

## More Money for Creators and More Support for Copyright in Society—Fair Remuneration Rights in Germany and the Netherlands

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### ABSTRACT

*The current copyright system is intended to provide an incentive for authors to invest more time and effort in the creation of literary and artistic works (utilitarian argument), recognize the acquisition of a property right as a result of creative labour (natural law argument) and enhance authors' freedom of expression by offering a source of income that is independent of patronage and sponsorship (free expression argument).<sup>1</sup> These arguments may be combined with considerations of industry policy, such as the growth of the creative and telecommunication industries, and the creation of jobs in these industries.<sup>2</sup> The basis of all these lines of reasoning, however, is the individual creator. Without the constant efforts of creators, there would be no new literature and art to fuel the publication and dissemination machinery of the industry. A focus on the income situation of the individual creator also ensures the acceptance of copyright law in society. It adds social legitimacy. Who would be against remunerating authors for the time and effort spent on the creation of a new work?*

*There is thus substantial reason to explore legislative measures seeking to ensure that copyright law generates not only a sufficient return on investment for the creative industries but also a decent income for individual creators. With specific copyright contract rules that guarantee a right to fair remuneration, the*

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1. These arguments will be discussed in more detail in Section I. For an overview of justifications for copyright protection, see Martin Senftleben, *Copyright, Creators and Society's Need for Autonomous Art—The Blessing and Curse of Monetary Incentives*, in WHAT IF WE COULD REIMAGINE COPYRIGHT? 25, 28–32 (Rebecca Giblin & Kimberlee Weatherall eds., 2017); F. W. GROSHEIDE, AUTEURSRECHT OP MAAT: BESCHOUWINGEN OVER DE GRONDSLAGEN VAN HET AUTEURSRECHT IN EEN RECHTSPOLITIEKE CONTEXT 127–29 (1986).

2. For an example of this line of argument in legislation, see Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Recital 4, 2001 O.J. (L 167) 10, 10.

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legislation in Germany and the Netherlands is particularly advanced in this respect. Hence, the question arises: what lessons can be learned from German and Dutch experiences? After a short introduction that refers to recent E.U. initiatives in this area, the following analysis will show that the issue of a fair remuneration for creators has a worldwide dimension. In light of the rationales of copyright protection in continental-European and Anglo-American copyright systems, it becomes clear that the high level of protection that has been reached in both legal traditions and at the international level only appears legitimate if individual creators receive an adequate remuneration for their work.<sup>3</sup> Fair remuneration is a universal, worldwide concern (Section I). Against this background, the analysis sheds light on the practical effects of the legislation in Germany and the Netherlands (Section II) and leads to general guidelines for the improvement of the income situation of creators (Section III).

### I. WORLDWIDE DIMENSION

Given the core rationale of copyright law to encourage and reward creators, the question arises whether the current copyright system is capable of ensuring a fair remuneration for creative work. In the E.U., this issue is high on the agenda of law and policy makers. In the framework of the current E.U. copyright reform, the E.U. Commission proposed to provide for a right of authors and performers “to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.”<sup>4</sup>

At the core of this proposal lies the concern that authors and performers are often unable to obtain a fair remuneration for their creative work because of a weak bargaining position in contractual relationships with exploiters of their works and performances. The E.U. Commission seeks to pave the way for “better balanced contractual relationships between authors and performers and those to whom they

3. As to the international level of protection, see Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, and *as amended* Sept. 28, 1979, 102 Stat. 2853, 828 U.N.T.S. 221 (entered into force in the United States Mar. 1, 1989); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994); WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94. For commentary, see, e.g., LE DROIT INTERNATIONAL DE LA PROPRIÉTÉ INTELLECTUELLE LIÉ AU COMMERCE: L’ACCORD SUR LES ADPIC, BILAN ET PERSPECTIVES, (Christophe Geiger ed., 2017); Martin Senftleben, *Commentary on the WIPO Copyright Treaty*, in CONCISE EUROPEAN COPYRIGHT LAW 93, 93–139 (Thomas Dreier & P. Bernt Hugenholtz eds., 2d ed., 2016); DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (4th ed., 2012); SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (2006); MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION (2002); JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996: COMMENTARY AND LEGAL ANALYSIS (2002).

4. Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, at 30, COM (2016) 593 final (Sept. 14, 2016).

assign their rights.”<sup>5</sup> The problem, however, is not limited to the E.U. A closer analysis of the theoretical underpinnings of the grant of exclusive rights in copyright law reveals that an adequate reward and an appropriate incentive for creative labour is a cornerstone of the justification of copyright protection not only in continental-European copyright systems but also in Anglo-American copyright law.

Continental-European countries invoke the notion of natural law to explain why authors are vested with exclusive rights and entitled to a fair reward for their creative work. Civil law copyright systems are often expressly rooted in natural law and tend to confer an air of “sacredness” on intellectual works.<sup>6</sup> In the natural law theory, the creator of a work of art occupies centre stage. Her unique form of self-expression which emerges in the course of the creative process leading to a work constitutes the centre of gravity.<sup>7</sup> It is assumed that a bond unites the creator with the object of her creation. Hence, the work is conceived as a materialization of the author’s personality.<sup>8</sup> Moreover, the creator acquires a property right in her work by virtue of the mere act of creation.<sup>9</sup> This has the corollary that nothing is left to the law apart from formally recognising what is already inherent in the “very nature of things.”<sup>10</sup> The author-orientation of civil law copyright systems calls on the legislator to ensure that creators have the opportunity to benefit from the use and exploitation of their self-expression.

The common law approach to copyright rests on utilitarian considerations.<sup>11</sup> Anglo-American copyright systems envision intellectual property rights as a utilitarian notion that fails to indicate an inherent right of authors to their creations.<sup>12</sup> Seeking instead to enhance the benefits for society, advocates of the common law approach invoke marketplace principles. The grant of copyright protection is seen as a vehicle to spur the creation of socially valuable works. Accordingly, the resulting system of copyright protection mirrors the reliance on

5. *Id.* at 3.

6. See, e.g., André Kéréver, *Droits d’Auteur et Développements Techniques*, 148 REVUE INTERNATIONALE DU DROIT D’AUTEUR 3, 13 (1991); Bernard Edelman, *The Law’s Eye: Nature and Copyright*, in OF AUTHORS AND ORIGINS 79, 82–87 (Brad Sherman & Alain Strowel eds., 1994).

7. See, e.g., Paul Edward Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, in OF AUTHORS AND ORIGINS 159, 169–70, *supra* note 6; Alain Strowel, *Droit d’auteur and Copyright: Between History and Nature*, in OF AUTHORS AND ORIGINS, *supra* note 6; Edelman, *supra* note 6, at 82–7.

8. This is a long-standing assumption in the civil law copyright tradition. See, e.g., HENRI DESBOIS, *LE DROIT D’AUTEUR EN FRANCE* 538 (2d ed., 1973) (“L’auteur est protégé comme tel, en qualité de créateur, parce qu’un lien l’unit à l’objet de sa création.”).

9. See, e.g., DESBOIS, *supra* note 8, at 538; Steve P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 310, 312–16 (1998).

10. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 5–6 (1987).

11. See, e.g., Strowel, *supra* note 7, at 235; William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1686–92 (1988).

12. See, e.g., Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1150, 1211, 1214–15 (1998); Calandrillo, *supra* note 9, at 310.

the motivating power of economic incentives. The promise of monetary rewards is offered to the creators of literary and artistic works as a bait to encourage their intellectual productivity.<sup>13</sup> Copyright is perceived as an “engine of free expression.”<sup>14</sup> A marketable right is conferred to ensure a sufficient supply of knowledge and information.

The outlined differences in the theoretical underpinnings of copyright protection, however, must not be overestimated. A closer inspection of early literary property regimes brings to light a wide array of similarities. The first copyright statute, known as the Statute of Anne (1709), lays the groundwork for both the English and U.S. copyright laws.<sup>15</sup> As an “Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies,” it pursues the objective to offer authors an incentive to create. Its preamble maintains that the Act aims at the “Encouragement of Learned Men to Compose and Write Useful Books.”<sup>16</sup> The Statute obviously rests on utilitarian notions. The grant of copyright protection is intended to encourage authors to write books for the benefit of society. This utilitarian foundation of the Anglo-American copyright tradition, however, was laid in an intellectual climate pervaded by the ideas of John Locke.<sup>17</sup> His elaboration of a natural right to property in his Second Treatise on Government is traditionally invoked as a basis for the natural law approach to copyright which prevails in continental-European countries. Locke’s labour theory influenced not only the decisions *Millar v. Taylor* and *Donaldson v. Beckett*, which had to respond to the question of whether there exists a common law copyright that is rooted in natural law and is thus independent of the stipulations of the Statute of Anne.<sup>18</sup> It was also reflected in the dawn of U.S. copyright legislation. All of the states except Delaware enacted copyright statutes before the adoption of the U.S. Constitution, thereby for the most part unequivocally referring to principles of natural law.<sup>19</sup> Not surprisingly, throughout the nineteenth century, U.S. courts defended copyright on the grounds of rightness and justice far more than as a matter of the public good even though the first U.S. copyright statute ultimately reflects the intention to apply copyright, along the utilitarian lines drawn in the Statute of Anne, as a means of fostering public

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13. See, e.g., Calandrillo, *supra* note 9, at 310–12; Geller, *supra* note 7, at 159, 164–66.

14. See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

15. For a detailed discussion of the Statute of Anne and its ongoing importance, see GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE (Lionel Bently et al., eds., 2010).

16. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS 131, 137, *supra* note 6; LUDWIG GIESEKE, VOM PRIVILEG ZUM URHEBERRECHT: DIE ENTWICKLUNG DES URHEBERRECHTS IN DEUTSCHLAND BIS 1845, 138–39 (1995).

17. Cf. ALAIN STROWEL, DROIT D’AUTEUR ET COPYRIGHT, 185–90 (1993).

18. Cf. GIESEKE, *supra* note 16, at 139–40; STROWEL, *supra* note 17, at 114–15.

19. Cf. Weinreb, *supra* note 12, at 1211–12. See also Ginsburg, *supra* note 16, at 139 (referring to the preamble to the Massachusetts Act of March 17, 1783); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1199 (1996) (quoting the preamble to Connecticut’s 1783 copyright statute).

education.<sup>20</sup> In practice, courts thus did not hesitate to intersperse the utilitarian framework laid down in early Anglo-American copyright statutes with notions stemming from the natural law theory.

A corresponding tendency to intermingle natural law and utilitarian considerations can be observed in the history of continental-European copyright systems. At an early stage of development, the notion of authors' natural rights had not yet been linked with the romantic elaboration of criteria such as originality, organic form and the work of art as a materialization of the unique personality of the creator. By contrast, it was often brought to the fore to mask manifest economic interests of booksellers.<sup>21</sup> The individual creator was used as a figurehead in this context. The development of copyright law in Germany, for instance, bears witness to the invocation of Locke's labour theory in favour of publishers. The inefficiency of the German privilege system, caused by Germany's territorial fragmentation, prompted various scholars to rely on the author's natural right in his writings as a starting point for the explanation of the illegitimacy of unauthorized reprints.<sup>22</sup>

The situation in France also shows that utilitarian objectives were hidden behind the rhetoric of natural law. As Professor Jane Ginsburg has shown, the French enactments of 1791 and 1793 reflect several instrumentalist objectives. The defence of the public domain against the monopoly enjoyed by the Comédie Française, for instance, can be regarded as the main principle of the 1791 law instead of the focus on author's rights as "the most sacred, the most legitimate, the most inviolable, and . . . the most personal of all properties".<sup>23</sup> Ginsburg maintains that, in 1793, the French Revolutionary legislators applied an amalgam of the notion of authors' natural rights and enlightenment values.<sup>24</sup> The latter support the public interest in the progress of knowledge rather than strong property rights in intellectual works. Therefore, the 1793 decree need not necessarily be regarded as

20. Cf. Ginsburg, *supra* note 16, at 140; Weinreb, *supra* note 12, at 1212–13 (pointing out that early treaties dealing with copyright law are to the same effect).

21. See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 295–96 (1992). With respect to "The Battle of Booksellers," see STROWEL, *supra* note 17, at 114–15. As to the situation in France, see Ginsburg, *supra* note 16, at 149.

22. See, e.g., JOHANN STEPHAN PÜTTER, DER BÜCHERNACHDRUCK NACH ÄCHTEN GRUNDSÄTZEN DES RECHTS GEPRÜFT §§ 20, 23 (Kraus Int'l Publications 1981) (1774) (basing his argumentation against unauthorised reprints on the assumption that new literary works that are published for the first time are "gleich ursprünglich unstreitig ein wahres Eigenthum ihres Verfassers, so wie ein jeder das, was seiner Geschicklichkeit und seinem Fleisse sein Daseyn zu danken hat, als sein Eigenthum ansehen kann."). See also WALTER BAPPERT, WEGE ZUM URHEBERRECHT 256–57 (1962); Gieseke, *supra* note 16, at 121–22. In the context of Anglo-American copyright law, see Peter Jaszi, *Authorship and New Technologies from the Viewpoint of Common Law Traditions*, in WIPO WORLDWIDE SYMPOSIUM ON THE FUTURE OF COPYRIGHT AND NEIGHBORING RIGHTS 61, 65 (1994) (similarly pointing out that, "effectively, 'authorship' had been introduced into English law as a blind for the booksellers' interests, and it continued to perform that function throughout the eighteenth century—and beyond.").

23. See Ginsburg, *supra* note 16, at 144–45. The quoted passage is taken from an often quoted statement made by Le Chapelier, who reported on the 1791 decree, which is also quoted by Ginsburg. She asserts that Le Chapelier's remark merely concerned unpublished works. *Id.* at 144.

24. *Id.* at 147–51.

a tribute paid to natural law theory. In reality, there is substantial reason to believe that this piece of copyright legislation formed part of a much broader scheme seeking to promote public education.<sup>25</sup> Not surprisingly, the 1793 law bears features that call to mind utilitarian Anglo-American statutes, such as the compliance with formalities as a prerequisite for suit.<sup>26</sup>

Hence, copyright law's early development is defined by a mixture of notions that are often exclusively assigned to the sphere of one legal tradition of copyright law. The historical common ground of copyright's legal traditions influences both of them to this day. Professor Lloyd Weinreb, for instance, has pointed out that even though the natural rights argument has been muted in recent years, it still remains a significant undercurrent of the U.S. copyright system.<sup>27</sup> The accession of common law countries to the Berne Convention also indicates that these countries are not necessarily loath to depart from their utilitarian basis, at least to some extent. The UK was among the first countries that became party to the Convention in 1887. India and Australia followed in 1928 and the U.S. in 1989. Pursuant to its preamble, the Berne Convention is not inspired with an aim to enhance the benefits for society, but animated by the "desire to protect, in as effective and uniform a manner as possible, the rights of authors." This formula recalls the creator-centric natural law concept.<sup>28</sup>

On the side of civil law countries, the traditional natural law foundation of copyright law is increasingly enriched with the notion that copyright law can serve as a means to further intellectual, cultural, and cultural-economic progress. Notions of this kind feature prominently in the European Copyright Directive 2001/29/EC which constitutes the cornerstone of harmonized E.U. copyright law. Pursuant to Recital 4 of the Directive: "[A] harmonised legal framework on copyright and related rights . . . will foster substantial investment in creativity and innovation . . . and lead in turn to growth and increased competitiveness of European industry. . . . This will safeguard employment and encourage new job creation."<sup>29</sup>

To conceive of the two traditions of copyright law as two incompatible, separate systems thus hardly portrays the actual situation accurately. By contrast, the two traditions of copyright are mixtures of a shared set of basic ideas derived from both natural law theory and utilitarian notions alike. Not surprisingly, the need to ensure a fair remuneration for the creative work of authors is a shared concern as well. It constitutes a universal concern that is relevant to copyright systems worldwide,

25. *Id.* at 146.

26. *Id.* at 147-51. Nevertheless, Alain Strowel points out that the protection itself was independent of any formalities. STROWEL, *supra* note 17, at 314

27. See Weinreb, *supra* note 12, at 1216; Cf. Sterk, *supra* note 19, at 1198-204; Jaszi, *supra* note 21, at 297-302 (presenting court decisions that support this proposition). Jaszi states that "over the history of Anglo-American copyright, Romantic 'authorship' has served the interests of publishers and other distributors surprisingly well." *Id.* at 298.

28. Cf. Geller, *supra* note 7, at 170; Strowel, *supra* note 7, at 249-50.

29. Recital 4 of Council Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 106).

even though the debate on fair remuneration rights may accentuate different aspects of the shared theoretical groundwork.

The natural law argument supporting a right to fair remuneration appeals to feelings of rightness and justice. As it is the individual creator who spends time and effort on the creation of a new work, she should reap the fruit of her labour.<sup>30</sup> To explain the creator's reward claim, advocates of the natural law approach can invoke Locke's elaboration of a natural right to property in his *Second Treatise on Government*. Locke envisions an unrestricted supply of resources in a world of abundance, and individuals enjoying the rightful liberty to use the earth's plenty.<sup>31</sup> In this world, so runs Locke's argument, whenever one mixes his effort with the raw stuff of the world, he has joined to it "something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it that excludes the common right of other men".<sup>32</sup> While the real world bears little resemblance to Locke's world of abundance, a certain degree of similarity can hardly be denied in the realm of intangible products. Because of the "public good" character of intellectual works, later authors are free, insofar as access is conceded, to ground their own creative activities in the creations of their predecessors without diminishing the intellectual world's supply of ideas and individual expression.<sup>33</sup>

Consequently, a line has been drawn between Locke's elaboration of a natural right to property in a world of abundance and the author's right to her creation in the world of ideas and individual expression. The mechanism of acquiring property, in both worlds, is the same. The property right results directly from mixing labor with the raw material found in the respective world of abundance. As the author spends time and effort on the creation of a new intellectual work, this work becomes her property. The reference to Locke's labor theory, however, is not only conducive to explaining the sudden change of creative labor in intellectual property, but also helps to clarify certain further ramifications of the natural law approach to copyright. Locke's concept of acquiring property in a world of abundance is an individualistic one. The laborer is given an isolated position. By postulating an unrestricted supply of resources, it becomes possible to focus on the individual laborer at the moment when property is acquired, instead of considering

30. Cf. Grosheide, *supra* note 1, at 128 (argument B).

31. Cf. W.J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1553 (1993); Weinreb, *supra* note 12, at 1223; Strowel, *supra* note 17, at 184.

32. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* book 2, chapter 5, § 27 (1689); Cf. Strowel, *supra* note 17, at 183.

33. Cf. Weinreb, *supra* note 12, 1224. With respect to the "public good" character of literary and artistic works, see NEIL NETANEL, *COPYRIGHT'S PARADOX* 84-85 (Oxford University Press, 2008); Richard Posner, *Intellectual Property: The Law and Economics Approach*, 19 JOURNAL OF ECONOMIC PERSPECTIVES 57, 57-59 (2005); Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV 1067, 1077 (2003); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV 354, 392-93 (1999); William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); Fisher, *supra* note 11, at 1700.

the potential implications for the overall welfare of society. The surrounding in which Locke places his elaboration of a natural right to property thus allows concentration on a single occurrence: the act of mixing labor with the raw material of the envisioned world. Under these circumstances, the individual merit of the laborer can be made visible in order to explain her natural right to property and her reward claim.

In contrast to this individualistic conception, utilitarian arguments in favor of copyright protection rest on a theoretical basis which requires some kind of community. Utilitarian theory conceives of property as a conventionally recognized stability of possession. The convention thereby arises out of the perception that individual advantage can be derived from mutual forbearance to interfere with the possessions of others. Any security of possessions stems from the belief that the establishment of a lasting association will be impossible as long as members of the envisioned community trespass against one another.<sup>34</sup> In the course of development towards a permanently ordained association, the evolving practice of mutual forbearance is fortified through an established set of rules. On the basis of utilitarian theory, private property is therefore rooted in the historical evolution of the customary acceptance of certain rules.<sup>35</sup>

In this framework of ingrained habits, so runs a further argument: a high level of productivity depends on arrangements which assure to every laborer a predictable amount of the fruits of her labor. It is assumed that the time and effort necessary to create a new product will not be spent unless generally accepted rules guarantee that the laborer is permitted to enjoy a substantial share of the product.<sup>36</sup> In this line of reasoning, the utilitarian approach to copyright relies on the motivating power of the grant of exclusive rights. As these rights afford a creator the control of the use and enjoyment of her intellectual work, they offer the possibility of deriving economic benefit from a work's creation. Copyright protection, thus, is understood as an incentive to create. The legal assurance that exclusive rights in works of the intellect will be conferred on every author is offered as bait to encourage intellectual productivity. The U.S. Constitution reflects this theoretical model by stating that it seeks "[t]o 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."<sup>37</sup>

Similar to natural law theory, the utilitarian approach to copyright, therefore, offers support for the objective to ensure a fair remuneration for the author's creative work. Otherwise, copyright could hardly provide an incentive for the creation of new literary and artistic works. In *Harper & Row v. Nation Enterprises*, the U.S. Supreme Court referred to copyright as the "engine of free expression".<sup>38</sup>

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34. See Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1208-209 (1967) (providing a description of utilitarian theories based on Hume and Bentham).

35. *Id.* at 1209-10.

36. *Id.* at 1211-12.

37. U.S. CONST. art. I, § 8.

38. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985).



It went on to elaborate that “by establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>39</sup> This line of reasoning receives an additional connotation when it is traced back to the age of enlightenment when traditional systems of censorship gave way to the copyright system.<sup>40</sup> If copyright offers authors the opportunity to derive sufficient economic profit from their works, it ensures the creators of intellectual works independence from any kind of patronage that might seek to restrict their freedom of expression.<sup>41</sup> The users of copyrighted material, in turn, can enjoy works that have been created in the absence of manipulation and censorship. Accordingly, copyright law promotes a free and independent intellectual debate as long as it ensures a fair remuneration that enables authors to earn a living on the basis of their creative work.<sup>42</sup>

## II. FAIR REMUNERATION LEGISLATION

As the fair remuneration of creators is thus a precondition for the grant of exclusive rights in both traditions of copyright law (continental-European and Anglo-American countries alike), the question arises as to how copyright legislation can ensure the payment of a fair remuneration. The answer to this question can hardly be found in the very nature of copyright itself. Copyright law ensures that authors’ exploitation rights are marketable. If, however, individual creators do not have sufficient bargaining power to insist on substantial economic benefits in negotiations with exploiters of their works,<sup>43</sup> the mere grant of copyright will not improve their income situation. By contrast, the creator of a literary or artistic work only serves as a provider of strong exploitation rights for the creative industries, without benefiting much herself. This imbalance may discredit the protection system as a whole. If copyright only serves as a vehicle to vest the creative industries with strong rights in information products while these rights are defended as a means to remunerate authors, the creators of literary and artistic works only function as a dummy to conceal the industry’s insatiable appetite for continuously expanding exclusive rights. As a result, the arguments advanced in

39. *Id.*

40. For a historical analysis of the joint origin of freedom of expression and copyright, see E. DOMMERING ET AL., *INFORMATIERECHT—FUNDAMENTELE RECHTEN VOOR DE INFORMATIESAMENLEVING* 431-39 (Otto Cramwinckel ed., 2000); Neil Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 353-58 (1996).

41. *Cf. Id.* at 288 (stating that “copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.”).

42. *Cf. Id.* at 288; P.B. HUGENHOLTZ, *AUTEURSRECHT OP INFORMATIE* 151, (Kluwer); Grosheide, *supra* note 1, at 139-41.

43. For an analysis of the bargaining position and income situation of individual creators, see MARTIN KRETSCHMER, SUKHPREETY SINGH, LIONEL BENTLY & ELENA COOPER, *COPYRIGHT CONTRACTS AND EARNINGS OF VISUAL CREATORS: A SURVEY OF 5,800 BRITISH DESIGNERS, FINE ARTISTS, ILLUSTRATORS AND PHOTOGRAPHERS*, (2011); JARST WEDA, ILAN AKKER, JOOST POORT, PETER RUTTEN, ANNEMARIE BEUNEN, *WAT ER SPEELT – DE POSITIE VAN MAKERS EN UITVOEREND KUNSTENAARS IN DE DIGITALE OMGEVING*, (SEO Economisch Onderzoek, 2011), <https://perma.cc/6T99-FFM6>. These studies confirm that, in fact, the income situation of authors is precarious.

favor of copyright can be unmasked as false rhetoric<sup>44</sup> and the system's social legitimacy is put at risk.

To avoid this erosion of copyright's acceptance in society, the lawmaker can seek to reduce the exposure to market forces and adopt measures that strengthen the position of creators vis-à-vis the creative industry. In 2002, an example of this kind of legislation (an Act on Copyright Contract Law) entered into force in Germany. This legislation confers upon authors a right to fair remuneration (in their contractual relationships with exploiters of their works) besides the grant of traditional exploitation rights. By virtue of § 32(1) of the German Copyright Act (Urheberrechtsgesetz; UrhG), as amended by the 2002 Copyright Contract Act, authors have the right to demand the modification of a contract about a work's exploitation that fails to provide for a fair remuneration (see the more detailed discussion of this point in the following subsection II(A)). The German legislation supplements this measure aiming at a fair remuneration *ex ante* (at the very beginning of the contractual relationship) with a right to fair remuneration that becomes relevant at a later stage. If the work has market success to such an extent that the remuneration originally received appears disproportionately low, an *ex post* remuneration rule gives the author the right to demand an adjustment of the contract in the light of changed circumstances. § 32a(1) UrhG states explicitly that the author can invoke this *ex post* remuneration right regardless of whether the parties could have foreseen the disproportionality between remuneration and revenue at the time of concluding the exploitation contract (subsection II(B)).

#### A. FAIR REMUNERATION EX ANTE

As explained, § 32(1) UrhG bestows on authors the right to demand the modification of a contract regarding a work's exploitation that fails to provide for a fair remuneration. § 32(2) UrhG makes it clear in this context that so-called "common remuneration rules" established in negotiations between a representative association of authors on the one hand, and an individual exploiter or an association of exploiters on the other hand (§ 36 UrhG), are to be deemed "fair" in this sense by virtue of the law. Although the German Copyright Contract Act has now been in effect for more than ten years, these legislative measures have not led to the envisaged general improvement of the income situation of authors.<sup>45</sup> Individual

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44. Cf. Sterk, *supra* note 19, at 1197-98 (pointing out that "although some copyright protection indeed may be necessary to induce creative activity, copyright doctrine now extends well beyond the contours of the instrumental justification. The 1976 statute and more recent amendments protect authors even when no plausible argument can be made that protection will enhance the incentive for authors to create.").

45. See H. Maas, *Kulturelle Werke – mehr als nur ein Wirtschaftsgut*, ZEITSCHRIFT FÜR URHEBER-UND MEDIENRECHT 207, 209 (2016); K.N. Peifer, *Urhebervertragsrecht in der Reform: Der Kölner Entwurf*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT-PRAXIS IM IMMATERIALGÜTER- UND WETTBEWERBSRECHT 1, 1-2 (2015); G. Schulze, *Vergütungssystem und Schrankenregelungen*, Gewerbl. Rechtsschutz und Urheberrecht 828 (2005). For more nuanced comment, see also A. Dietz, *Das Urhebervertragsrecht in Deutschland*, in R.M. HILTY, C. GEIGER, IMPULSE FÜR EINE EUROPÄISCHE HARMONISIERUNG DES URHEBERRECHTS 465, (Springer, 2007). Dietz qualifies the first

creators seem hesitant to assert their remuneration right in court. As an exception to this rule, translators started court procedures that finally led to first decisions of the German Federal Court of Justice (German Supreme Court) on the question of fair remuneration.<sup>46</sup> On balance, however, the determinants of what constitutes a fair remuneration in an individual case still seem too vague to allow the effective use and enforcement of the fair remuneration right. As the party invoking the right to fair remuneration, the burden of proving that a contractually agreed remuneration falls short of the statutorily guaranteed fair remuneration rests on the author. Hence, she also carries the risk and costs of showing what a fair remuneration in the relevant sector of the creative industry would be, and that the concluded contract does not provide for this fair remuneration.<sup>47</sup>

For cases in which no common remuneration rules are available, § 32(2) UrhG indicates that a remuneration can be considered fair when it complies with the remuneration which, according to the customary practices in the sector concerned, an author could reasonably expect in light of the scope and reach of the granted right, the duration and time of the use, and other circumstances relevant to the individual case. These flexible factors, however, can hardly clarify the conceptual contours of the fair remuneration right. In the absence of model contracts or other customary remuneration schemes that come close to common remuneration rules in the sense of § 36 UrhG, an author will still have difficulty proving that a contractually agreed remuneration is not fair on the basis of this vague definition of fairness.<sup>48</sup> Similarly, the author will have difficulty in assessing the risk of litigation regarding the remuneration question as long as there is no reliable information on the customary remuneration.

Against this background, the additional option to invoke § 36 UrhG and formally establish common remuneration rules in collective negotiations between an association of authors and industry representatives is of particular practical importance. By virtue of § 32(2) UrhG, a standard remuneration scheme of this type constitutes a legally binding definition of the fair remuneration in the relevant industry sector. A common remuneration rule in the sense of § 36 UrhG thus provides the legal certainty necessary to assess the chances of court procedures. It can also serve as a yardstick for proving the unfairness of a remuneration that does not comply with the standard described in the remuneration scheme.

In Germany, the Common Remuneration Rules for Writers of German Fiction<sup>49</sup> constitute a prominent example of remuneration rules that were concluded on the basis of the German Copyright Contract Act in negotiations between the

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common remuneration rule that has been established under the new German legislation as a success of the system as a whole. *Id.* at 473-74.

46. Federal Court of Justice, 7 October 2009, cases I ZR 38/07 and I ZR 230/06, *available (in German) at* <https://perma.cc/7Z2F-TLKZ>. This case law will be discussed in more detail below.

47. See Schulze, *supra* note 45, at 829-830; Dietz, *supra* note 45, at 469.

48. See Schulze, *supra* note 45, at 829-830; A.A. Wandtke, *Der Anspruch auf angemessene Vergütung für Filmurheber nach § 32 UrhG*, *GEWERBLICHER RECHTSSCHUTZ UND ÜRHEBERRECHT INT.* 704, 707 (2010).

49. These common remuneration rules are available (in German) at <https://perma.cc/XN9T-NQH4>.

Association of German Writers in the United Services Trade Union Ver.di and several publishers.<sup>50</sup> As no representative association of publishers entered the negotiations,<sup>51</sup> it was difficult to foresee the impact of this standard remuneration rule on the sector as a whole. The fact that the German Ministry of Justice had to mediate informally between the parties to ensure the adoption of the remuneration rules mirrors the difficulty of the negotiations.<sup>52</sup>

Given the scarcity of common remuneration rules in the sense of § 36 UrhG,<sup>53</sup> it is tempting for the courts to make extensive use of the existing rules. As already indicated above, the German Federal Court of Justice had the opportunity to clarify the scope of common remuneration rules in cases that had been initiated by translators. A collective remuneration rule for translators in the sense of § 36 UrhG was not available for a decision in these cases. Moreover, the Federal Court of Justice had serious doubts about the customary remuneration in the translation sector. Referring to the aforementioned general definition of “fair remuneration” in § 32(2) UrhG, the Court pointed out that compliance with customary remuneration practices in a particular sector may nonetheless be insufficient in the light of the general fairness criteria formulated by the legislator: “Even if a particular honorarium—as in this case—is customary in the sector, this does not necessarily mean that it is fair. By contrast, a given remuneration is only fair when it equally takes account of the interests of the author besides those of the exploiter.”<sup>54</sup>

Having neither a common remuneration rule in the sense of § 36 UrhG nor an appropriate customary remuneration scheme in the sense of § 32(2) UrhG at its disposal, the Federal Court of Justice finally turned to the Common Remuneration Rules for Writers of German Fiction as a reference point for determining the fair remuneration of translators.<sup>55</sup> By analogy, the Court used the Common Remuneration Rules for Writers of German Fiction as a guideline for its decision on a fair level of remuneration for translators. This wide application of common remuneration rules by the Court is remarkable because the Common Remuneration Rules for Writers of German Fiction explicitly exclude applicability to translated works.<sup>56</sup> In addition, the Federal Court of Justice was unimpressed by the fact that

50. The rules were signed, for instance, by Rowohlt, S. Fischer and Random House.

51. See Kurzprotokoll der 14. Sitzung (öffentlich) der Enquete-Kommission DEUTSCHER BUNDESTAG, ‘Kultur in Deutschland’ 3 May 2004, Protokoll Nr. 15/14, p. 13/4-13/5. (Ger.).

52. The mediation was informal in the sense that it was not a formal mediation procedure with a dispute commission under § 36a UrhG. See Schulze, *supra* note 45, at 830.

53. Cf. G. Spindler, *Reformen der Vergütungsregeln im Urhebervertragsrecht*, 1 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT, 921, 921 (2012).

54. Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009, case I ZR 38/07, 11, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 2009, 1148 (1150) with case comment by R. Jacobs; Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009 I ZR 230/06, 12, available (in German) at <https://perma.cc/ZX4U-9H3T>.

55. Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009, II ZR 38/07, 16, and I ZR 230/06, 15-16.

56. See *Gemeinsame Vergütungsregeln für Autoren belletristischer Werke in deutscher Sprache*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ n. 1, available at <https://perma.cc/E4VD-U9G2>; *Contra* Bundesgerichtshof [BGH] [Federal Court of Justice] October 7, 2009., I ZR 38/07, 17, and I ZR 230/06, 16.

only one of the two cases brought by translators concerned fiction works. The second case was about translations of non-fiction books. The Court, however, surmounted the hurdle of “double” analogy. It did not matter that the case concerned translators instead of writers, and it did not matter that it concerned non-fiction instead of fiction books:

Even though the remuneration rules . . . are not directly applicable to publication contracts for non-fiction books, there are no prevailing concerns against their use for the purpose of determining a fair remuneration for the translation of a non-fiction book. According to the findings of the Court of Appeals, none of the parties argued and no other circumstances suggest that the conditions of publication contracts for non-fiction books differ from those of contracts over fiction works to such an extent that the remuneration rules for writers could not be taken into account.<sup>57</sup>

Using the Common Remuneration Rules for Writers of German Fiction as a guideline for the development of a fair remuneration standard for translators, the Court finally ruled that translators are entitled to two percent of the net retail price of hardcover editions and one percent in the case of paperback editions. This amounts to one-fifth of the remuneration which, according to the Common Remuneration Rules for Writers of German Fiction, is due to writers. If the publisher guarantees a honorarium that can be deemed reasonable in light of the custom in the sector, this right to fair remuneration is reduced to 0.8% for hardcover sales and 0.4% for paperback sales. Furthermore, this reduced royalty only needs to be paid as of the 5000<sup>th</sup> copy sold. In addition, translators are entitled to fifty percent of the net profits from the commercialization of ancillary rights.<sup>58</sup>

This jurisprudence of the Federal Court of Justice shows that common remuneration rules in the sense of § 36 UrhG can have a broad field of application. In particular, judges may extend the scope of these rules to parties who have not been involved in the underlying negotiations. A common remuneration rule may become a general yardstick for the establishment of fair remuneration standards in a given sector even though it was only concluded between specific parties and for a specific group of creators. On its merits, the described decisions transform common remuneration rules into generally binding legal instruments with a considerable impact on remuneration standards in the respective branch of the creative industry.

On the one hand, this approach can have positive effects for authors in a sector where no agreement on a common remuneration rule can be reached. By invoking remuneration rules of a related sector or a related group of creators, German courts can nevertheless arrive at a fair remuneration standard and improve the income situation of authors by reference to remuneration standards in a comparable field. On the other hand, the jurisprudence of the Federal Court of Justice can easily

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57. See Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009, *ibid.*, case I ZR 230/06, para. 34.

58. See Bundesgerichtshof [BGH], [Federal Court of Justice] October 7, 2009, I ZR 38/07, 18-23, and I ZR 230/06, 18-23. Nonetheless, this level of fair remuneration did not meet the expectations of translators. Cf. Dietz, *supra* note 45, at 469.

become an additional obstacle to negotiations on common remuneration rules in the sense of § 36 UrhG. If it is at all possible to find individual exploiters or business associations that are willing to speak about common remuneration rules in a particular branch, these exploiters and associations may be reluctant to enter into formal negotiations. The hesitance is due to the risk of resulting fair remuneration standards being declared applicable to the whole sector afterwards by the courts. Given this risk of generalization, interested enterprises and associations may also face pressure from other players in the relevant sector who fear that the establishment of common remuneration rules in one particular branch may finally affect remuneration standards in the entire sector.<sup>59</sup> Nonetheless, the German Federal Court of Justice confirmed the broad application of common remuneration rules in later decisions.<sup>60</sup>

In spite of the described problems, the underlying recipe—the combination of a right to fair remuneration with the possibility of establishing common remuneration standards in negotiations between authors and the creative industry—served as a model for other countries also seeking to enhance the credibility of the copyright system. In the Netherlands, legislation that copies the core elements of the German system was adopted in 2015.<sup>61</sup> Professor Bernt Hugenholtz and Lucie Guibault had laid the basis for this legislative development in 2004 by highlighting the problem of an increasingly weak bargaining position of individual creators and providing a comparative study of copyright contract legislation in other countries.<sup>62</sup> After a lengthy legislative process,<sup>63</sup> the adoption of the new copyright contract rules led to

59. Admittedly, the number of common remuneration rules in the sense of § 36 UrhG is nevertheless growing in Germany. Cf. A. Dietz, *Schutz der Kreativen (der Urheber und ausübenden Künstler) durch das Urheberrecht oder Die fünf Säulen des modernen kontinentaleuropäischen Urheberrechts*, 1 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT – INTERNATIONALER TEIL 2015, 309, 315–16. The scope of these rules, however, is often limited to specific groups of authors and exploiters. For example, see the initiatives in the area of public broadcasting described by P. Weber, *Rahmenverträge und gemeinsame Vergütungsregeln nach Urhebervertragsrecht – aus der Praxis des ZDF*, 1 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 2013, 740, 742–45. On balance, the result can thus still be seen as unsatisfactory. See Spindler, *supra* note 53, at 921.

60. Bundesgerichtshof [BGH], [Federal Court of Justice], May 21, 2015, case I ZR 62/14, GVR *Tageszeitungen I, operative part available (in German) at* <https://perma.cc/Z94L-T29M>.

61. See the Law of 30 June 2015 changing the Dutch Copyright Act and the Neighbouring Rights Act in connection with the strengthening of the position of authors and performing artists in contracts concerning copyright and neighbouring rights (Copyright Contract Act), Staatsblad 2015, 257, which led to a new section in the Dutch Copyright Act (Arts. 25b-25h) dealing specifically with authors' contract rights.

62. P.B. Hugenholtz & L. Guibault, *Auteurscontractenrecht: naar een wettelijke regeling?*, AMSTERDAM: INSTITUTE FOR INFORMATION LAW (IViR) 2004, available at [www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf](http://www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf).

63. As to the long preparatory work for the new legislation, see Ministerie van Veiligheid en Justitie, 12 June 2012, *Wetsvoorstel auteurscontractenrecht*, KAMERSTUKKEN II 2011/12, 33 308, in TIJDSCHRIFT VOOR AUTEURS-, MEDIA EN INFORMATIERECHT 23 (2013); B.J. Lenselink, *Auteurscontractenrecht 2.0 – Het wetsvoorstel inzake het auteurscontractenrecht*, 1 TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 7 (2013); E. Wybenga, *Ongebonden werk – Is de literaire sector gebaat bij het voorontwerp auteurscontractenrecht?*, 1 TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 41 (2011); D. Peeperkorn, *De lange geschiedenis van het auteurscontractenrecht*, TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 167 (2010); J.P. Poort & J.J.M. Theeuwes, *Prova d'Orchestra – Een economische analyse van het voorontwerp auteurscontractenrecht*,

a right of authors to receive a fair remuneration in exchange for the grant of an exploitation entitlement (regardless of whether the basis of this entitlement is a transfer of rights or a licensing agreement). The new right is set forth in Article 25c(1) of the Dutch Copyright Act (*Auteurswet*; Aw). As the Dutch legislator was alert to the difficulty of proving an insufficient level of remuneration in the absence of clear remuneration standards, Article 25c(2) Aw entitles the Dutch Minister of Education, Culture and Science to fix the level of fair remuneration with regard to a specific branch of the creative industry and for a particular period of time in an administrative regulation. However, this formal fixation mechanism can only be set in motion on joint request of a representative association of authors, and an individual exploiter or a representative association of exploiters in the sector concerned. The request must contain a joint recommendation that clearly describes the agreed level of fair remuneration and clearly demarcates the relevant branch of the creative industry (Article 25c(3) Aw).<sup>64</sup>

Regardless of this export success of the German model, the question remains how fair remuneration legislation could be rendered more effective in practice. A clearer definition of the underlying concept of fairness, a reversal of the burden of proof with regard to evidence of remuneration standards in a given sector, extra incentives for the creative industry to enter into collective negotiations with associations of authors and, as a last resort, the imposition of a legal obligation to establish common remuneration rules could be considered in this context. In the drafting process underlying the German legislation, a far-reaching obligation to accept common remuneration standards was contemplated by the legislator with regard to situations where the parties involved in negotiations, finally, could not reach agreement. A common remuneration rule could then also have been established in compulsory settlement procedures or through a court decision.<sup>65</sup> This proposal, however, was rejected because of fears that it would encroach upon fundamental freedoms of enterprises and business associations: in particular the general freedom of action and the negative freedom of not being obliged to enter into coalitions.<sup>66</sup> Legislation that imposes a *de facto* obligation to establish

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TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 137 (2010); M.R.F. Senftleben, *Exportschlager deutsches Urhebervertragsrecht? Het voorontwerp auteurscontractenrecht in Duits perspectief*, TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 146 (2010); H. Cohen Jehoram, *Komend auteurscontractenrecht*, INTELLECTUELE EIGENDOM EN RECLAMERECHT 303 (2008).

64. For a more detailed description of the new fair remuneration legislation in the Netherlands, see A.G.I. Terhorst, *Auteurscontractenrecht: er is een wettelijke regeling!*, TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 162, 162 (2015).

65. See Entwurf eines Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern', *Drucksache*, DEUTSCHER BUNDESTAG, June 26, 2001, 14/6433, 4 (§ 36(3), (5) to (8)) and p. 17; Kurzprotokoll der 14. Sitzung (öffentlich) der Enquete-Kommission DEUTSCHER BUNDESTAG, 'Kultur in Deutschland' 3 May 2004, , Protokoll Nr. 15/14, p. 13/4-13/5. (Ger.).

66. As to the guarantee of these freedoms in German constitutional law, see Articles 2(1) and 9 of GRUNDGESTEZ [GG] [Basic Law], translation available at <https://perma.cc/9RRF-3ZGW>.; Cf. H. Schack, *Neuregelung des Urhebervertragsrechts*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 453, 462 (2001). See also N.P. Flechsig/K. Hendricks, *Zivilprozessuales Schiedsverfahren zur Schließung urheberrechtlicher Gesamtverträge – Zweckmäßige Alternative oder Sackgasse?*, ZEITSCHRIFT FÜR

common remuneration rules thus seems excessive.<sup>67</sup> Recent proposals seeking to further improve the German system, however, include the clarification that a fair remuneration, in principle, requires more than a one-time “buy out” payment. Instead, the author should continuously receive a share of the revenue accruing from the exploitation of her work.<sup>68</sup>

More generally, antitrust concerns may affect the concept of negotiations between an association of authors and industry representatives. In § 36(1) UrhG, the German legislator entrusts associations of authors and exploiters with the task of fixing common remuneration standards. To this day, however, it is unclear whether this task assignment in the law itself is sufficient to dispel concerns about incompliance with antitrust legislation. Already during the drafting phase, the reliance on collective negotiations was criticized for encouraging cartel negotiations and being in conflict with E.U. competition law.<sup>69</sup> Nevertheless, E.U. competition authorities have refrained from measures against collective negotiations in Germany so far. Against this background, § 36 UrhG is believed to comply with E.U. antitrust standards.

Besides the inactivity of E.U. competition authorities, this assumption is based on the argument that individual authors often depend on the creative industry to the same extent as employees. Only formally, they have the status of self-employed freelancers with individual businesses. Therefore, negotiations on remuneration standards between associations of freelance authors and creative industry representatives are deemed not to be comparable with the formation of cartels in other cases where powerful businesses are on both sides. In addition, it is noted that common remuneration rules in the sense of § 36 UrhG only provide general guidelines for determining a fair level of remuneration. They do not readily fix the individual remuneration due to the author. As explained by Adolf Dietz,

[t]he legal effect of common remuneration rules, namely the irrefutable assumption based on § 32(2), first sentence, that a remuneration complying with the rules is fair, does not consist of a mutual obligation to apply the rules in contracts. By contrast, their legal effect follows from the law itself. Common remuneration rules are collectively developed remuneration standards but not remuneration agreements. In the sense of antitrust law, they are thus to be regarded as an aliud.<sup>70</sup>

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URHEBER- UND MEDIENRECHT 721 (2001) (for an assessment of the pros and cons of a formal settlement procedure).

67. For a detailed discussion of this point, see Spindler, *supra* note 53, at 925–28.

68. Cf. K.N. Peifer, *Der Referentenentwurf zum Urhebervertragsrecht*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 6, 8 (2016); J. Kreile and E. Schley, *Reform der Reform – Wie viel vom Kölner und Münchner Entwurf steckt im Referentenentwurf zum Urhebervertragsrecht?*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 837, 837 (2015).

69. See M. Schmitt, *§ 36 UrhG – Gemeinsame Vergütungsregelungen europäisch gesehen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 294, 295–96 (2003); H. Schack, *Urhebervertragsrecht im Meinungsstreit*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 853, 857 (2002).

70. See Dietz, *supra* note 45, at 473 (emphasis in the original text, translation by the author). Cf. B. Schlink & R. Poscher, *Verfassungsfragen der Reform des Urhebervertragsrechts*, Study Commissioned by the Deutsche Journalisten-Verband (DJV) and the Vereinte



Depending on the position taken in the debate on compliance with antitrust standards, the German system for the establishment of common remuneration rules may thus also appear problematic from the perspective of competition law. Therefore, copyright legislation seeking to improve the income situation of creators should not exclusively rely on the recognition of a right to fair remuneration. On its merits, this legislative measure rests on the vague hope that agreements on appropriate remuneration standards will evolve from negotiations between authors and the creative industry, and that these standards will survive further scrutiny in the light of antitrust standards. Given these unpredictable factors, additional instruments seem necessary to ensure that authors receive a fair monetary reward for their creative work.

While a general right to fair remuneration *ex ante* may be of particular importance to authors whose works are likely to be commercially successful in the marketplace, the difficulty of providing evidence for a certain level of standard remuneration in a specific field of creativity is likely to constitute an almost insurmountable hurdle for less successful authors (at least as long as no binding common remuneration rule has been adopted in the sector concerned). To improve the income situation of these latter authors, a remuneration concept presupposing the existence of a customary level of fair remuneration seems inapt. In addition, authors may fear negative reactions in the creative sector concerned when they insist on the right to fair remuneration. Facing a relatively small circle of investors and producers, a creator may be concerned about seeing her name being added to a “black list” of persons with whom exploiters do not want to work because of past disputes about insufficient remuneration.

## B. FAIR REMUNERATION EX POST

Once a work has success, however, the author may have a particular interest in a remuneration rule that ensures fair profit sharing *ex post*. If the work becomes successful in the market to such an extent that the remuneration originally received appears disproportionately low, an *ex post* remuneration rule ensures that the author can demand an adjustment of the contract in the light of changed circumstances. Again, copyright legislation in Germany can serve as an example in this context. Prior to the introduction of the above-described 2002 Act on Copyright Contract Law, the German Copyright Act already contained a safeguard against a contractual remuneration scheme that turned out to be disproportionate in the course of a work’s exploitation: the so-called “bestseller clause” was regarded as an important addition to the general rule on *imprévision* in the German Civil Code. It softened the requirement that new circumstances justifying an adjustment of the remuneration had to be unforeseeable for contracting parties at the time of concluding the exploitation contract. The strict application of this requirement had

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Dienstleistungsgewerkschaft (ver.di), Munich: DJV/ver.di 2002. For a more cautious assessment, see J.B. Nordemann, *Urhebervertragsrecht und neues Kartellrecht gem. 81 EG und § 1 GWB, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* 203, 210 (2007) (underlining the need to monitor the impact of common remuneration rules on the practice of concluding exploitation contracts).

rendered the general *imprévision* rule in the German Civil Code ineffective in many copyright cases.<sup>71</sup> Against this background, the traditional bestseller clause in the German copyright system was based on an alternative threshold for requesting an adjustment of the remuneration: a showing of “gross” disproportionality. This condition was deemed to be fulfilled when the honorarium received by the author amounted to only one-third of what would have constituted a usual royalty revenue when taking into account the work’s success.<sup>72</sup>

In the 2002 Act on Copyright Contract Law, the German legislator replaced this bestseller clause with a more elastic “fairness clause.” In § 32a(1) UrhG, it was stated explicitly that this new fairness clause could be invoked regardless of whether the parties could have foreseen the disproportionality between remuneration and revenue when entering into the exploitation contract. The condition of “gross” disproportionality was attenuated by setting forth a threshold of “striking” disproportionality instead. In the official materials accompanying the 2002 Act, the German legislator explained that this new requirement could be deemed to be met when the author had received a honorarium amounting to less than half of the income that would have been fair considering the work’s success.<sup>73</sup> The German Federal Court of Justice took this fifty-percent-rule from the legislative history as a starting point. In the decision *Fluch der Karibik*, the Court stated that, in any case, there was a striking disproportionality if the contractually agreed remuneration reached only half of the remuneration that would have been fair. The Court added that in light of the individual circumstances of the relationship between the creator and the exploiter, a smaller deviation from the fair remuneration standard could be sufficient as well.<sup>74</sup> The ruling thus leaves the door open for a more flexible application of the fairness clause in favor of creators. In literature, it has been argued that even a deviation of twenty percent may already be sufficient to assume a striking disproportionality.<sup>75</sup>

As the traditional bestseller clause, the new fairness clause covers all kinds of contracts awarding exploitation entitlements. Its scope of application ranges from transfers and exclusive licenses to non-exclusive licenses and specific permissions

71. For instance, see Bundesgerichtshof [BGH], [Federal Court of Justice], “Horoskop-Kalender”, in *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* 901, 902 (1991); Bundesgerichtshof [BGH], [Federal Court of Justice], 22 January 1998, case I ZR 189/95, *Comic-Übersetzungen*, in *ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT* 497, 502 (1998).

72. See Bundesgerichtshof [BGH], [Federal Court of Justice], “Horoskop-Kalender”, in *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* 901, 903 (1991).

73. Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern – Beschlussempfehlung und Bericht des Rechtsausschusses, Deutscher Bundestag, 23 January 2002, s. Drucksache 14/8058, 19.

74. Bundesgerichtshof [BGH], [Federal Court of Justice], May 21, 2012, I ZR 145/11, *Fluch der Karibik*, in *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* 1248 (2012).

75. Cf. overview provided by G. Schulze, §32a – *Auffälliges Missverhältnis*, in T. DREIER & G. SCHULZE, *URHG – KOMMENTAR* 716-717 (5th ed., 2015). As to the practical difficulties of court procedures seeking to clarify the fairness of the remuneration received by the authors under the new fairness clause, see N. Reber, *Der “Fairnessparagraf”*, § 32a UrhG, *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT – INTERNATIONALER TEIL* 708, 709 (2010).

of use, such as permission to translate or adapt a work.<sup>76</sup> Moreover, the new provision makes it clear that in the case of a license chain, the author can assert the right to *ex post* adjustment of the remuneration against every license holder (§ 32a(2) UrhG). It is thus irrelevant whether a licensee was involved in the original honorarium negotiations and received the exploitation entitlement directly from the author. In 2015, the Dutch legislator also opted for an *ex post* fair remuneration rule allowing authors to insist on additional remuneration in case a “serious” disproportionality arises in light of the revenue accruing from the work’s exploitation (Article 25d(1) Aw). However, Dutch courts have not had the opportunity to clarify the threshold requirement of serious disproportionality yet.

Arguably, the *ex post* adjustment measures in Germany and the Netherlands are more effective than attempts to secure a fair remuneration *ex ante*—at a stage where a work’s exploitation has not yet started. Support for *ex post* remuneration mechanisms can also be found in international copyright law. The optional *droit de suite* recognized in Art. 14*ter*(1) of the Berne Convention for the Protection of Literary and Artistic Works grants the author and her heirs an interest in any sale of original works of art and original manuscripts subsequent to the work’s first transfer. As bestseller and fairness legislation seeking to ensure an additional income in case of disproportionality between initial remuneration and later revenues, this international provision aims to ensure that the author receives a share of profits accruing from a work’s successful exploitation at a later stage.

A final aspect of the debate on *ex post* remuneration rules concerns the cross-financing of productions. When *ex post* measures are taken to adjust the remuneration in the case of works having huge market success, exploiters may warn of shrinking budgets for the financing of less successful productions. The income from bestsellers, so runs the argument, is needed to compensate for the losses stemming from unsuccessful works. If the creative industry must share profits accruing from bestsellers with the creators, the potential of bestseller productions for levelling out losses resulting from investment in commercially insecure productions is reduced. This may limit the willingness of the creative industry to invest in unorthodox works of unknown artists. If it was true that the creative industry used the income from successful productions to finance less promising productions, *ex post* adjustments of revenue streams leading to a higher income for creators might have the effect of reducing the budget available for less secure productions of unknown authors.

In the absence of an economic analysis confirming this alleged interdependence of investment decisions, however, it cannot readily be assumed that the alleged cross-financing of productions is taking place, and that it would be frustrated by *ex post* adjustments of remuneration schemes for bestsellers. These *ex post* adjustments would only occur when a work’s market success has not already been factored into the equation at the time of concluding the exploitation contract. Once a creator is known as a bestseller author, she will have the bargaining power

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76. See G. Schulze, §32a – Auffälliges Missverhältnis, in T. DREIER & G. SCHULZE, URHG – KOMMENTAR 712 (5th ed. 2015).

necessary to negotiate an adequate remuneration in the initial exploitation contract. Hence, *ex post* adjustments only impact the calculations of the creative industry in case a work was not expected to have outstanding commercial success so that the creator had limited bargaining power. Even if the alleged practice of cross-financing exists, it is thus unclear whether these exceptional cases would minimize industry profits to such an extent that the alleged subsidizing of insecure productions becomes unfeasible.

### C. OTHER FAIR REMUNERATION MEASURES

In the Netherlands, the discussion on legislation ensuring a proper remuneration of authors shed light on a potential further measure to ensure a fair remuneration of authors. In a preliminary proposal for new legislation, the Dutch Ministry of Justice had proposed the partitioning of a work's exploitation period into intervals of five years. Every five years, the exploitation rights would return to the author who could then grant them anew. The rationale underlying this proposal was the hope that this would give the author the opportunity to renegotiate exploitation contracts and adapt them to changing circumstances every five years. Instead of strengthening the position of authors, however, this proposal is likely to have a corrosive effect in practice. If the maximum period of exploitation which an author can offer at the beginning of a work's exploitation is only five years, the creative industry will only pay for an exploitation horizon of five years. If the work does not have enough success to offer promising exploitation prospects for a second five-year term, the author will have difficulty finding another exploiter willing to pay for a further five-year period. She may thus see her reward for the work being reduced to a single payment for an exploitation period of five years instead of receiving a payment for the entire term of copyright.

Legislators considering a rule of fixed exploitation intervals would thus have to ensure that the initial period of exclusivity which an author can offer is long enough to cover the entire exploitation horizon and amortization period underlying the investment decision of the creative industry concerned.<sup>77</sup> Otherwise, such legislation will only shift the risk of market success from exploiters to authors. The result would be a weakening of the position of authors not creating bestsellers and a lower income for works that do not become evergreens. Against this background,

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77. See the risk assessment by Poort & Theeuwes, *supra* note 63, at 142-43, who point out that the partitioning of the exploitation period in five-year intervals is unlikely to be beneficial for the majority of authors. Only successful authors may be able to increase their income. Countries presently providing for a right to reclaim copyright after a given period of time, such as the U.S. (Section 203 of the U.S. Copyright Act provides for a rights return after thirty-five years), provide for much longer periods. For a discussion of the historical evolution of the U.S. system, see L. Bently & J. Ginsburg, *The Sole Right ... Shall Return to the Authors: Anglo-American Authors' Reversion Rights From the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECHNOLOGY LAW JOURNAL 1475-587 (2010). With regard to a proposal of rights returning to the author after thirty years which was tabled in the framework of the debate about the strengthening of the position of authors in Germany, see H. Schack, *Neuregelung des Urhebervertragsrechts*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 453, 460 (2001).

it is doubtful whether fixed exploitation intervals are an effective tool to ensure a fair remuneration of creators.

### III. CONCLUSION

For lawmakers aiming at appropriate remuneration mechanisms for individual creators, the debate on fair remuneration in Germany and the Netherlands yields important guidelines. In particular, exploitation contracts offering authors a revenue share seem more desirable than fixed one-time honoraria in “buy out” contracts. A remuneration scheme ensuring a continuous royalty stream reduces the risk of disproportionality between remuneration and revenue from the outset. As a legislative measure, it is thus advisable to encourage remuneration in the form of royalty percentages and discourage agreements based on lump sum honoraria as the only form of remuneration.

Considering the advantages of remuneration in the form of royalty percentages, the *ex post* remuneration rules—bestseller clauses—that have been adopted in Germany and the Netherlands are of particular importance. They encourage the creative industry to give authors an appropriate share of the royalties accruing from a work’s continuous exploitation. Otherwise, the exploiter of a work remains exposed to the risk of a disproportionately low remuneration and an *ex post* remuneration claim. Viewed from this perspective, Article 15 of the proposed E.U. Directive on Copyright in the Digital Single Market<sup>78</sup> constitutes an important first step in the right direction. It would lead to a harmonized bestseller clause—and the option of *ex post* fair remuneration claims—in the E.U.

The development of effective *ex ante* remuneration rules, however, remains a particularly difficult task. The German and Dutch systems of voluntary negotiations about common remuneration rules only had limited success so far. Regardless of the formal recognition of a right to fair remuneration in contracts about the exploitation of a work, it thus remains an open question how this kind of fair remuneration legislation could be rendered more effective in practice. A clearer statutory definition of the underlying concept of fairness, a reversal of the burden of proof with regard to evidence of remuneration standards in a given sector, and extra incentives for the creative industry to enter into collective negotiations with associations of authors could be considered in this context. Antitrust concerns and the risk of an encroachment upon the fundamental freedom of coalition, however, pose obstacles to the adoption of the most effective (and most intrusive) legislative measure: the imposition of a legal obligation on the creative industry to establish binding common remuneration rules in negotiations with representative associations of authors and performers.

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78. Proposal for a Directive on Copyright in the Digital Single Market, *supra* note 4. Cf. Section I above.