Copyright Contract Law according to the New German Legislation and Practice

In addition to only relatively efficient earlier attempts to regulate copyright contract law, the German copyright legislator, in March 2002, adopted an amendment to the Copyright Act of 1965 in order to 'strengthen the contractual position of authors and performers'. The core provisions of that amendment concern a) the introduction of a general claim to 'adequate remuneration' in case of the grant of a right of use (concession or licence) and b) 'common remuneration standards' to be established by associations of authors and/or performers, on the one hand, and associations of work users or individual users, on the other hand. A special mediation procedure shall help to establish such standards in case of discord. First results of such establishment are expected in the near future.

Adolf Dietz
Professor; Dr. jur. (LMU Munich 1966); Dr. h.c. (KU Brussel 1996); Senior Research Fellow (ret.), Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, Germany.

Introduction

Copyright contract law (*Urhebervertragsrecht*) has become a 'hot' topic in Germany since the preparation of the 'Law on Strengthening the Contractual Position of Authors and Performers' (Copyright Contract Law) and its adoption on March 22, 2002[1] (Amendment 2002). Apart perhaps from new and innovative forms of 'direct' exploitation of their own works in the Internet, authors (and performers) normally need a middleman (a producer) to put their work on the market; consequently, in economic terms, it is on the basis of authors contracts and their conditions where the financial interests of authors are realized or not. From the authors' point of view, but also for those who are interested in the general development of copyright law, it is therefore almost a necessity to speak more about copyright contract law, and not only in Germany.

Insofar it is certainly more than only a happy coincidence that – at the request of the Dutch Ministry of Justice – an interesting and solid comparative study on copyright contract law and its possible regulation in the Netherlands has recently been published.[2] That study represents, as it appears, a more concrete and detailed as well as more legal-politically oriented follow-up of an earlier comparative study on copyright contract law of the same authors, that time elaborated at the request of the European Commission.[3] The authors of these important studies, in particular of the chronologically second one, can only be congratulated on their work, the congratulations certainly to be extended to the Dutch Ministry of Justice for its precious initiative. I have almost no problems with the analyses made in the Dutch study, in particular as far as the statements about German law are concerned; that is true, too, for the results and recommendations of the study.

Interestingly, there is one important point where the authors of the Dutch study would expressly not go as far as the German legislation, namely concerning the binding concept of a general right of equitable remuneration. Here the authors write in their summary: *Voor de invoering van een algemeen recht op billijke vergoeding voor iedere vorm van exploitatie, zoals dat recent in Duitsland is ingevoerd, achten wij de tijd nog niet gekomen. Invoering van een algemene* iustum pretium*-regel in het auteursrecht zou een vergaande ingreep in de contractsvrijheid betekenen. Bovendien biedt het door ons voorgestelde pakket van wettelijke maatregelen, naar wij verwachten, voldoende warborg voor het ontstaan van een praktijk van billijke vergoedingen.*

Of course, that statement for which the authors certainly have good reasons from a Dutch point of view shall not be criticized. It might well be that Dutch media industry is generally more cooperative in that field than the German

1 *'Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern'* of March 22, 2002, which, technically speaking, is essentially an Amendment to the Copyright Law of 9 Sept. 1965 (as several times amended); see *BGBl*. I, No. 21, March 28, 2002, at 1155. For a consolidated English translation of the provisions of the new law, see *IIC* 2002, 842.

2 See Hugenholtz/Guibault, *Auteurscontractenrecht: naar een wettelijke regeling?* Onderzoek in opdracht van het WODC (Ministerie van Justitie), Instituut voor Informatierecht, Amsterdam, 2004.

3 See Hugenholtz/Guibault, *Study on the conditions applicable to contracts relating to intellectual property in the European Union*. Final Report, Institute for Information Law, Amsterdam 2002.

one. Be it as it may, we are to discuss exclusively the German experience here, in particular the question why the German legislators of the Amendment 2002 precisely tried to find rather binding solutions in terms of authors' remuneration. The main argument was that the existing rules were not sufficient to really improve the economic and contractual position of authors and performers.[4]

Legal-philosophical and constitutional background of the reform of copyright contract law

Fruitful discussions on strengthening the contractual position of authors make sense only when we have a clear idea of their role and place in the whole system of copyright protection and on what legal-philosophical and/or constitutional concepts we can base our endeavour.

Here, one can quote once again the Dutch study[5] because it contains, in a nutshell, a very concise and convincing justification formula for modern authors' protection as a whole, but in particular also for author-protective reforms of copyright contract law: *Idealiter weerspiegelt een wettelijke regeling van het auteurscontractenrecht de sociaal-culturele ratio van het auteursrecht: de scheppende mens een zodanig inkomen te verschaffen dat hij aan de culturele productie een bijdrage zal leveren. Wettelijke bescherming van auteurs en uitvoerend kunstenaars tegen oneerlijke contractuele praktijken is niet alleen een kwestie van sociale rechtvaardigheid, maar ook van culturele opportuniteit. Eenzijdige allocatie van rechten ondermijnt de 'incentive' die aan het auteursrechtelijk systeem ten grondslag ligt en gaat derhalve ten koste van de culturele productie.*

Of course, one can ask whether such and similar statements are not unproven a priori statements or whether they are really based on legal rules of a constitutional or otherwise primary order. Indeed, as discussed by Herman Cohen Jehoram,[6] it is difficult to find a positive and express constitutional justification in the constitution of the Netherlands; that is true, by the way, for almost all European countries, including such important copyright countries as France and Germany. Traditionally, therefore, we had to go back to the philosophers of the eighteenth century and the great jurists of the nineteenth century to find an adequate justification for it that authors' protection is not only an opportunity for the state so that it might grant protection or not.

Still, I think the almost general absence of express constitutional guaranties for copyright or better authors' rights protection is a shame for our countries; that absence is, however, at least partly compensated by guaranties of authors' rights in international instruments, in particular by Art. 27(2) of the Universal Declaration of Human Rights of 1948 as well as by Art. 15(1) lit. c of the International Covenant on Economic, Social and Cultural Rights of 1966, the latter being a binding international treaty to which all European countries including Germany and the Netherlands adhere. The author's right to protection of his moral and material interests therefore is a true human right.

In addition to that, and fortunately enough, we have now a very recent and comprehensive new justification formula in the European Union, which has been unanimously adopted in 2001 as part of the so-called Information Society Directive or Copyright Directive[7] by the European legislators, i.e. the Council, representing the then 15 Member States of the EU, as well as the European Parliament. Indeed, in recitals 9 to 12 of that Directive we can read the following very modern and very comprehensive legal-political statements:

> *(9) Any harmonization of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognized as an integral part of property.*
>
> *(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward [eine angemessene Vergütung] for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.*
>
> *(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.*

4 Authors and performers, also in view of the gradual improvement of the legal situations of the latter in terms of exclusive economic, but also moral rights, are, at least in Germany, more and more addressed now under the common term of 'creative people' (in German '*die Kreativen*'). In our context therefore speaking of authors, apart from still existing differences, would mean almost always creative people altogether, including performers. Apart from some important points (rights of use for unknown forms of uses) that is true in particular for the new German regulation of copyright contract law.

5 See Hugenholtz/Guibault, op. cit. (supra note 2) at p. 77.

6 See Cohen Jehoram, 'Urheberrecht: eine Sache des Rechts oder der Opportunität? Eine alte Debatte ohne Ende in den Niederlanden', GRUR Int. 1993, 118 et seq.; Dutch version under the title of 'Auteursrecht: Opportuniteit of recht? Een onvoltooid debat', in *AMI* 1992, 63 et seq.; originally a speech held during a Seminar in Wolfenbüttel, Germany in 1991.

7 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167 of 22 June 2001, p. 10.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

Of course, recitals of a Directive are only a sort of enlarged preamble; they primarily serve as authentic interpretations of the provisions proper of the Directive concerned; in addition to that, however, they sometimes contain more general political statements on the legislative aims behind the Directive, and that is particularly true in our case.

Modern copyright/authors' rights protection is thus based on a specific mixture of legislative motives of an economic, social and cultural nature, what Hugenholtz and Guibault rightly call the *sociaal-culturele ratio* of copyright. As a first general result, therefore, we can observe that legislators of EU member countries who want to ameliorate the economic position of authors can feel very good on the background of the statements as presented to you; *faute de mieux* they represent the political *communis opinio* throughout the European Union on what modern copyright and, indeed, authors' rights protection is all about.

By the way, the German term corresponding to *appropriate reward*, namely *angemessene Vergütung*, as used in the German text of Recital 10 of that Directive, is precisely the same central term as used in a number of provisions of the Copyright Contract Amendment of 2002; German legislators have thus in a way only transposed a common European political statement into a rule of law. This we will describe now in more detail.

Historic Background to the Amendment 2002

The new author-protective rules were certainly not invented from scratch. They had a long historic background dating back until the adoption of the German Copyright Law of 1965. From the beginning, the latter already contained a number of provisions of a contractual nature, in particular, provisions regulating the grant of (exclusive or non-exclusive) rights of use (Secs. 31 and 32), amongst which the famous and still existing rules on *Zweckübertragung*, i.e. purpose-related interpretation of copyright contracts, in Sec. 31(5) and, respectively, on the ineffectiveness of grants of rights of use for unknown uses of works in Sec. 31(4) of the Law. In addition and most importantly, according to the express provision in Sec. 29, an assignment of copyright as such was not and is still not possible under German copyright law as a consequence of the monistic theory underlying it.

However, such and other contractual provisions in Secs. 31-44 of the original text of the Copyright Law were of a rather rudimentary nature, because the German government, in its official draft of the Law dated 1962,[8] had stated that it planned 'to complete the new copyright law by a comprehensive copyright contract law, which shall contain provisions for all kinds of contracts in the field of copyright'.[9] That often quoted announcement, or rather legislative pledge, was eventually fulfilled forty years later by the Amendment 2002.

Of course, the debate on whether and how such a comprehensive copyright contract law should and could be adopted never totally ended during the past forty years. There was, e.g., an in-depth study made by Eugen Ulmer in 1977[10] at the request of the then German Minister of Justice, there was an elaborate legislative draft as proposed by Wilhelm Nordemann at the beginning of 1991,[11] and there was a collection of studies on all aspects of copyright contract law (legal, political, systematic and comparative) as published in a book in honour of Gerhard Schricker in 1995.[12] Finally, a 'group of professors', at the request of the Federal Minister of Justice Ms. Herta Däubler-Gmelin, drafted a regulation on copyright contracts[13] in the year 2000.[14]

Interestingly, already long before, in 1974, the German legislators had tried to solve an important aspect of the whole problem, namely how to enable the use of binding collective agreements on remunerations in the field of freelance authors and performers; that was done by adoption of Sec. 12a of the Collective Labor Agreements Law (*Tarifvertragsgesetz*).[15] That provision expressly allowed certain groups of freelancers namely 'quasi employed authors', that is those who are 'economically dependent and socially in need of protection similar to employees' (*arbeitnehmer-ähnliche Personen*), to conclude, under certain conditions, collective labour agreements with their partners mainly from the culture and media industries.

However, in spite of certain initial achievements, for example in the field of public broadcasters,[16] in other fields

8 See Bundestags-Drucksache IV/270, March 23, 1962.
9 *Idem* at 28, see *also* at 56.
10 See Ulmer, *Urhebervertragsrecht*, Bonn 1977.
11 See *GRUR* 1991, 1 et seq.
12 See Beier, Götting, Lehmann & Moufang (eds.), *Urhebervertragsrecht. Festgabe für Gerhard Schricker*, Munich 1995.
13 See, as far as the second of a total of three versions of that Draft is concerned, *GRUR* 2000, 765 (with preface by Ms. Herta Däubler-Gmelin, Federal Minister of Justice). The professors' group comprised Profs. Dietz, Loewenheim, Nordemann, Schricker and Dr. Vogel.
14 For more details see Dietz, 'Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers', *IIC* 2002, 828 et seq. with further references; see also my articles in *Auteurs & Media* 2003/1 p. 42 *et seq*. as well as in *RIDA* No. 198 (Oct. 2003), p. 147 *et seq*.
15 German text of Sec. 12a reproduced in Hillig (ed.), Urheber- und Verlagsrecht Collection of legal texts (10th ed. 2003), at. p. 189.
16 See examples of such collective labour agreements under Sec. 12a of that Law in Hillig (ed.), *op.cit*. at p. 130 *et seq*.

success could not be achieved, since important parts of the culture and media industries, especially in the private sector, simply did not want to enter into negotiations on remuneration agreements, and the author side had no real means to fight for them. In the long run, therefore, the model of 1974 could not be regarded as a sufficiently successful solution to the problems posed in the field of copyright contract law. That failure to a large extent was responsible for the new start.

Consequently, during the legislative reform process,[17] it was one of the most crucial and most debated questions how such an attitude of 'negotiation boycott' of the contractual partners of freelance authors and performers could be overcome. How could it be assured that collectively negotiated standards for terms of use of works, in particular for remunerations, could be achieved within a reasonable amount of time? With the Amendment 2002 a big step in that direction has been made, indeed, based, it is true, on a number of compromises, which interested groups, the creative people and the industries were finally willing to accept.

From a theoretical and constructive point of view the new solution is important too, because freelance authors and other creative people are often – not always convincingly – regarded as entrepreneurs in the sense of antitrust law, so that negotiations and agreements on contractual terms, and in particular on remunerations between groups of such freelance entrepreneurs and their partners, could be interpreted as forbidden agreements – in particular as forbidden price-fixing – under antitrust law. Here, Sec. 12a of the Collective Labour Agreements Law (1974) had already partly cleared the way but was still not a comprehensive solution.

But, with the Amendment 2002 it is clear now that negotiations on, or, better, the establishment of, common remuneration standards for whole branches and sub-branches of the culture and media industries are legally permitted, at least under *German* antitrust law. But, finally, that appears true *even under EC antitrust law* since a totally different type of collective negotiations has been created by the new law, the result of which cannot be understood as traditional collective agreements or agreements at all; it rather represents what I propose to call the 'industrial standards model'.

The Main Elements of the Amendment 2002

As the title of the Amendment 2002, namely 'Law on Strengthening the Contractual Position of Authors and Performers', clearly indicates, its intention was to strengthen the bargaining power of – mainly freelance – authors and performers. The Amendment consists of a number of partly substantive, partly procedural provisions (mediation procedure) in that sense, the interrelationship of which represents a true innovation in German law.

From a more political point of view it appears important to state that, in spite of many controversial positions taken by groups and individuals during the legislative process inside and outside the Bundestag, the final text of the new law represents a number of compromises and could thus be adopted by a majority from all factions in the Bundestag with only a relatively small number of individual opposing votes of deputies from several parties.

The Basic Principle - A Right to Equitable Remuneration

The basic principle of the new law can be best understood as a systematic interrelationship of two new provisions, namely Sec. 32 and Sec. 36 (plus Sec. 36a). The first provision introduces a general claim to equitable remuneration for the grant of rights of use in a work, the second one provides for a regulated framework for the establishment of common remuneration standards in different fields. The concept of 'equitable remuneration' is thus the cornerstone of the reform.

In essence therefore, if no equitable remuneration is agreed between the individual parties of a copyright contract the author may require assent by his contracting partner to alter the contract so that the author is indeed assured an equitable remuneration. That part of Sec. 32(1), of course, is the true innovation. Since the very term of 'equitable remuneration' is admittedly relatively vague and difficult to apply, perhaps the most important additional provision is laid down in Sec. 32(2), first sentence. According to it, a remuneration under Sec. 32(1) is equitable (shall be deemed equitable) if it is determined by a common remuneration standard as regulated in Sec. 36.

Consequently, according to Sec. 36(1), in order to determine the equity of remunerations provided under Sec. 32, associations of authors in cooperation with associations of users of works or individual users are entitled and even urged by the law, to establish such common remuneration standards under the conditions laid down in Sec. 36. Eventually, correctly established common remuneration standards form an irrefutable presumption of equity according to Sec. 32(2), first sentence, if applied, e.g. by the courts, to the relevant individual cases.

The Industrial Standards Model

But there is more. We have already mentioned that the provision in Sec. 36(1), allowing and even urging such standards to be commonly negotiated and established, at the same time represents a legislative clearance of the

17 For further details of the legislative history of the Amendment 2002 see Dietz loc. cit. (supra note 13) as well as, e.g., Jacobs, 'Das neue Urhebervertragsrecht', *NJW* 2002, 1905 et seq. and Ory, 'Das neue Urhebervertragsrecht', *AfP* 2002, 93 et seq.

antitrust problem. A closer look at that provision demonstrates, indeed, that there are no collective agreements involved at all.

Originally Sec. 36 of the so-called professors' draft[18] had proposed an extension and generalisation of the earlier quasi-labour law approach, as already chosen in 1974, to all groups of freelance authors and performers; consequently binding collective agreements on remunerations should have been generally allowed, but with effect exclusively for the members of the organizations concerned. In contrast to that proposal and under the influence of a number of criticisms the German legislators finally made a systemic change and introduced the concept of commonly established remuneration standards applicable to all relevant cases as already described.

Consequently one will not find the (ugly) word 'agreement' (Vereinbarung) here; in Sec. 36(1) the law only speaks of the establishment (Aufstellung)of 'common remuneration standards' (gemeinsame Vergütungsregeln) by the parties (associations of creative people and of work users or individual users). I call that solution 'industrial standards model' since it functions in the same way as other – technical – industry standards where legal provisions refer back to technical standards which have been established by private experts of the relevant industry branches, in Germany under the roof of the DIN Deutsches Institut für Normung. The decisive rule, namely that such standards shall be generally binding for, and applied in, the practice, is anchored in the law itself, their binding character does and cannot flow from an agreement by the parties to that effect. An agreement element is present only insofar as the parties must consent to it that they have established the standards in common, i.e. not unilaterally, since only commonly established remuneration standards will have the legal effect as ascribed to them by Sec. 32(2), first sentence.

Such a result is also confirmed by the provision in Sec. 32(2) second sentence; according to it, where no such common remuneration standards are (as yet) available, remuneration is deemed equitable if it conforms at the time of contracting to what is regarded as customary and fair in business. Remuneration standards commonly established – as we will see, not without pains – by associations of authors and of users do nothing more than to make explicit what implicitly is and shall be customary and fair in business, as prescribed by the law itself. They are no price agreements or other agreements on contractual terms at all and therefore cannot fall under the verdict of antitrust law.

Mediation Procedure

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

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

If indeed the parties cannot escape the mediation procedure when one party makes a written request, the settlement proposal to be made by the mediation panel becomes a common remunerations standard in the legal sense of the word only if both parties accept it, almost a tautological statement, indeed.

But, one could rightly ask the question why such a complicated procedure has been introduced by the Amendment 2002, if the legal effect of its outcome still ultimately depends on the will of both parties. But, even in case negotiations fail and the mediation panel proposal is not accepted, such a proposal still exists; it could even be officially published and, as the legislators expressly stated,[19] would certainly have a de-facto effect as evidence in remuneration cases, that should not be underestimated. And that was part of the big compromise which had been found at the end of the legislative debate.

Other Provisions

We cannot go into further details of the Amendment 2002 here;[20] that concerns, more in particular, the criterion of 'customary and fair in business', or the amelioration of the so-called 'bestseller clause' (originally con-

18 See supra note 12.

19 See the legal reasoning for Sec. 36 given by the Legal Commission of the German *Bundestag* in: Bundestag-Drucksache 14/8058, January 23, 2002, at 49.

20 For more details on other provisions see the comparative parts of the two studies of Hugenholtz/Guibault, op.cit. (supra notes 2 and 3) as well as my own publications (see supra note 13).

tained in the previous Sec. 36, now in Sec. 32a), or else the conflict-of-laws provision in Sec. 32b, the latter assuring that the mandatory provisions in Sec. 32 and 32a of the Amendment 2002 cannot be set aside by a simple choice of the applicable law. However, before concluding, at least a few words about the practical effects of all these provisions since there coming into force on July 1, 2002 appear necessary.

The Practical Effects of the New Provisions

Of course, in view of the newness and the indubitably difficult features of the whole concept behind the Amendment 2002 (including the mediation procedure), it could not be expected that common remuneration standards could have been established very rapidly. Indeed, no such standards (with or without a mediation procedure) have as yet been established. But the parties and associations concerned are working hard for that, at least in some branches of the culture and media industry.

As far as I am informed there are at least four fields where negotiations on the establishment of common remuneration standards are running or are already waiting for mediation, namely negotiations on remunerations for authors of belletristic works (fiction writers), for literary translators, for freelance journalists in newspapers and magazines and lastly for film authors.

In the case of belletristic authors, represented by the German Writers' Association (*Verband deutscher Schriftsteller* within *Gewerkschaft VER.DI*) initial talks had failed because the German Association for Book Trade (Börsenverein des Deutschen Buchhandels) felt not authorized for such negotiations by its publisher members, while the specially created publishers' group dissolved itself when a mediation procedure (*Schlichtungsverfahren* under Sec. 36a of the Law) was imminent. Surprisingly, the German Ministry of Justice (Dr. Hucko) in September of this year took the initiative for a compromise proposal to which both sides have responded and which has a certain chance to be finally accepted as the very first common remuneration standards in that field.[21] The proposal starts with the so-called 10%-rule for hardcover editions of belletristic books, with a whole number of exceptions it is true.

In the field of literary translators an early draft of common remuneration standards had been published by the translators' branch of the Writers' Association;[22] but negotiations failed in a similar way as in the field of belletristic authors. Consequently a mediation procedure was initiated, but which has to be forced through a court decision which at the moment has been somewhat delayed in order to wait for the outcome of the belletristic talks in Berlin. That situation is rather curious since the bad pay of literary translators was expressly mentioned by the legislators of the Amendment 2002 as an example which could not longer be tolerated.[23] In addition to that, German courts[24] have begun, still on the basis of the previous 'bestseller clause' in the old Sec. 36, to award literary translators as an average 2% royalties as adequate remuneration.

In the field of freelance journalists, serious talks are underway as well. At the beginning, the German Association of Newspaper Publishers (BDZV) also had problems of authorization to negotiate; in the meantime, however, most regional (*Länder*) associations have granted such authorizations to it; this is a token that negotiations are taken serious; the talks on the establishment of common remunerations standards for freelance journalists then really began. The same could soon be true in the field of magazine publishers.

Finally, negotiations with film and TV producers have made progress this year; they are complicated by the fact that a number of different groups of 'film people' and their associations (directors, scenarists, actors etc.) are represented on the authors side which have to come to internal compromises before each round of negotiations. On the other hand, the parties concerned have already a certain negotiation routine, since under the old and still applicable rules of the Collective Labour Agreements Law (as mentioned before) they had earlier already concluded collective agreements in the field of film production.[25] What they intend now is to repeat that endeavour; at the same time, the rules of the agreement shall form the bases for common remuneration standards in those areas where the collective agreement is not applicable. By the way, according to Sec. 32(4) and Sec. 36(1)(3) collective labour agreements, where applicable, prevail over individual remuneration claims and common remunerations standards.

In sum, realistically we can expect some results in the near future. At the moment at least it is not justified to state, as could already be heard, that the new German copyright contract law is a failure. A year later we will certainly know more!

21 See the recent Statement of the German Federal Ministry of Justice of Nov. 8, 2004 concerning a preliminary result of the informal mediation organized by that Ministry ('Mediation im Bundesjustizministerium vermittelt gemeinsame Vergütungsregeln für Autoren belletristischer Werke'); the proposal has still to be finally accepted by both parties.

22 See 'Gemeinsame Vergütungsregeln für Übersetzer – Entwurf', *Kunst und Recht* 2002, 110 *et seq*.

23 See Bundestags-Drucksache 14/8058 at. p. 43.

24 See recently Oberlandesgericht München, 22 May 2003, *ZUM* 2003, 684; for other cases under the old Sec. 36 decided predominantly in favour of the authors see my article in *RIDA* (supra note 13), p. 200 *et seq*.

25 The former agreements, however, only concerned employed film authors and performers, even if employed only for the time of production.

Conclusion

Not surprisingly, the new German copyright contract law has, both before and after its enactment, met with sometimes fierce criticisms. In particular, economists[26] have blamed it as counterproductive: more protection and more pay to authors almost inevitably would mean fewer jobs and fewer opportunities to work. That all too well known argument can also be read the opposite way: less pay creates more opportunities, but where does that end? I think that market regulation alone cannot be sufficient here; we must find more balanced solutions based not on unilateral decisions of work users, but on true negotiations of both groups, the outcome of which then shall be binding as minimum conditions in all comparable situations.

As expressly recognized by the German legislators, creative people (authors and performers) are structurally weaker groups in contract negotiations as are, e.g., tenants, employed persons and consumers in general. The law, therefore, at least to a certain extent, must compensate that structural weakness by protective rules. You can call that paternalism, but that does not really hurt me; copyright protection (authors' rights protection) as a whole is an inherently paternalistic concept if one understands it also in the sense of promotion of creativity at the source where the works are born.

26 See e.g. Hummel, 'Volkswirtschaftliche Auswirkungen einer gesetzlichen Regelung des Urhebervertragsrechts', *ZUM* 2001, p. 660/669; Homburg/Klarmann, 'Betriebswirtschaftliche Auswirkungen möglicher Veränderungen der Honorarsituation in Verlagen als Folge der Urheberrechtsnovellierung', *ZUM* 2004, p. 704/708.