

Law
to Strengthen the Contractual Position of Authors and Performing Artists

of 22 March 2002

The Bundestag passed the following law:

Article 1
Amendment of Copyright Law

The Copyright Law of 9 September 1965 (Federal Law Gazette I p. 1273), as last amended by Article 16 of the Law of 13 December 2001 (Federal Law Gazette I p. 3656), shall be amended as follows:

1. The following second sentence shall be added to Section 11:

“It shall also serve to ensure equitable remuneration for the exploitation of the work.”

2. Section 29 shall be worded as follows:

“Section 29

Contractual Agreements on Copyright

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

(2) The granting of exploitation rights (Section 31), contractual authorisations and agreements on exploitation rights as well as contracts on moral rights of authors as regulated under Section 39 are permitted.”

3. Section 31 shall be worded as follows:

a) Subsections 1 to 3 shall be worded as follows:

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

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

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

b) Subsection 5 shall be worded as follows:

“(5) If the types of use have not been 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 in fact been granted, whether it shall be a non-exclusive or an exclusive

exploitation right, how far the right to use and the right to forbid extend, and to what limitations the exploitation right shall be subject.”

4. Sections 32 and 33 shall be replaced by the following provisions:

“Section 32

Equitable Remuneration

(1) The author shall have a right to the contractually agreed remuneration for the granting of exploitation rights and permission for exploitation of the work. If the amount of the remuneration has not been determined, equitable remuneration shall be deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration.

(2) Remuneration shall be equitable if determined in accordance with a joint remuneration rule (Section 36). Any other remuneration shall be equitable if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the manner and extent of the possibility of exploitation granted, in particular the duration and time of exploitation, and considering all circumstances.

(3) An agreement that deviates from subsections 1 and 2 to the detriment of the author cannot be invoked by the other party to the agreement. The provisions stipulated in the first sentence shall apply even if they are circumvented by other arrangements. The author may, however, grant a non-exclusive exploitation right to anyone free of charge.

(4) The author shall have no right pursuant to subsection 1 third sentence to the extent that the remuneration for exploitation of his works has been determined in a collective bargaining agreement.

Section 32a

Further Participation by the Author

(1) Where the author has granted an exploitation right to another party on conditions that, taking into account the author’s entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author’s request, to consent to a modification of the agreement that grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained.

(2) If the other party has transferred the exploitation right or granted further exploitation rights and if the conspicuous disproportion results from proceeds or benefits enjoyed by a third party, the latter shall be directly liable to the author in accordance with subsection 1, taking into account the contractual relationship within the licensing chain. The other party shall then not be liable.

(3) The rights under subsections 1 and 2 may not be waived in advance. An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective.

(4) The author shall not have a right pursuant to subsection 1 if the remuneration has been determined in accordance with a joint remuneration rule (Section 36) or in a collective bargaining agreement and explicitly provides for a further equitable participation in cases under subsection 1.

Section 32b

Compulsory Application

The application of Sections 32 and 32a shall be compulsory

1. if German law would be applicable to the exploitation agreement in the absence of a choice of law or
2. to the extent that the agreement covers significant acts of exploitation within the territorial scope of this Law.

Section 33

Continuing Effect of Non-Exclusive Exploitation Rights

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

5. In Section 34, subsections 3 to 5 shall be worded as follows:

“(3) An exploitation right may be transferred without the author’s consent if the transfer is comprised in the sale of the whole

exploitation right if exercise of the exploitation right by the transferee may not be reasonably demanded of the author. The second sentence shall also apply when the shareholder relations with respect to the enterprise of the holder of the exploitation rights are substantially changed.

(4) The transferee shall be jointly and severally liable for the discharge of the transferor’s obligations under his agreement with the author, if the author has not expressly consented to the transfer of the exploitation right in the individual case.

The author cannot waive the right of revocation and the liability of the transferee in advance.

Otherwise, the holder of the exploitation right and the author may agree on different terms.”

6. Section 35 shall be amended as follows:

- a) In the title, the words “non-exclusive” shall be replaced with the word “further”.
- b) In subsection 1 first sentence, the words “non-exclusive” shall be replaced with the word “further”.
- c) In subsection 2, the reference “(4)” shall be replaced with “(5) second sentence”.

7. Section 36 shall be worded as follows:

Section 36

Joint Remuneration Rules

(1) In order to determine whether remuneration is equitable pursuant to Section 32, authors' associations together with associations of users of works or individual users of works shall establish joint remuneration rules. Joint remuneration rules shall take account of the circumstances of the respective area of regulation, especially the structure and size of the users. Regulations contained in collective bargaining agreements shall take precedence over joint remuneration rules.

(2) Associations as referred to under subsection 1 shall be representative, independent and empowered to establish joint remuneration rules.

(3) If the parties have so agreed, proceedings for the establishment of joint remuneration rules shall be conducted before the Arbitration Board (Section 36a). Proceedings shall be conducted upon written request of one of the parties, if

1. the other party does not commence negotiations on joint remuneration rules within three months of the written request of one of the parties to initiate negotiations,

2. negotiations on joint remuneration rules do not result in an outcome one year after the written request to initiate such negotiations, or

3. one of the parties has declared that the negotiations have irretrievably failed.

(4) The Arbitration Board shall submit to the parties a settlement proposal giving reasons and containing the contents of the joint remuneration rules. The proposal shall be deemed to have been accepted if the Arbitration Board does not receive any written objection thereto within three months of the receipt of such proposal.

8. The following Section 36a shall be inserted after Section 36:

"Section 36a

Arbitration Board

(1) In order to establish joint remuneration rules, authors' associations together with associations of users of works or individual users of works shall set up an Arbitration Board if the parties have agreed this or one of the parties has requested that arbitration proceedings be conducted.

(2) The Arbitration Board shall consist of an equal number of assessors appointed by each of the respective parties, and an impartial chairman, the appointment of whom both parties should agree upon.

(3) If it is not possible for agreement to be reached on who is to be appointed as chairman, the Higher Regional Court competent pursuant to section 1062 of the Code of Civil Procedure shall appoint the chairman. The Higher Regional Court shall also decide failing agreement as to the number of assessors. Sections 1063 and 1065 of the Code of Civil Procedure shall apply mutatis mutandis to the proceedings before the Higher Regional Court.

(4) A request for arbitration proceedings in accordance with Section 36(3) second sentence must contain a proposal for the establishment of joint remuneration rules.

(5) The Arbitration Board shall decide by majority vote following an oral consultation. The decision shall initially be taken by the assessors: if a majority vote cannot be obtained, the chairman shall, following

further consultation, participate in a renewed vote. If one of the parties does not appoint any members or if the members appointed by one of the parties do not take part in the session in spite of a timely invitation to do so, the chairman and the members who have attended shall decide on their own in accordance with the first and second sentences. The decision of the Arbitration Board shall be set forth in writing, signed by the chairman and delivered to each party.

(6) Unless the parties agree otherwise, the costs of the arbitration proceedings shall be borne by the applicant.

(7) The parties may lay down the details of proceedings before the Arbitration Board in the form of an agreement.

(8) The Federal Ministry of Justice shall have the power to lay down by ordinance, without consent of the Bundesrat, further details of the procedure before the Arbitration Board, as well as further provisions on the costs of proceedings and the payment of members of the Arbitration Board.”

9. (deleted)

10. (deleted)

11. The following Section 63a shall be inserted after Section 63.

“Section 63a

Statutory Remuneration Rights

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

12. (deleted)

13. Section 71 subsection 1 third sentence shall be worded as follows:

“Sections 5,

14.

“(4)

(5)

separately exploited, they may decide before the performance to authorise one person to pursue their claims under Sections 32 and 32a. Section 80 remains unaffected.”

15. (deleted)

16. Section 88 shall be amended as follows:

a) Subsection 1 shall be amended as follows:

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

b) Subsection 3 is repealed.

17. The following subsection 4 shall be added to Section 89:

“(4) Concerning the rights of cinematographic exploitation in photographs and photographic works produced in connection with the creation of a cinematographic work, subsections 1 and 2 shall apply *mutatis mutandis*.”

18. Section 90 shall be worded as follows:

“Section 90
Limitation of Rights

The provisions on the transfer of exploitation rights (Section 34) and the grant of further exploitation rights (Section 35) as well as on the right of revocation for non-exercise (Section 41) and for changed conviction (Section 42) shall not apply to the rights referred to in Section 88(1) and Section 89(1). The first sentence shall not apply to the right of cinematographic adaptation until the commencement of the shooting of the film.”

19. Section 91 is repealed.

20. (deleted)

21. (deleted)

22. In Section 95, the reference “Section 91” shall be deleted and the reference “89(4)” shall be inserted before the reference “90”.

23. Section 132 shall be amended as follows:

a) In subsection 1 first and second sentences, and in subsection 2, in each case, the words "the entry into force of this Law" shall be replaced with the reference "January 1, 1966".

b) The following subsections shall be added:

"(3) Subject to the second and third sentences, the provisions of this Law shall apply further in the version of the Law in force on March 28, 2002 to contracts, or other situations, which were either concluded or came into being, respectively, prior to July 1, 2002. Section 32a shall apply to situations which came into being after March 28, 2002. Section 32 shall also apply to contracts which were concluded between June 1, 2001 and March 28, 2002, where the right granted or the permission has been used after March 28, 2002.

(4) Subsection 3 shall apply to performers *mutatis mutandis*."

Article 2

Amendment of the Publishing Law Act

Article 28 of the Publishing Law Act in the revised version published in the Federal Law Gazette [BGBl] Part III, classification number 441-1, last amended by Article 5 (26) of the Act dated 26 November 2001 (Federal Law Gazette I, p. 3138) shall be deleted.

Article 3

Entry into Force

This Act shall enter into force on the first day of the fourth month after promulgation.

The constitutional rights of the Federal Council have been heeded.

The above Act is hereby executed and promulgated in the Federal Law Gazette.

Berlin, 22 March 2002

Federal President

Johannes Rau

Federal Chancellor

Gerhard Schröder

Federal Minister of Justice

Däubler-Gmelin
