the

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184 Schricker, *supra* note 33, at 807; Berger, *supra* note 87, No. 132; Wandtke & Grunert, *supra* note 62, § 32 German CA No. 38; Schack, *supra* note 51, at 855; Erdmann, *supra* note 50, at 927; Reber, *supra* note 124, at 395; Government draft of the 2002 amendment, BT-Drucks. 14/8058, 18; Jani, *supra* note 112, at 312 *et seq*; GRUR [Supreme Court] 602, 603 (2002) – Musikfragmente. For a justification of this legal standpoint, Hertin points out that the new default rules on motion pictures effectively result in a complete allocation of rights in the hands of the producer and that therefore even "buy-out" is the statutory default rule. *See* Hertin, *supra* note 91, at 17. However, against this view one might object that §§ 88-93 German CA only provide for secure exploitation in favor of the producer and that this law shall be without prejudice to the provisions about equitable remuneration that are applicable to the production of motion pictures without any statutory limitation. *See* Nordemann, *supra* note 51, § 32 German CA No. 27 (providing for "buy-out" is permissible only in rare cases, such as when there are a large number of authors who contribute to a work, such as an encyclopedia, or a large number of background players, such as in a motion picture).

185 *See, e.g.*, Jay S. Kenoff, *in* 1 Entertainment Industry Contracts Form 4-1 Acquisition of Literary Material cl.23 (Donald C. Farber ed. 2002).

author files the claim in a German court,[186] we summarize the conditions under which a German court has jurisdiction over a United States entity. To further illustrate the impact of this provision on the entertainment industry in the United States, we ask whether authors and performing artists from all countries, especially the U.S., are entitled to the new claims. We also show how U.S. courts will handle claims for equitable remuneration. Finally, we examine whether German decisions will be recognized and enforced in the United States.

A. *International Jurisdiction of German Courts over U.S. Entities and Individuals*

German courts will consider not only the general German choice of law rules on contracts,[187] but particularly section 32b of the German CA, which declares sections 32 and 32a of the German CA to be internationally mandatory rules. Therefore, the applicability of the new claims essentially depends upon the jurisdiction of German courts.

As no convention governing international jurisdiction is in force between Germany and the U.S., German courts have personal jurisdiction over U.S. defendants according to sections 12-37 of the German Code of Civil Procedure.[188] Foreign corporations or other entities, as well as individuals, are subject to jurisdiction *in personam* if the entity is domiciled in, or if the individual resides in, the respective court circuit.[189] Jurisdiction is also ascertained where the exploiter maintains a branch in Germany and the claim for equitable remuneration relates to this branch.[190]

In addition, section 23 of the German Code of Civil Procedure establishes personal jurisdiction over producers not based in Ger-

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186 Courts apply the choice of law rules of the forum. For German law, see BGHZ [Supreme Court] 47, 324 (F.R.G.); NJW 2305 (1993); NJW 2097 (1995); NJW 54 (1996); NJW 1321 (1998); Ulrich Magnus, *in* JULIUS VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH before Arts. 27-37 EGBGB Nos. 40-43 (13th ed. Selier – de Gruyter 2002); CHRISTIAN VON BAR, INTERNATIONALES PRIVATRECHT 581 *et. seq.* (C. H. Beck 1991); JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT 117 (4th ed. 2001); Hoeren, *supra* note 11, at 129. For U.S. law, see EUGENE F. SCOLES et al., CONFLICT OF LAWS § 3.1 (3d ed. 2000).

187 Arts. 27-37 Introductory Act to the German Civil Code, Einführungsgesetz zum Bürgerlichen Gesetzbuche, [EGBGB].

188 BGHZ [Supreme Court] 44, 46, 47; 63, 219; 126, 196, 199 (F.R.G.); NJW 3092, 3093 (1991); BERND VON HOFFMANN, INTERNATIONALES PRIVATRECHT § 3 No. 38 (7th ed. 2002); REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT No. 943. (4th ed. 2001).

189 §§ 12, 17 German Code of Civil Procedure [ZPO].

190 § 21 ZPO. Additionally, the plaintiff may rely on jurisdiction at the place of performance of the relevant obligation § 29 ZPO. The relevant place of performance with regard to the obligation to pay equitable remuneration is, absent an agreement to the contrary, the domicile of the debtor. *See* §§ 269, 270 Nr. 4 ZPO; NJW [Supreme Court] 1914 (1988). Therefore, this provision is not likely to establish jurisdiction over U.S.-based exploiters.

many in certain cases.[191] It allows a suit in German courts against any defendant who has assets in Germany, provided that he is neither domiciled in, nor residing in Germany.[192] For example, if the defendant holds stock in Germany or has accounts receivable against debtors domiciled in Germany, the court where the corporation or the debtor is domiciled has *in personam* jurisdiction over the U.S. based defendant.[193] To invoke this provision in international cases, the claim must involve certain minimum contacts with Germany.[194] However, this prerequisite is easily met. Commentators point out that a court may hear the case if the litigation is connected with assets in Germany, for example receivables against German licensees for the use of the respective work, or if the plaintiff's interests warrant protection, for example, if the author-plaintiff resides in Germany.[195]

Will choice of forum clauses help to avoid this exorbitant jurisdiction? The answer is not necessarily yes.[196] Whether the stipulation of a foreign forum has legal effect goes by the *lex fori* of the

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191 Martha Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323, 327 (1961). Section 23 ZPO is not applicable if the defendant is domiciled in a Member State of the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 012) 1-23. Art. 3 of the Regulation provides:

> 1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.
>
> 2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Id.; § 23 ZPO is listed in Annex I of the regulation.

192 NJW [Supreme Court] 325 (1997). With regard to legal entities: NJW [Federal Labor Court] 2910, 2911 (1985).

193 *See* § 23 Nr. 2 ZPO.

194 NJW [Supreme Court] 3092 (1991); Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts [IPRspr] Nr. 140a (1995); NJW 324, 325 (1997); Der Betrieb [DB] [Labor Court] 2619 (1998); RIW [Munich Court of Appeals] 66 (1993); RIW [Düsseldorf Court of Appeals] 598, 601 (1996); NJW [Celle Court of Appeals] 3722 (1999); RIW [Stuttgart Court of Appeals] 829, 830 (1990). *Contra* HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT No. 320 (3d ed. 2002); GEIMER, *supra* note 188, No. 1077a, 1346.

195 *Cf.* Jürgen Mark & Hans-Jörg Ziegenhain, *Der Gerichtsstand des Vermögens im Spannungsfeld zwischen Völkerrecht und deutschem internationlen Prozessrecht*, NJW 3062, 3064 (1992); HOFFMANN, *supra* note 188, § 3 No. 48.

196 Different rules are applicable if the defendant is domiciled in a member state of the European Union, thus the EC regulation on jurisdiction is applicable. In this case, courts in member states have to give effect to a choice-of-law provision because it is presumed that the applicable law of the chosen forum provides similar rules compared to the law of the derogated forum. RIW [European Court of Justice] 955 (1999) - Castelletti; Juristen Zeitung [JZ] [European Court of Justice] 896, 897 (1998) - Benincasa; GEIMER, *supra* note 188, No. 1774a; JAN KROPHOLLER, EUROPÄISCHES ZIVILPROZESSRECHT (7th ed., Verlag Recht und Wirtschaft 2002) (EC-REGULATION, art. 23, No. 17, at 86); IPRax [Stuttgart Court of Appeals] 86, 88 (1992); IPRax [District Court Darmstadt] 318, 321 (1995).

derogated court, i.e. German law.[197] Section 38(2) of the Code of Civil Procedure provides that the parties may agree on exclusive jurisdiction of courts of another country if one party is not domiciled in Germany.[198] However, this agreement has to be in writing.[199] Moreover, the Federal Supreme Court rendered invalid forum clauses that met these formal requirements either on the ground that one party with superior bargaining power forced the weaker party to agree on derogation in order to make litigation unreasonably harder, or because of the mere fact that the clause led to a circumvention of German mandatory law.[200] With regard to contracts of employment, the Federal Labor Court did not give effect to a choice of forum clause because "the protection of the employee demands the applicability of German law."[201] Considering these decisions, the national and international mandatory character of the new claims suggests that a German court would possibly render a clause invalid if it provides for exclusive jurisdiction of U.S. courts, and thus deprives authors of the protective measures granted under the Copyright Act. However, relevant case law on this topic is not yet available.

B. *Crucial Mandatory Rule: Section 32b of the German Copyright Act*

German exploiters heavily opposed the 2002 amendment. They feared the broad scope of the claims could have a negative

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197 GEIMER, *supra* note 188, No. 1677, 1757; NJW [European Court of Justice] 501, 502 (2001) - Coreck.

198 Otherwise, a choice of court clause is enforceable only for two reasons. First, it can be enforced if both parties are entrepreneurs. However, freelance artists are not entrepreneurs under section 1 of the Commercial Code [HGB]. *See* NJW [Federal Fiscal Court] 3655 (2002) (discussing freelance editors); Schmitt, *supra* note 166, at 295 (discussing freelance writers); HUCKO, *supra* note 89, at 8. Second, it can be enforced if the parties stipulate the clause after the conflict has arisen. *See* § 38(1) No. 3 ZPO.

199 *See* § 38(2) No. 2 ZPO.

200 *See* Zeitschrift für Zivilprozess [ZZP] [Supreme Court] 318, 320 (1975) (necessary requirements not met in particular case); NJW [Supreme Court] 2037 (1984); RIW [Frankfurt Court of Appeals] 902 (1986). *But see* Wertpapier Mitteilungen [WM] [Frankfurt Court of Appeals] 2107 (1996) (regarding the amended German Securities Exchange Act); Schack, *supra* note 194, No. 451; Rainer Hausmann, *in* INTERNATIONALES VERTRAGSRECHT No. 435 (Christoph Reithmann & Dieter Martiny eds., 5th ed., O. Schmidt 1996). *Contra* GEIMER, *supra* note 188, No. 1057, 1770. Under U.S. law, a forum selection clause in a contract is prima facie valid and should be enforced unless the opposing party shows that enforcement would contravene a strong public policy of the state in which the case is brought, or that the chosen forum would be so seriously inconvenient for trial that the opposing party would be deprived of his or her day in court. *See* Maher & Assocs., Inc. v. Quality Cabinets, 267 Ill. App. 3d 69, 74 (App. Ct. 1994); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 15, 18 (1972); Calanca v. D & S Mfg. Co., 157 Ill. App. 3d 85, 87-8 (App. Ct. . 1987); Yamada Corp. v. Yasuda Fire and Marine Ins. Co., Ltd., 305 Ill. App. 3d 362, 367 (App. Ct. 1999); Williams v. the Illinois State Scholarship Comm'n, 139 Ill. 2d 24, 70 (1990); RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1971).

201 NJW [Federal Labor Court] 2180 (1970); NJW 1119 (1979).

impact on their competitive strength, especially in the international entertainment market. Film producers and publishing companies wanted to do everything they could to evade the new law. As these are inalienable claims, one could, in the customary case that the contract has foreign elements as described above,[202] try to circumvent them either by a party choice of law clause[203] or by transfer of the company's domicile to another country so that a different law is applicable to the contract.

Only eleven days before the 2002 amendment passed in the German parliament, the Ministry of Justice submitted § 32b of the German CA. The provision is intended to prevent a choice of law related circumvention of the new claims.[204] It states that the rules

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202 *See supra* Part I.

203 Art. 27 EGBGB, *supra* note 187. Freedom of choice of law is a basic principle in German and European law on conflicts of law. *Cf.* The Convention on the law applicable to contractual obligations opened for signature in Rome on June 19, 1980, European Contract Convention, ECC art. 3, 1998 O.J. (C 27) 34-46. *See* U.C.C. § 1-105(1) (discussing U.S. law on the same issue). *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971); SCOLES ET AL., *supra* note 186, §§ 18.1-18.2.

204 Section 32b of the German CA declares that sections 32 and 32a of the German CA are internationally mandatory rules according to Art. 34 EGBGB, *supra* note 187 (discussing ECC art. 7(2)). *See* Hilty & Peukert, *supra* note 87, at 643; Eva Inés Obergfell, *Deutscher Urheberschutz auf internationalem Kollisionskurs*, Kommunikation & Recht (K&R) 118 (2003); Schack, *supra* note 51, at 857; Erdmann, *supra* note 50, at 929; HAAS, *supra* note 68, at No. 468-80.

A widely held opinion states that the other imperative provisions on copyright contracts are also internationally mandatory. *See* Zeitschrift für Urheber- und Medienrecht Rechtsprechungsdienst [ZUM-RD] [Munich District Court] 25 (2002) – Aguilera (discussing § 31(5) German CA); KATZENBERGER, *in* URHEBERVERTRAGSRECHT, FESTGABE SCHRICKER, *supra* note 11, at 255; KATZENBERGER, *in* URHEBERRECHT, *supra* note 11, before §§ 120 German CA Nos. 160-68; NIKOLA KLEINE, URHEBERRECHTSVERTRÄGE IM INTERNATIONALEN PRIVATRECHT 146-48 (P. Lang 1986); WILHELM NORDEMANN, *in* URHEBERRECHT before §§ 120 German CA No. 8 (Wilhelm Nordemann et al. eds., 9th ed., Kohlhammer 1998); Paul W. Hertin, *in* URHEBERRECHT before §§ 31/32 German CA No. 32; MARTIN HIESTAND, DIE ANKNÜPFUNG INTERNATIONALER LIZENZVERTRÄGE 135 (Lang 1993); Hoeren, *supra* note 11, at 132; EUGEN ULMER, DIE IMMATERIALGÜTERRECHTE IM INTERNATIONALEN PRIVATRECHT 58 (1975); Ulrich Loewenheim, *Rechtswahl bei Filmlizenzverträgen*, ZUM 923, 926 (1999); *see also* BGHZ [Supreme Court] 380, 388 – Spielbankaffaire (F.R.G.).

Correspondingly, a German court had to give effect to the above-mentioned imperative rules of the German CA, for example, section 41 of the act, irrespective of the otherwise applicable *lex causae*. In view of the fact that the German legislature enacted a special provision proclaiming the internationally imperative character of sections 32 and 32a of the German CA, this opinion is not convincing. *See* Hilty & Peukert, *supra* note 87, at 648; MARCUS VON WELSER, *in* URHEBERRECHT – PRAXISKOMMENTAR, *supra* note 62, § 32b German CA No. 2; Obergfell, *supra* at 204; Schack, *supra* note 71, No. 1148; Mäger, *supra* note 11, at 132, 154. Given the dominant opinion, section 32b German CA would be superfluous.

One must furthermore argue that *e contrario* all other provisions of the German CA are only nationally imperative, but not in the stronger sense that they are intended to apply irrespective of the *lex causae* and the presence of substantial connecting factors with a foreign legal system. Additionally, it has been rightly argued that only provisions that serve a public interest, such as regulations concerning social and economic life, meet the requirements of the ECC Treaty art. 7(2). *See* Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] [Supreme Court of the German Reich] 240, 245 (169); Entscheidungen des Bundesarbeitsgerichts [BAGE] [Federal Labor Court] 17 (63); BAGE 197 (71); Sammlung Arbeitsgerichtlicher Entscheidungen [SAE] [Federal Labor Court] 31 (1997); not decided

on equitable remuneration[205] apply, (1) irrespective of a valid choice of law clause if German law governed the contract without the choice of law clause, or (2) insofar as substantial exploitations in Germany are the subject matter of the contract. The first condition overrides an effective stipulation of, for example, California state law if the contract is most closely connected with Germany.[206] This is the case if the producer is contractually obliged to exploit the work and has its registered office in Germany or, if the producer is not obliged to use the work, if the author or performing artist is domiciled in Germany.[207] Therefore, a U.S. based company that covenants to use the rights that are granted may rely on a stipulation of U.S. law unless substantial exploitations in Germany are the subject matter of the contract, as indicated in the latter condition.

This latter condition, section 32b(2) of the German CA, is more relevant in international business than section 32b(1).[208] It not only supersedes a choice of law clause but also the applicable law in the absence of a party choice of law. Therefore, even if the parties deliberately chose the law of the state of California and Germany is not the country with which the contract is most closely connected, sections 32 and 32a of the German CA are applicable insofar as substantial use of the work takes place in Germany. If the requirement of "substantial exploitation in Germany" is met,

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by RIW [Supreme Court] 875, 878 (1997); *see also* Peter Mankowski, *Keine Sonderanknüpfung deutschen Verbraucherschutzrechts über Art. 34 EGBGB*, Deutsche Zeitschrift für Wirtschaftsrecht [DZWir] 273 (1996); Peter Mankowski, *Spezielle vertragsrechtliche Gesetze und Internationales Privatrecht*, IPRax 230 (1995); Dieter Martiny, *in* 10 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH Art. 34 EGBGB No. 7, 79 (Kurt Rebmann et al. eds., 3rd ed., C. H. Beck 1998); Magnus, *supra* note 186, Art. 34 EGBGB No. 68-71; KROPHOLLER, *supra* note 186, at 478 *et seq.* Were all nationally imperative rules that protect "weaker" parties also internationally mandatory rules, the existence of special provisions on certain consumer contracts and individual employment contracts, EEC Treaty arts. 5-6, would not be understandable. *See* KROPHOLLER, *supra* note 186, at 22; Magnus, *supra* note 186, Art. 34 EGBGB No. 71; VON BAR, *supra* note 186, at 452.

Finally, Article 7(2) ECC has to be narrowly construed because it goes against the desirable purpose of uniform rules concerning the law applicable to contractual obligations and against legal certainty. *See* Jan Kropholler, *Das kollisionsrechtliche System des Schutzes der schwächeren Vertragspartei*, 42 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ] 634, 657 *et seq.* (1978); Hans-Jürgen Sonnenberger, *Eingriffsrecht - Das trojanische Pferd im IPR oder notwendige Ergänzung?*, IPRax 104 (2003).

205 Section 32a(2) German CA, as an annex to § 32a(1) German CA, follows the same rules with respect to conflicts of law. *See* Hilty & Peukert, *supra* note 87, at 646. *Contra* Obergfell, *supra* note 204, at 119, 124 (application of *lex loci protectionis*).

206 This is the fundamental precondition for the applicability of German law in the absence of a choice-of-law provision in the contract. *See* Art. 28(1) EGBGB, *supra* note 187.

207 Legal entities are domiciled where the central administration is located. However, if a branch furnishes the contractual obligation, the law of the country where the branch is located is applicable. *See* Art. 28(2) EGBGB, *supra* note 187; Hilty & Peukert, *supra* note 87, at 647.

208 BT-Drucks. 14/8058, 20.

section 32b of the German CA also prohibits a derogation of German law with respect to use in foreign countries,[209] and the court has to consider all acts of exploitation that fall within the contractual consent, even if they occur, for example, in the U.S.[210] Legislative history does not give any clues as to how to interpret the wording "substantial" (*maßgeblich*) exploitation. Given that international mandatory provisions override the otherwise applicable law only if the case has certain minimum contacts to the country that demands applicability of its national law,[211] the mere fact that the contract covers, *inter alia*, the use of the work in Germany, will not be sufficient. Rather, the actual utilization of the work in Germany has to be substantial compared to the overall exploitation of the work or performance. In other words, Germany has to be one of the economically important places of business with respect to the contract that is at stake.[212]

Section 32b of the German of the Copyright Act is also applicable to all kinds of exploitation contracts of performing artists.[213] However, this has only been true since September 13, 2003 when the 2003 amendment took effect.[214] With respect to the interval between July 1, 2002, effective date of the 2002 amendment, and September 12, 2003, section 32b of the German CA did not apply to exploitation contracts with performing artists, because section 75(4) of the German CA, amended in 2003, did not refer to section 32b of the German CA.[215] Thus, choice of law clauses in exploitation contracts with freelance performers that were concluded before September 13, 2003 are enforceable, unless a German court finds that the stipulated law is manifestly incompatible with German public policy, which only occurs in exceptional cases.[216]

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[209] This splitting up is not compatible with the international perspective of section 32b German CA to also enforce the claims in an international context. *See* Obergfell, *supra* note 204, at 119, 125. *Contra* Hertin, *supra* note 91, at 19.

[210] *Contra* without explanation: Marcus von Welser, *Neue Eingriffsnormen im internationalen Urhebervertragsrecht*, IPRax 364, 365 (2002).

[211] RIW [Supreme Court] 875, 878 (1997).

[212] Obergfell, *supra* note 204, at 125. *Contra* von Welser, *supra* note 210, at 365 (the mere contractual regulation of exploitation within Germany is sufficient).

[213] § 79(2) German CA; *see supra* Part II.B.

[214] Art. 6(1) Act on Copyright in the Information Society, v. 10.9.2003 (BGBl. I S.1774).

[215] Legislative history in no way indicated that this was an editorial mistake of the 2002 amendment that can be declared irrelevant. *See* Hilty & Peukert, *supra* note 87, at 644; Hertin, *supra* note 91, at 19; Obergfell, *supra* note 204, at 119. *Contra* BT-Drucks. 14/8058, 20-21. The differences between neighboring rights and copyright prevented § 32b German CA from being applied by analogy. *See generally* PEUKERT, *supra* note 29, at 36-37.

[216] *See* Art. 6 EGBGB, *supra* note 186; ECC art. 16. Nevertheless, even before the 2003 amendment took effect, performing artists were protected against disadvantageous choice-of-law clauses. As the new provisions also modify individual contracts of employment, see *supra* note 114, they are a statutory protection of employees, so that a choice-of-law clause cannot have the result of depriving an employed performer of the protection afforded to

C. *Are U.S. Authors and Performing Artists Also Entitled to Obtain Equitable Remuneration?*

Assuming a court applies sections 32 and 32a of the German CA to an exploitation contract, the following question arises: can every author and performing artist file a claim for equitable remuneration or are only German nationals and domiciliaries so privileged? To answer this question, one must examine German law relating to aliens.[217] Even if German law is applicable, it does not necessarily mean that German copyright law accords its protection to every author and performing artist from abroad. National law may limit the scope of application of substantive law[218] as do sections 120 *et seq.* of the German CA concerning copyright. Unlike, for example, Swiss copyright law,[219] these rules deprive most foreign authors and performing artists of the protection that the copyright act generally provides. This is an astonishing contrast to the fact that the claims are, at least for authors, internationally mandatory, and therefore govern many contracts between foreign authors and foreign exploiters. In the following discussion, we sketch the interface between German law and international treaties on copyright and related aspects that lay down conditions under which a foreign author is granted the same protection as a German author, with respect to contractual compensation. Authors and performing artists from the European Union ("EU") or the European Economic Area ("EEA")[220] countries are granted complete national treatment and thus may bring a claim for equitable remuneration.[221] In *Phil Collins v. Imtrat*,[222] the Court of Justice of the European Community held that Article 12 of the EC Treaty prohib-

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him by mandatory rules of his "home" law. *See* Art. 30 EGBGB, *supra* note 186; ECC art. 6. For a more detailed discussion, see Hilty & Peukert, *supra* note 87, at 647-651.

217 *Fremdenrecht*, §§ 120-128 German CA.

218 Bernd von Hoffmann, *Inländische Sachnormen mit zwingendem internationalem Anwendungsbereich*, IPRax 261, 270 (1989); Schack, *supra* note 71, at No. 797.

219 MANFRED REHBINDER, SCHWEIZERISCHES URHEBERRECHT 222 (3d. ed., Stämpfli 2000); DENIS BARRELET & WILLI EGLOFF, DAS NEUE URHEBERRECHT § 1 No. 1 (2d ed., Stämpfli 2000); FRANÇOIS DESSEMONTET, LE DROIT DÂUTEUR 31-33 (Centre du droit de léntreprise de lUnivesité de Lausanne 1999). This all-inclusive protection is granted only in part by 17 U.S.C. § 104. Unpublished works qualifying for statutory copyright are protected from the moment of creation, no matter what the nationality or domicile of the author. For published works, 17 U.S.C. § 104(b) requires certain conditions according to which foreign authors are eligible for the same protection in the U.S. as are citizens.

220 Member States of the EU are the following: Austria, Belgium, Denmark, The Netherlands, Germany, Greece, France, Great Britain, Ireland, Luxembourg, Spain, Portugal, Italy, Finland, Sweden, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia. Member States of the EEA are the following: Norway, Iceland, and Liechtenstein.

221 §§ 120(2), 125(1) German CA.

222 GRUR [European Court of Justice] 280 (1994); ZUM [European Court of Justice] 631 (2002) - Ricordi; NJW [Supreme Court] 868, 869 (1995) - Cliff Richard II.

its any discrimination on grounds of nationality in the field of intellectual property.

Less clear is the legal status of authors and performing artists from outside the EU or the EEA, for example, from the United States.[223] These foreign authors are, like stateless persons and foreign refugees,[224] granted "copyright protection with respect to their works" if the work is first published in Germany.[225] In our view, the new claims for equitable remuneration are part of the copyright protection provided for in the German CA, so that foreign authors and performers are protected only insofar as international conventions on copyright and neighboring rights grant national treatment.[226] This reference to international conventions is meant to compensate for the above-mentioned discrimination, and it works with respect to absolute rights against unauthorized reproduction (infringement cases). However, it does not work when it comes to contractual claims like sections 32 and 32a of the German CA that represent a qualitatively new concept to protect authors and performing artists.[227]

Article 5(1) of the Berne Convention[228] ("Convention") states that authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention. First, the wording of this article does not suggest that a contractual protection can be subsumed under this section, because sections 32 and 32a of the German CA are not rights in respect of protected works, but provisions on contract law.[229] Second, and more important, neither the first text of

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223 Hilty & Peukert, *supra* note 87, at 652.

224 §§ 122, 123 German CA. *See* § 125(5) German CA (discussing performing artists).

225 § 121(1) German CA. *See* § 125(2) German CA (discussing performances by artists in Germany). This measure is supposed to induce authors and performers to publish their work or carry out their performance in Germany. *See* [BGHZ] [Supreme Court] 95, 229, 232 - Puccini; GRUR [Munich Court of Appeals] 195, 200 (1983) - Oper Tosca.

226 *See* § 121(4) German CA (discussing authors); § 125(2) German CA (discussing performing artists). For performing artists, § 125(1) of the German CA expressly refers to the "protection afforded by §§ 73 to 83 German CA" and thus to §§ 79, 32, 32a of the German CA. This inclusion of the new claims for equitable remuneration shows that the provisions of the law relating to aliens cover all rights contained in the German CA. With regard to the protection of foreign authors, one could nevertheless argue that § 121(1) of the German CA only covers rights against infringements, but no claims of a contractual nature as §§ 32 and 32a of the German CA. According to this view, all foreign authors are entitled to claim for equitable remuneration, not dependent on the conditions set out in §§ 121-125 of the German CA.

227 Hilty & Peukert, *supra* note 87, at 652.

228 Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 5(1), 102 Stat. 2853.

229 *See* GELLER, *supra* note 4, § 6[2][c][i]; Katzenberger, *supra* note 16, at 735. *Contra*

the Convention nor the revisions of the Convention, show any consent from the contracting countries that copyright contract law shall be the subject matter of the Convention.[230] The Convention contains only a few provisions that deal with contract law.[231] Provisions on contractual remuneration are totally lacking. The same is true of the WIPO Copyright Treaty,[232] which simply refers to Article 5 of the Berne Convention, and of the Universal Copyright Convention, which does not have a wider scope of application than the Berne Convention.[233]

Article 3(1) of TRIPS[234] provides that each member shall accord treatment to the nationals of other member countries, which is no less favorable than that which it accords to its own nationals with regard to the protection of intellectual property. A note on this national treatment clause clarifies that, for the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this convention. The claims for equitable remuneration may be subsumed

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Dietz, *supra* note 71, at 840 (2002) (without giving further reasons). Dietz overlooks the fact that these measures are not new absolute rights or statutory claims for remuneration that have been introduced to compensate for the fact that copyright law does in certain situations, withdraw absolute rights, for example in the case of certain limitations of rights. See, for the rationale of these statutory claims, Government draft for the 1965 Copyright Act, BT-Drucks. IV/270, 31, 70; German government bill for a "Gesetz zur Änderung von Vorschriften auf dem Gebiet des Urheberrechts" BT-Drucks. 10/837, 9; Gerhard Schricker, *Zur Bedeutung des Urheberrechtsgesetzes von 1965 für das Verlagsrecht*, GRUR Int. 446, 452 (1983); Benvenuto Samson, *Anspruch auf die Schulbuchvergütung hat der Urheber*, 71 UFITA 65, 67 (1974); MANFRED REHBINDER, *Wem steht der neue Vergütungsanspruch gegen die Schulbuchverleger zu?*, 71 UFITA 53, 58 (1974); Haimo Schack, *Der Vergütungsanspruch der in- und ausländschen Filmhersteller aus § 54 I UrhG*, ZUM 267, 270 (1989). *See* also Berne Convention, *supra* note 228, art. 11 bis(2).

230 *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERRARY AND ARTISTIC WORKS: 1886-1986 209 (1987); JOSEF DREXL, ENTWICKLUNGSMÖGLICHKEITEN DES URHEBERRECHTS IM RAHMEN DES GATT 69 (1990); CLAUDE MASOUYÉ, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS No. 5.6 (WIPO Publication 1978); György Boytha, *Der schillernde Schutz von Urheberpersönlichkeitsrechten in der Berner Übereinkunft*, in FESTSCHRIFT FÜR MANFRED REHBINDER, *supra* note 32, at 199, 207.

231 *See, e.g.*, KATZENBERGER, *in* URHEBERVERTRAGSRECHT, FESTGABE SCHRICKER, *supra* note 11, at 236. In the Berne Convention, Article 14bis (2)(b)(c) establishes only a compromise between different national laws on the question of initial ownership of copyright. *See* ULMER, *supra* note 204, at 40.

232 World Intellectual Property Organization ("WIPO")World Copyright Treaty and the Performances and Phonograms Treaty, December 20, 1996, 112 Stat. 2860, 21 U.S.T. 1749 [hereinafter WPPT].

233 GRUR Int. [Austrian Supreme Court] 447, 449 (2000); David Vaver, *Die Inländerbehandlung nach der Berner Übereinkunft und dem Welturheberrechtsabkommen*, GRUR Int. 191, 212 (1988); DREXL, *supra* note 227, at 175.

234 Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Pub. Law No. 103-465 [hereinafter TRIPS].

under the wording "matters affecting the use of intellectual property rights." However, contractual remuneration is not addressed in TRIPS and is, therefore, not subject to this national treatment rule.

National treatment clauses in conventions on the rights of performing artists are confined to the rights that are specifically addressed in each convention.[235] Therefore, these international conventions clearly do not compensate for the discrimination of German copyright law relating to aliens because contract law is not the subject matter of these conventions.

Finally, even the "most favored nation" treatment according to Article 4 TRIPS does not benefit foreign authors and performing artists. It covers "with regard to the protection of intellectual property any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country." The claim for equitable remuneration is an advantage that is accorded to members of the EU and EEA countries. However, nationals of all other member states of TRIPS are not entitled to refer to sections 32 and 32a of the German CA because the privilege of EU and EEA nationals is exempted from the "most favored nation" clause of TRIPS.[236] The same is true for performing artists, because "most favored nation" treatment is limited to rights provided under TRIPS, which is not the case for the right to obtain equitable remuneration.[237]

It follows that copyright contract law is not the subject matter

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235 *See* Rome Convention, International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Oct. 26, 1961, art. 2, No. 2; Eugen Ulmer, *Das Rom-Abkommen über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern un der Sendeunternehmen*, GRUR Int. 569 (1961); Joseph Straus, *Der Schutz der ausübenden Künstler und das Rom-Abkommen von 1961 – Eine retrospektive Betrachtung*, GRUR INT [GRUR Int.] 19 (1985). *Contra* DREXL, *supra* note 230, at 211 *et seq.*, 235. WPPT, *supra* note 232, art. 4 (1); TRIPS, *supra* note 234, art. 3(1)(2); Jörg Reinbothe, *Der Schutz des Urheberrechts und der Leistungsschutzrechte im Abkommensentwurf GATT/TRIPs*, GRUR Int. 707, 713 (1992); Manfred Rehbinder & Alesch Staehelin, *Das Urheberrecht im TRIPs-Abkommen. Entwicklungsschub durch die New Economic World Order*, 127 UFITA 5, 12 (1995); Hans Waldhausen, *Schließt TRIPS Schutzlücke bei Bootlegs?*, ZUM 1015, 1020 (1998); Paul Katzenberger, *TRIPS und das Urheberrecht*, GRUR Int. 447, 460 (1995); Thorsten Braun, *Der Schutz ausübender Künstler durch TRIPS*, GRUR Int. 427 (1997).

236 TRIPS, *see supra* note 234, art. 4(d). National treatment for EU and EEA nationals with respect to the protection of intellectual property derives from the EEC an EEA treaties which entered into force prior to the adoption of the WTO Agreement. As both treaties are notified to the Council for TRIPS it is held that this discrimination is consistent with the most-favored-nation treatment; *see* Jörg Reinbothe, *TRIPS und die Folgen für das Urheberrecht*, ZUM 735, 741 (1996); Note (Aktuelle Informationen), *Internationales – Ausnahme von der Meistbegünstigungsklausel des TRIPS-Abkommens für EU- und EWR-Vertrag*, GRUR Int. 269 (1996); Sigrid Dörmer, *Streitbeilegung und neue Entwicklungen im Rahmen von TRIPS: eine Zwischenbilanz nach vier Jahren*, GRUR Int. 919, 931 (1998); Katzenberger, *supra* note 235, at 461.

237 TRIPS, art. 4 (c).

of existing conventions on intellectual property law. This result corresponds with the present system of international copyright law. The majority opinion holds that international conventions on proprietary aspects of copyright are based on the principle of territoriality, which means that authors effectively own a bundle of national copyrights. International copyright contract law, however, does not follow this concept. Proprietary aspects of copyright as incorporeal property differ from the solely contractual aspects and have their own rules of conflict.[238] Therefore, it does not seem possible or desirable to incorporate copyright contract law into the existing conventions.[239]

To sum up, authors and performing artists from the U.S. are not entitled to ask for equitable remuneration, even if the court applies sections 32 and 32a of the German CA. Therefore, U.S. companies have to consider these claims with regard to contracts with authors[240] and performing artists from the EU or EEA.

D. *Plaintiff Sues for Equitable Remuneration Against a U.S. Company in the United States*

Would a U.S. court apply the new provisions of German copyright law if a European author or performer filed the claim for equitable remuneration in a U.S. court that has jurisdiction over the defendant?

As in Germany, rules of choice of law are forum rules. In the U.S., conflicts law is primarily state law, subject to the general constraints of federal law.[241] Due to the complexity of these issues, we will not discuss how U.S. courts determine the applicable law in general. Instead, we outline the conditions under which U.S. courts are likely to give effect to sections 32 and 32a of the German CA. In doing so, we distinguish whether general rules of choice of law refer to U.S. law or to German law.

If the parties stipulate, for example, the law of the state of California, a U.S. court that has jurisdiction will generally enforce this choice and apply local law. Party autonomy, is widely upheld in U.S. caselaw dating back to the nineteenth century because it is seen as the best means to predict and protect party expectations in

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238 See GUIBAULT & HUGENHOLTZ, *supra* note 120, at 133; *see also supra* Part III.B.

239 *See* Peukert, *supra* note 121, for an alternative proposal for European law.

240 *See supra* note 226, for a diverging argumentation in favor of protection of all foreign authors.

241 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (extending Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal common law should not be sued to decide conflicts of law disputes); *see also* SCOLES ET AL., *supra* note 186, §§ 3.20-3.55.

conflicts of law.[242] However, this party autonomy is not unrestricted in American law, even if such limitations are very narrowly tailored. This is true even if a court is asked to apply law other than the one stipulated.[243] Admittedly, recent decisions have considered the public policy of the state to which the transaction bears the most significant relationship.[244] *Restatement (Second) of Conflict of Laws* § 187(2)(b) provides that the stipulated law be superseded if it is contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue, and which, under section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. Additionally, comment (g) notes that the more closely the state of the chosen law is related to the contract and to the parties, the more likely it is that the choice-of-law provision will be given effect.[245]

Despite the approach of taking foreign public policies into account, it is very unlikely that a U.S. court would apply German copyright contract law instead of the otherwise applicable local law. Simple inequality of bargaining power and a lack of negotiation do not void a choice of law provision.[246] Courts do not allow the insurer or employer to stipulate a law other than that of the insured's or employee's home state, on the grounds that these parties need protection against the superior bargaining power of their respective contractors.[247] However, this applies only to insurance and employment contracts and not to copyright contracts. *Restatement*

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242 *See* SCOLES ET AL., *supra* note 186, § 18.2.

243 *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 186 cmt. b (1971):

> It should be reiterated that in the contracts area the forum, in the absence of a contrary indication of intention, will not apply the choice-of-law rules of another state. The forum will consult these rules, however, for whatever light these rules may shed upon the extent of the other state's interest in the application of its relevant local law rule.

Id. If the parties did not stipulate the applicable law, it is out of the question that a U.S. court applies U.S. law, rather than German law, if the choice-of-law rules of the forum refer to local law.

244 *See, e.g.*, Blalock v. Perfect Subscription Co., 458 F. Supp. 123, 127 (S.D. Ala. 1978); *judgment aff'd* 599 F.2d 743 (5th Cir. 1979); Bus. Incentives Co. v. Sony Corp. of Am., 397 F. Supp. 63, 67 (S.D.N.Y. 1975); Nedlloyd Lines B.V. v. Superior Court of San Mateo County 3 Cal. 4th 459, 464-66 (1992). A number of older cases focused exclusively on the policies of the forum. *See, e.g.*, Oceanic Steam Navigation Co. v. Corcoran, 9 F.2d 724, 730 (2d Cir. 1925); F.A. Straus & Co., Inc. v. Canadian Pac. R. Co., 173 N.E. 564, 567 (N.Y. 1930).

245 *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2)(b) cmt. g (1971).

246 *See* SCOLES ET AL., *supra* note 186, § 18.5.

247 *See, e.g.*, Nelson v. Aetna Life Ins. Co., 359 F. Supp. 271, 290-92 (W.D. Mo. 1973); Johnston v. Commercial Travelers Mutual Accident Ass'n of Am., 131 S.E.2d 91, 95 (S.C. Sup. Ct. 1963) (both dealing with insurance contracts); Blalock v. Perfect Subscription Co., 458 F. Supp. 123, 127 (S.D. Ala. 1978), *aff'd* 599 F.2d 743 (5th Cir. 1979); Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 97 Cal. Rptr. 811, 814-5 (Ct. App. 1971) (both dealing with employment contracts).

(Second) Conflict of Laws § 187(2) provides exceptions to party autonomy in choice of law only if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed at that issue. In other words, if the particular issue is subject to parties' discretion, the law of the state chosen by the parties will be applied without exception.[248] This is the case with respect to contractual compensation. Therefore, one could argue that there can be no limitations on the freedom to choose the applicable law at all. Additionally, the forum will apply its own legal principles in determining whether a given policy is a fundamental one and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue.[249] In view of U.S. contract law, freedom of contract plays a prominent role, and the German CA fundamentally differs from this approach, at least for freelance authors and performers.[250] Thus, if the inalienable claims for equitable remuneration run against fundamental principles of U.S. contract law, it seems much less likely that a U.S. court would consider this German policy.

Accordingly, internationally competent U.S. courts will thus apply sections 32 and 32a of the German CA if the parties choose German law or if, in the absence of an effective choice by the parties, the forum's choice of law rules refer to German law.[251] However, even in this case, it may well be that a U.S. court will not give effect to the claims for equitable remuneration. A U.S. forum will disregard the choice of law provision of the exploitation contract and will refuse to entertain the foreign cause of action if this is offensive to the public policy of the forum.[252] To declare a foreign law offensive to local public policy, it is not enough that the chosen law differs from U.S. law.[253] Instead, it is required that application of the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[254] Considering the pivotal

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248 RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2) (1971).

249 *Id.* § 187(2)(b) cmt. g.

250 *See supra* Part I.B.

251 See SCOLES ET AL., *supra* note 186, § 18.21 for a survey of 300 decisions on choice of law with regard to contracts.

252 In the case of a stipulation of German law, a U.S. forum may focus on local public policies only if the transaction at stake bears the most significant relationship to the forum; *see* SCOLES ET AL., *supra* note 186, § 18.4.

253 SCOLES ET AL., *supra* note 186, §§ 3.15-3.16.

254 Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918); Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 479 (1938); Marchlik v. Coronet Ins. Co., 40 Ill. 2d 327, 332 (1968).

role of freedom of contract in U.S. law, both in contract law and in choice of law, it is conceivable that a U.S. court might find that the German approach of modifying the contractually agreed upon remuneration through statutory provision meets this test.

E. *Recognition and Enforcement*

Once rendered, a decision still has to be executed. If an author or performing artist successfully sues a producer for equitable remuneration in Germany, it might be necessary to enforce this judgment in the U.S.[255] due to the fact that the defendant has no, or insufficient, assets in Germany. While recognition and enforcement of a judgment on the basis of the contractually agreed upon remuneration does not raise specific problems, such problems might arise if the judgment in favor of the plaintiff solely relies on the statutory modification of the agreed remuneration according to the new German copyright contract law that limits party autonomy.

Article IV, section 1 of the U.S. Constitution requires each state to give "Full Faith and Credit . . . to the . . . Judicial Proceedings of every other State."[256] This policy of preclusion, to put an end to litigation, does not apply to judgments of foreign countries. There are no international conventions applicable for the recognition and enforcement of German decisions in the U.S.[257] An early Supreme Court decision held that such judgments were entitled to recognition only on the basis of comity.[258] However, the extent to

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255 Conversely, if the U.S. producer obtains a declaratory judgment of a U.S. court that establishes that the author or performer is only entitled to the contractual compensation but not to a possibly higher "equitable remuneration," 28 U.S.C. §§ 2201-02 (2004), this judgment precludes a following German decision on this subject on the condition that, *inter alia*, the U.S. decision is not inconsistent with fundamental public policy principles of German law. *See* § 328 ZPO. Courts construe this limitation very narrowly. *See* NJW [Supreme Court] 3096 (1992); NJW [Constitutional Court] 649 (1995) (punitive damages not enforceable in Germany); IPRax [Supreme Court] 371, 372 (1999); Götz Schulze, *Anerkennung einer ausländischen Entscheidung bei Einwand strukturell ungleicher Verhandlungsstärke und nicht wirksamer Vertretung im Erstverfahren*, IPRax 342 (1999); Herbert Roth, *Zur Anerkennung einer ausländischen Entscheidung über eine Verpflichtung aus einer Bürgschaft*, JZ 1119 (1999). *But see* NJW [Supreme Court] 1600, 1601 (1975) (upholding national mandatory rules demand application of German law and hinder recognition).

256 U.S. CONST. art. IV, § 1.

257 Lothar Determann & Saralyn M. Ang-Olson, *Recognition and Enforcement of Foreign Injunctions in the U.S.*, Computer und Recht International [CRI] 129 (2002).

258 Hilton v. Guyot, 159 U.S. 113, 214 (1895). *See, e.g.*, Yahoo!, Inc. v. La Ligne Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 1181, 1192 (N.D. Cal. 2001); DeSilva v. DiLeonardi, 125 F.3d 1110, 1114 (7th Cir. 1997) ("There is no international doctrine of full faith and credit ('comity' is some distance short of the legal obligation established by 28 U.S.C. § 1738) . . . ."); RESTATEMENT (SECOND) CONFLICT OF LAWS § 98 (1971); Courtland H. Peterson, *Foreign Country Judgments and the Restatement, Second, Conflict of Laws*, 72 COLUM. L. REV. 220, 223 (1972); Ruth Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INTL LAW. 720, 725 (1970).

which foreign-country decisions should have preclusive effect has long been uncertain, mainly because this problem is basically decided by the states as part of the development of common law.[259] While a number of courts regularly accord recognition to foreign-country judgments on essentially the same basis as sister-state judgments, a few jurisdictions have continued to adhere to the concept of comity.[260]

More legal certainty for foreigners who ask for recognition and enforcement can be found where the judgment grants or denies the recovery of a sum of money. The Uniform Foreign Money-Judgments Recognition Act ("UFMJR") is in force in thirty-two states.[261] A German decision that grants equitable remuneration is covered by this act, for example in California and New York. The act codifies, rather than changes, the common law as applied by the majority of courts in the United States. The purpose of the act is to make it more likely that judgments rendered in a state that has adopted the act will be recognized abroad because in a large number of civil-law countries the granting of conclusive effect to money judgments from foreign courts is made dependent on reciprocity.[262] This relatively uniform state legislation provides for recognition and enforcement of foreign country judgments "in the same manner as the judgment of a sister state which is entitled to full faith and credit," if certain conditions are met.[263] In section 4, the act sets forth specific grounds that, when found, justify a court's non-recognition of a foreign money judgment. These are, *inter alia*:[264] that the foreign court lacked personal or subject matter ju-

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259 *See* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 743 (2d. ed 1992); *see also* SCOLES ET AL., *supra* note 186, § 24.3-7.

260 *See Yahoo!, Inc.*, 169 F. Supp. 2d at 1192; SCOLES ET AL., *supra* note 186, § 24.35 (for further references).

261 *See* Uniform Law Commissioners: The National Conference of Commissioners on Uniform State Laws, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Oct. 24, 2004).

262 *See* Jay M. Zitter, Annotation, *Construction and Application of Uniform Foreign Money-Judgments Recognition Act*, 88 A.L.R.5th 545, *2a (2001); Sara L. Johnson, Annotation, *Validity, Construction, and Application of Uniform Enforcement of Foreign Judgments Act*, 31 A.L.R.4th 706 (1984). *See generally* Andrew M. Campbell, Annotation, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R.Fed. 481 (1998) (discussing federal cases in which confirmation of a foreign arbitration award has been resisted on the grounds that enforcement of the award would violate the public policy of the United States).

263 UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 263 (1986) [hereinafter UFMJR].

264 *See* Zitter, *supra* note 262, at 545 for a case summary on the different subsections. Proof that the service of process was invalid or did not confer jurisdiction over the defendant can be shown where the documents served on an American defendant who did not read the German language were in German and the accompanying correspondence did not identify the documents as materials of legal significance. *See* Julen v. Larson, 101 Cal. Rptr. 796, 799-800 (Cal. Ct. App. 1972).

risdiction[265] and the cause of action or claim for relief on which the judgment was based is repugnant to the public policy of the forum state.[266]

With regard to the first limitation of personal jurisdiction, section 5 UFMJR provides a non-exhaustive list of factors supporting a finding of personal jurisdiction, including personal service in the foreign state, a voluntary appearance in the foreign state proceeding, an agreement to submit to the foreign country's jurisdiction, domicile in that country and business connections with the foreign country. The sole fact that the defendant has assets in Germany, sufficient according to section 23 of the Code of Civil Procedure,[267] does not seem to fulfill these requirements.[268] Courts have denied recognition on the basis of lack of personal jurisdiction of the foreign court where the dollar amount of foreign business contacts was small,[269] or where there was only a single incident involving a purchase in the foreign country.[270]

Considering the public policy exception to recognition and enforcement, it is to be noted that the question of "repugnance" has been variously interpreted as referring to the general type or particular facts of the claim itself, or to the factors necessary to prove the claim generally. Although the standard for what is repugnant to public policy is a relatively high one,[271] and recognition and enforcement was accepted in cases that dealt with foreign money judgments that contained claims that were unknown in the respective state,[272] courts nevertheless denied recognition in exceptional cases.[273] The concept of freedom of contract rests on the

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265 UFMJR § 4(a)(2, 3).

266 UFMJR § 4(b)(3).

267 *See supra* Part IV.A.

268 SCOLES ET AL., *supra* note 186, §§ 24.42, 24.6.

269 Titan PRT Sys., Inc. v. Fabian, 6 Mass. L. Rptr. 345 (Super. Ct. 1997) ($750 per year).

270 Siedler v. Jacobson, 383 N.Y.S.2d 833, 834 (Ct. App. 1976).

271 A common formulation for public policy concerns is that the foreign decision "'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property . . . ." Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986). *See* Vergiette v. Samara, No. 93-529-B, 1995 WL 66260, at *2 (D. N.H. Feb. 15, 1995); McCord v. Jet Spray Int'l Corp., 874 F. Supp. 436, 439 (D. Mass. 1994); Milhoux v. Linder, 902 P.2d 856, 861 (Colo. Ct. App. 1995).

272 *See* Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

273 *See* Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (holding that the British libel judgment was unenforceable because the libel standards were found repugnant to the public policies of the State of Maryland and the United States). The court in *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992), held that an English libel judgment against a New York operator of a news service could not be recognized because it was imposed without safeguards for freedom of speech and the press as required by the First Amendment to the United States Constitution and N.Y. Const. art. I, § 8. *See*

premise that it is in the public interest to accord individuals broad power to order their affairs by way of legally enforceable agreements.[274] A U.S. court that is asked to enforce a German judgment that supersedes party autonomy with regard to compensation will have to consider whether this limitation to an acknowledged U.S. public policy interest is justified in light of the intention to protect a weaker party against unequal bargaining power.[275] Therefore, recognition and enforcement of German judgments on equitable remuneration cannot be taken for granted, even if jurisdiction over the U.S. defendant is not based on § 23 German Code of Civil Procedure.

CONCLUSION

Contracts that govern the relationship between authors and performing artists on the one hand, and exploiters on the other, stand at the beginning of most creative products we use. This pivotal role of exploitation agreements will continue to exist in the future. German law takes a much more paternalistic view with regard to these exploitation contracts than U.S. law. German copyright law provides for unassignability of copyright and has, for a long time, contained several provisions that were meant to accord protection to the author, who is generally considered to be the weaker party in relation to the producer. Nevertheless, freedom of contract with respect to compensation remained unaffected in German law until 2002. Collective labor agreements providing minimum payment schemes covered only segments of the entertainment industry in Germany. Freelance authors and performers were left to cope with conditions of free market and freedom of contract to protect their income.

The 2002 amendment of the German CA significantly changed this principle. Every author and performing artist is now entitled to demand from his contracting partner consent to alter the contract so that the author is assured an equitable remuneration under section 32 of the German CA. Additionally, authors and performers may claim further equitable remuneration if the agreed compensation is, *ex post*, conspicuously disproportionate to the returns and advantages from the use of the work as described in the "best-seller clause" of section 32a of the German CA. Both

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Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) (denying recognition of judgment).

274 *See supra* Part I.B.

275 *See supra* Part III.A.1 (discussing protection of weaker parties according to U.S. labor law principles).

claims are inalienable. These claims are accompanied by special provisions on "common remuneration standards" under sections 36 and 36a of the German CA. The agreements that establish these standards differ from basic agreements negotiated in the U.S. entertainment industry in that they also involve independent contractors.

To determine the impact of these amendments on the U.S. entertainment industry, which disseminates its products globally and is the unchallenged market leader in Germany, issues of international jurisdiction as well as international copyright and contract law have to be taken into account. German courts have personal jurisdiction over U.S. defendants if the defendant is domiciled in Germany. Additionally, courts may rely on section 23 of the German Code of Civil Procedure, which provides for personal jurisdiction when a defendant not based in Germany has assets in Germany. In order to prevent a choice of law related circumvention of the new claims for equitable remuneration, section 32b of the German CA declares that the claims for equitable remuneration apply irrespective of an effective party choice of law, and even if a country other than Germany is most closely connected with the contract insofar as substantial exploitations in Germany are the subject matter of the contract. However, according to German copyright law relating to aliens, only nationals from Germany and member states of the EU and the EEA, but not U.S. authors and performers, are entitled to obtain equitable remuneration.

In considering possible litigation over the claims in a U.S. court, this article reasoned that it is very unlikely that U.S. courts would give effect to sections 32 and 32a of the German CA despite that the parties stipulated for U.S. law. Even if German law was applicable to the contract at stake on the basis of general principles of the conflict of law doctrine, U.S. courts may refuse to entertain a cause of action that refers to sections 32 and 32a of the German CA. United States courts may also deny recognition and enforcement of German judgments because the involved limitation of freedom of contract is inconsistent with U.S. public policy. Thus, pleading the new German law promises to be much more successful if litigation and enforcement take place in Germany, not in the United States. In summary, one can say that the German copyright law as amended in 2002 accords authors and performers a statutory guarantee for equitable remuneration in the international entertainment market as well as at home, but it will have to be analyzed in practice to see whether it delivers what it promises.