Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity vs. other approaches

GERMAN REPORT

Prepared by Claudius Pflüger, and (for parts B. 1. B. 3.) Victor Struppler

A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement cannot be concluded in the first place and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law)?

i. Offering of hyperlinks to works

According to case law, the offering of hyperlinks of works does not constitute making available under § 19a UrhG (Act on Author's Rights and Related Rights) because the mere setting of a hyperlink is not sufficient to make a work publicly available or to aid and abet thereto.[1]

ii. Offering of deep links to works

Offering of deep links to works is not covered by German copyright law, see i.

iii. Framing/embedding of works

Framing and embedding of works is not covered by German copyright law, as the CJEU (C-348/13) decided upon a request for a preliminary ruling of the German Federal Supreme Court (BGH). In its question referred to the court, [2] *the BGH initially disagreed with the aforementioned result and wanted to maintain its position. Accordingly, (with decision of 10/April/2014 - I ZR 46/12) the BGH maintained the question for preliminary ruling submitted to the CJEU by decision of 13 May 2013. The CJEU decided in the case "BestWater International GmbH"(C 348/13) on 21/October/2014. This decision has been criticized in Germany. The BGH hearing is scheduled for 9/July/2015.*[3]

iv. Streaming of works

The classification of streaming is not yet settled in detail. While on-demand-streaming is argued to be covered by § 19a UrhG (Making available to the public), live-streaming is argued to be covered by §20 UrhG (Right of Broadcasting).[4]

Collective management organizations (CMOs) have put certain streaming-tariffs in place. [5]

---

[1] Cf. BGH GRUR 2003, 958, 962 – *Paperboy;* concerning aspects of fundamental rights in the framework of § 95a UrhG, see also BGH GRUR 2011, 513 – *AnyDVD*. With regard to the international and European legal situation, see also ALAI, Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet, http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf.

[2] BGH GRUR 2013, 818 – *Die Realität*.

[3] http://www.bundesgerichtshof.de/DE/Presse/Terminhinweise/terminhinweise_node.html.

[4] Cf. *Bullinger* in Wandtke/Bullinger, 4th ed, § 19 a, para 34 und § 20, para 4.

[5] Cf. e.g. GEMA Tarif Vergütungssätze VR-W I (collective remuneration agreement). https://www.gema.de/fileadmin/.../Tarife/Tarife.../tarif_vr_w_i.pdf. and OLG (Higher Regional Court); Hamburg, GRUR-RR 2014, 136.

v. Download of works

The term "download" is not defined in German copyright law. Here, it is understood as only referring to the reproduction/copy of the work rather than to the transmission. A copy is regularly regarded as a form of material reproduction of the work according to § 16 UrhG.[6]

In contrast, simply looking at a work on the screen may be considered differently. Following the current CJEU's jurisprudence in C-360/13, "the copies on the user's computer screen and the copies in the internet 'cache' of that computer's hard disk, made by an end-user in the course of viewing a website, satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process, as well as the conditions laid down in Article 5(5) of that directive, and [that they] may therefore be made without the authorization of the copyright holders".[7]

vi. Upload of works

The term "upload" is not defined in German copyright law. Here, it is understood as only referring to the reproduction/copy of the work rather than to the transmission. A copy is regularly regarded as a form of material reproduction, which is covered by § 16 UrhG.[8]

vii. Supply of a platform for 'user-generated content'

The mere supply of a platform for ´user-generated content´ is not an act covered by authors' rights law. But it may trigger duties of verification, which, in turn, may lead to liability, based on authors' rights.[9]

viii. Other novel forms of use on the internet.

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

In principle, licensing agreements between right holders and third parties are possible, if a relevant act is covered by authors' rights is at stake – such as in the case of Youtube, the making available to the public.

For instance, between 2007 and 2009 there was an agreement between GEMA and Youtube concerning the remuneration for the use of protected musical works. Following the expiration of this agreement, GEMA and Youtube have been arguing in the framework of a legal dispute.

The legal dispute of this conflict is not yet resolved at final instance. According to GEMA (the relevant CMO), it has a right to remuneration on the basis of a license. Insofar as the involved rights are claimed

[6] BGH GRUR 2011, 418, 419 – *UsedSoft*.
[7] CJEU C-360/13, para 63 – *Public Relations Consultants Association/Newspaper Licensing Agency*.
[8] OLG Düsseldorf MMR 2010, 702 – Rapidshare II; BGH GRUR 2010, 626, para 17 et seq. – *Vorschaubilder.*
[9] BGH I ZR 79/12 (GRUR 2014, 136) I ZR 80/12 und I ZR 85/12 – *Rapidshare.*

by a CMO, the CMO is subject to the obligation to contract. Upon request, the CMO therefore would have to grant Youtube the respective rights under appropriate conditions.[10]

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

   - for content providers

As content providers are liable according to the general principles (§ 7 TMG Telemediengesetz – German Telemedia Act), hence in compliance with § 97 et seq. UrhG, they are fully liable for their own content. This so-called content-provider-liability also applies when the provider adopts another person's content as his own, for example by verifying the accuracy of such content and by accepting the grant of comprehensive rights of use.[11]

Among others, the liability extends to injunction, removal and damages according to § 97 UrhG as well as to supply of information pursuant to § 101 UrhG. A necessary condition for the claim of damages is fault (intent or negligence); in this context, the standards for the avoidance of fault are strict. The user, for example, has to inquire in a complete and comprehensive manner about the required rights. On the contrary, an injunction or removal claim may be made irrespective of fault, from the date of knowledge or the obviousness of a violation of law on.

   - for host providers

A host-provider may be liable for damages due to an infringement of authors' rights (§§ 16, 19 a UrhG) under the "Störerhaftung" (Breach of Duty of Care) according to § 10 TMG, if he knows that users infringed the law, or if such infringements are obvious or if the host-provider does not prevent the infringements immediately after obtaining knowledge thereof. An infringement of law is obvious, if it has been detected by fulfilling the duties of verification. The scope and extent of these duties are determined on a case-by-case basis, with increased duties of verification if the "interferer's" (Störer) business model aims at infringements by users from the outset. Therefore, after having been instructed as to an evident infringement of law, a provider of a file-sharing-platform is obliged to undertake anything technically and economically possible in order to eliminate the respective infringement and to prevent similar infringements in the future.[12]

The situation is different if the platform provider adopts the content of his users as his own and therefore is considered as a content provider. In this case, liability as an offender applies without any legal particularities (see above).

The liability regardless of fault for injunction or removal applies in all cases, see § 7 (2) phr. 2 TMG, § 97 (1) UrhG.

---

[10] Cf. https://www.gema.de/aktuelles/youtube/.
[11] BGH GRUR 2010, 616 – *marions-kochbuch.de.*
[12] BGH GRUR 2013, 1030 – *File-Hosting-Dienst.*

On 12/ March/ 2015, the Ministry of Economic Affairs submitted a draft bill for the limitation of the "Störerhaftung" (Breach of Duty and Care) of WLAN operators.[13]

- for access providers

Access providers are not liable unless they initiate the data transmission, select the addressee, or select or change the transmitted data, § 8 (1) TMG.

- for others?

b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

See above under a).

4. In these cases of infringement, who has standing to sue:

- the author

The author alone has standing to sue unless he has transferred exclusive rights of use. If he has done so, he continues to have standing to sue on the basis of his moral right. Furthermore, he has standing to sue with regard to the rights of use kept by him.

However, also concerning transferred exclusive rights of use, the author continues to have standing to sue, if he has a personal interest in prosecution, which is worthy of protection – for instance, if he has a right to a share in the licensee's licensing revenues.

- the exclusive licensee

The holder of an exclusive right of use has standing to sue, provided that a violation of his exclusive right occurred.

- the non-exclusive licensee

The holder of a non-exclusive license has generally no standing to sue.

- the employer of the author

The standing to sue of the author's employer is dependent on the employer having or not having an exclusive right of use to the work. There are no particularities. Regularly however, he will enjoy an exclusive right of use as far as required by the business purpose.[14] *Where the employer enjoys a neighboring right, he may have standing to sue on the basis of this right.*

- the CMO that manages the exclusive right?

[13] Announcement with references under http://www.bmwi.de/DE/Presse/pressemitteilungen,did=695502.html and http://www.urheberrecht.org/news/p/1/i/5379/.

[14] BGH GRUR 2011, 56 – *Lärmschutzwand*; cf. also *Wandtke* in Wandtke/Bullinger, 4th ed 2014, § 43, para 73.

Collective management organizations have standing to sue dependent on the exclusive rights they exercise.

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

   - as a general rule for all kinds of contracts;

Yes.

Regarding the legal situation:

The fundamental idea of German copyright law is to equitably remunerate authors for the economic exploitation of their works.[15] This is explicitly laid down today in § 11 phr. 2 UrhG.[16] The principle attribution of the financial outcome of the creative effort to the author is protected by the fundamental right of property. This fundamental right also covers the author's freedom to have this financial outcome at his very own disposal at his own responsibility, as well as the entitlement to exploit the work economically on reasonable terms. This represents the constitutionally protected core of authors' rights.[17]

The UrhG provides rules for this purpose, on the one hand limiting the scope of the ***transfer of rights****, and on the other hand offering* ***claims to participation*** *within an (agreed) chain of rights.*

1. Scope of the transfer of rights

The starting point of the UrhG was the provision according to which the author would be economically protected by rights that would have the tendency to remain with him, so that, in the case of further

[15] Cf. BGHZ 11, 135, 143; BGHZ 17, 266, 282; BGHZ 141, 13, 35.

[16] **§ 11 UrhG** provides the general principle that the author's rights not only protect the author's intellectual and personal relationship to the work and the use of the work, but also serve to ensure an equitable remuneration for the use of the work.

[17] **BVerfG** (Bundesverfassungsgericht – Federal Constitutional Court), NJW 2014, 46 = GRUR 2014, 169 , para 87, with further references, and para 88:
The author's right to an equitable remuneration is also subject of guarantees in public international and European law. Already in Article 27 of the Universal Declaration of Human Rights, a claim for the protection of moral and economic interests of authors is embedded that result from their scientific, literary and artistic authorship.
The International Covenant on Economic, Social and Cultural Rights of 19/December/1966 (UNTS 993, p. 3, BGBl 1973 II p. 1570) includes in Article 15 (1) letter a) the right of everyone „to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". The Committee, which is responsible for the interpretation and application of the Covenant, derives therefrom the necessity to secure an reasonable standard of living for authors and an equitable remuneration for the use of intellectual property (cf. Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005), 35th session, UN Doc E/C.12/GC/17 (2006), para 23 et seq.). The necessity of an equitable remuneration is also mentioned in recital 10 of the Directive 2001/29/EC of the European Parliament and the European Council of 22/May/2001on the harmonization of certain aspects of copyright and related rights in the information society (OJ No. L 167 of 22/June/2011 p. 10).

exploitation, the author was entitled to negotiate about such rights that had remained with him. This corresponds to the longstanding jurisprudence, according to which an author is entitled to equitable remuneration for each act of use of his work, even if the use does not yield any immediate economic benefits;[18] *this jurisprudence was established by the „Reichsgericht" (German Federal Supreme Court until 1945) and continuously sustained by the BGH.*

§ 31 (5) UrhG, *the purpose of the contract envisaged by both parties determines the scope and extent of contractually granted exploitation rights, if the forms of exploitation have not been specifically designated. Exploitation rights tend to remain with the author so as to offer him further possibilities of exploitation, even though common practice is to grant comprehensive rights in a contract.*

§ 31 a UrhG *regulates the contractual grants of rights regarding unknown types of exploitation. This is accompanied by an independent statutory right to a separate equitable remuneration under §* ***32 c UrhG.***

§ 41 UrhG *provides for rights of revocation in case of the contractual partner's insufficient exercise of the rights of use. These revocation rights are accompanied by additional bases of claims; for instance claims on the basis of the „Verlagsgesetz" (VerlG) (German Publishing Law) or the „Bürgerliches Gesetzbuch" (BGB) (German Civil Code).*

§§ 88 et seq. UrhG *regulate the grant of rights within the field of films; however, they provide for a quite far-reaching presumption of grant.*

2. Remuneration

Claims based on copyright contract law *are applicable if rights have been granted.*

§ 11 UrhG *lays down as a general principle, that the authors' rights law serves to ensure an equitable remuneration for the use of the work (apart from the protection of the author's intellectual and personal relationship to the work and the use of the work).*

§ 32 UrhG *states (since 2002) the requirement of an equitable remuneration at the time of the conclusion of the agreement.*

*"In the amount agreed upon by contract, the author shall have a right to remuneration for the granting of exploitation rights and the permission to exploit a work. If the amount of the remuneration has not been determined, equitable remuneration shall be deemed to have been agreed upon. If the agreed remuneration is not equitable, the author may require the contractual partner to consent to a modification of the agreement so that equitable remuneration is granted to the author" (****§ 32 (1) UrhG).***

*"A remuneration shall be equitable if determined in accordance with a common rule on remuneration (§ 36). Furthermore, remuneration shall be equitable, if, at the time of the conclusion of the contract, it conforms to the customary and fair remuneration paid in the framework of the respective business relations and given the nature and extent of the permission for the exploitation granted, in particular the duration and time of exploitation, and in due consideration of all circumstances". (****§ 32 (2) UrhG).***

[18] E.g. BGHZ 11, 135/143 – *Lautsprecherübertragung;* BGH GRUR 1974, 786/787 – *Kassettenfilm*; BGH GRUR 1976, 382/383 – *Kaviar*; in particular also BGHZ 17, 266/282 – *Grundig-Reporter*; most recently BGH GRUR 1995, 673/675 – *Mauer-Bilder*; cf. also BT-Drucks. 14/6433, p. 10 – legislative proposal regarding contractual law provisions for authors' rights.

*"The other contractual partner may not rely on any agreement deviating from paragraphs 1 and 2 to the detriment of the author. The provisions referred to in sentence 1 shall also apply if they are circumvented by other configurations. The author may, however, grant a non-exclusive exploitation right to anyone free of charge." (**§ 32 (3) UrhG).***

*"The author shall not have any right under paragraph 1, third sentence, to the extent that the remuneration for exploitation of his works has been determined in a collective bargaining agreement" (**§ 32 (4) UrhG).***

*§ 32 UrhG is constitutional[19] and compelling (**§ 32 b UrhG**).*

§§ 32 and 32 a UrhG (which will subsequently be illustrated under the question on „bestseller situations", see p. 10 below) are applicable in parallel.

***Apart from these individual claims, § 36 UrhG[20]** regulates the requirements for the establishment of common rules on remuneration. **§ 36 a UrhG[21]** provides for an arbitration board. The rules on remuneration irrefutably substantiate the meaning of an "equitable remuneration" within the meaning of §§ 32, 32 a UrhG, as far as no prevailing, collective bargaining agreement (with trade unions) exists. The legislator intended to leave the binding answer to this question of an equitable remuneration to the discretion of the involved parties of each branch of authors.*

§ 36 Common rules on remuneration

(1) In order to determine whether remuneration pursuant to § 32 is equitable, authors' associations together with associations of exploitation businesses of works or individual exploitation businesses of works shall establish common rules on remuneration. The common rules on remuneration shall take into account the circumstances of the respective field of regulation, especially the structure and size of the exploitation business. Provisions contained in collective bargaining agreements shall prevail over common rules on remuneration.

(2) Associations as referred to under paragraph (1) have to be representative, independent and empowered to establish common rules on remuneration.

(3) Proceedings for the establishment of common rules on remuneration at the arbitration board (§ 36 a) shall be conducted if the parties agree thereon. The proceedings are conducted at the written request of one of the parties, if

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

2. negotiations on common rules on remuneration do not lead to any result within one year following the written request to initiate such negotiations or

3. one of the parties declares that the negotiations have definitely failed.

---

[19] BVerfG, 1 BvR 1842/11 of 23/October/2013, paras 1 - 115, NJW 2014, 46 = GRUR 2014, 169; http://www.bverfg.de/entscheidungen/rs20131023_1bvr184211.html.

[20] Until 2002, § 36 UrhG (former version) was called „bestseller paragraph". It corresponded under former terms to § 32 a UrhG. The reform of contractual law provisions for authors' rights law was to lower this barrier.

[21] http://dejure.org/gesetze/UrhG/36a.html.

(4) The arbitration board shall present to the parties a well-founded settlement proposal containing the contents of the common rules on remuneration. The proposal shall be deemed to have been accepted, if no written objection thereto has been made within three months of the receipt of such proposal.

***§ 43 UrhG** makes these provisions also applicable to authors being party of an employment contract or contract for services.*

***§ 79 (2) UrhG** establishes the right to equitable remuneration also for performing artists (since 2002) by referring to the previous provisions.*

In addition, for some time, collective agreements[22] have been existing and regulating authors' rights including remuneration rights. Sometimes, courts use them as yardstick for defining what is "customary" in respect of the determination of "equitable remuneration" in the frame of individual claims.

Regarding Case Law

Because of the lack of a right for associations to initiate proceedings and the impossibility to consider the above provisions within a judicial control of general terms and conditions (AGB-Kontrolle),[23] individual right owners have brought a number of lawsuits,[24] e.g. authors, screenplay writers, translators, photographers, designers, camera men, and voice actors. However, these proceedings are time-consuming and frequently result in a situation where these authors will no longer be offered work. Therefore many authors are hesitant to file such a suit.

When determining the equitable remuneration (as far as there are no remuneration rules or collective agreements) the courts criticize the low degree of precision of the statutory provisions of § 32 (2) phr. 2 UrhG. Accordingly, for a remuneration to be equitable it matters what a customary and fair remuneration is in consideration of all circumstances. Even if a particular remuneration is customary within the respective industry, it is not necessarily also fair.[25] Only if the authors' interests and the users' interests are equally taken into account, the remuneration will be fair[26].

In general, authors' interests are sufficiently looked after only if authors will participate adequately in every economic use of their works. Therefore, in cases of a continuous usage of the work, remuneration linked to the frequency of use best suits this principle of participation ("Beteiligungsgrundsatz"). However, in such cases also a fixed remuneration or lump sum may be adequate, provided that such remuneration ensures an equitable participation in the expected total revenues of the use (from an objective point of view at the time of the conclusion of the contract). Under the latter conditions also a combination of a fixed remuneration/lump sum and a success-related remuneration may be adequate and within this model, an interaction between both elements of remuneration exists so that a higher fixed remuneration/lump sum can compensate a lower success-related remuneration and vice versa[27].

The equitable remuneration has to be determined according to reasonable discretion. Usually this will mean that the author has to participate adequately in the revenues and advantages from the use of

---

[22] Cf. also Schimmel, ZUM 2010, 95, 98.
[23] BGH, GRUR 2012, 1031 – *Honorarbedingungen Freie Journalisten.*
[24] For reference, see http://dejure.org/dienste/lex/UrhG/32/1.html.
[25] Already BGH, decision of 13 December 2001 – I ZR 44/99, GRUR 2002, 602, 604 = WRP 2002, 715 – *Musik-fragmente.*
[26] BGH, GRUR 2009, 1148, para 22 with further references.- *Talking to Addison*
[27] BGH, GRUR 2009, 1148, paras 23 et seq.– *Talking to Addison*,

his/her work. In determining the adequate participation, it is possible to use, as a standard of comparison, remuneration that has been paid according to fair practice within the same industry or within different industries for comparable usages of works[28]*.*

Besides, common rules of remuneration, which are agreed on very slowly, are intensely litigated[29]*.*

- as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);

Yes.

I. Regarding the legal situation

The relevant legal provisions regarding "best-seller" situations were/are:

- *Before 2002: § 36 UrhG (former version)*
- *After 2002: § 32 a UrhG (new version) (and intersections*[30]*) as well as § 313 BGB (frustration of contract – "Störung der Geschäftsgrundlage") as far as they are not overruled by special rules.*

Pursuant to § 32 a (1) UrhG ("Fairnessausgleich"), which replaced § 36 (1) UrhG (former version) ("Bestsellerparagraph"), the author who has granted another party an exploitation right on terms that cause the consideration agreed upon (taking into account the entire relationship between the author and the other party) to be markedly out of proportion to the proceeds and benefits arising from the exploitation of work, may request the other party's consent to amend the contract, granting to the author a further participation which is appropriate under the circumstances. Whether the contradicting parties foresaw the amount of the proceeds or benefits obtained or could have done so shall be irrelevant according to § 32 (1) phr. 2 UrhG.

If the exploitation rights holder has transferred the exploitation rights or granted further exploitation rights to another party and if the significant discrepancy arises from the proceeds or benefits of a third party, the third party shall be directly liable to the author according to paragraph 1 and in consideration of the contractual relationships within the license chain[31]*. The other contracting party shall not be liable* ***(§ 32 a (2) UrhG).***

Claims as referred to in paragraphs 1 and 2 may not be waived in advance. The expectancy of the claims shall not be subject to execution. Any disposal of the expectancy shall be invalid. However, the author may grant a non-exclusive exploitation right to everyone free of charge ***(§ 32 a (3) UrhG).***

The author shall have no claim under paragraph 1 if the remuneration has been determined according to common rules on remuneration (§ 36) or by a collective bargaining agreement and if further appropriate participation is expressly stipulated for the case referred to in paragraph 1 ***(§ 32 (4) UrhG).***

§ 32 a UrhG shall be applied mutatis mutandis to the rights of a performing artist ***(§ 79 (2) phr. 2 UrhG).***

---

[28] BGH, GRUR 2009, 1148 – *Talking to Addison*, para 33, with further references.
[29] For reference see http://dejure.org/dienste/lex/UrhG/36/1.html.
[30] Cf. BGH GRUR 2012, 496 – *Das Boot.*
[31] BGH, GRUR 2012, 1248, para 38 – *Fluch der Karibik.*

If verifiable facts provide for concrete indications regarding a claim on the basis of § 32 a (1) UrhG, the author may request the disclosure of information (§ 242 BGB) and, when necessary, financial accounting (§ 259 (1) BGB) in order to determine the further conditions of this claim and to calculate the remuneration to be paid[32].

In order to answer the question of whether the consideration agreed upon is markedly out of proportion to the proceeds and benefits arising from the exploitation of the work for the third party, it is firstly necessary to ascertain the remuneration agreed upon by the author and the third party's obtained proceeds and benefits. Thereafter, one has to determine from an ex post perspective the remuneration that must be equitable, particularly with regard to the proceeds and benefits under § 32 (2) phr. 2 UrhG. And finally, the agreed remuneration has to be compared to the aforementioned equitable remuneration, in order to find out whether it is markedly out of proportion[33] as to the proceeds and benefits. A significant discrepancy exists in any case if the agreed remuneration only is half of the equitable remuneration. Given that all the relations of the author to the other party have to be considered, also lower deviations may cause a significant discrepancy, according to the particular circumstances of the case[34].

In part, doctrine considers even less than 20-30% of the equitable remuneration as being markedly out of proportion[35].

II. Regarding Case Law

Please see references in the paragraphs above[36].

- in the case of oppressive contracts;

If the remuneration is inappropriate, § 32 UrhG will be relevant. Moreover § 32 a UrhG is applicable under the particular conditions of the provision.

Upon further circumstances that cause a contract to be immoral (Sittenwidrigkeit), for example because of a significant discrepancy between performance and consideration, the contract has to be considered according to general civil law rules (§ 138 BGB)[37]. In extreme cases this will lead to the invalidity of the contract. In such cases, again an equitable remuneration has to be paid for the previous use, either on the basis of provisions on unjust enrichment (§§ 812 et seq. BGB) – if only the obligation agreement (Verpflichtungsgeschäft) was invalid – or by way of compensation for damages, calculated according to the licence analogy method, pursuant to § 97 UrhG, if also the material transaction agreement (Verfügungsgeschäft) was invalid.

- in other cases:

[32] BGH GRUR 2012, 496, paras 11 et seq. – *Das Boot.*
[33] Cf. BGH, GRUR 2012, 496 paras 25 and 40 – *Das Boot.*
[34] BGH GRUR 2012, 1248 et seq., para 55 – *Fluch der Karibik*.
[35] *Wandtke/Grunert* in Wandtke/Bullinger, 4th ed 2014, § 32a, para 20, with further references.
[36] For special references, see http://dejure.org/gesetze/UrhG/32a.html#Rspr, concerning the former version: http://dejure.org/gesetze/UrhG/36.html#Rspr.
[37] *Schack,* Urheber- und Urhebervertragsrecht, 6th ed 2013, para 1084; cf. also BVerfG GRUR 2005, 880, 882 – *Xavier Naidoo*; BGH GRUR 1989, 198 – *Künstlerverträge.*

§ 20b (2) UrhG provides a statutory remuneration right of the author for cable retransmission according to the model of Article 4 Directive 92/100/EEC (Rental and Lending Rights Directive), and thus after the author has granted his exclusive right to a broadcasting organization, a phonogram producer, or a film producer. It applies mutatis mutandis to performing artists (§ 78 (4) UrhG).

The addressee of the right to an equitable remuneration arising from § 20 b (2) UrhG is the person who actually carries out the cable retransmission (cable distributor). A necessary condition for the application of the remuneration right is that the author has granted the right to cable retransmission to a broadcasting organization or a producer of sound recordings or films.

Furthermore, § 27 (1) UrhG provides an equitable remuneration for rental in line with the same model of Article 4 Directive 92/100/EEC (Rental and Lending Rights Directive).

Accordingly, the author enjoys a right of equitable remuneration against the hirer-out if the author has granted a producer of sound recordings or films the exclusive rental right (§ 17 UrhG). The claim directly addresses the hirer-out. Hiring out as referred to in § 17 (3) 1 UrhG is the permission for use for a limited period of time, which directly or indirectly serves profit-making purposes. The right under § 27 (1) UrhG was introduced by the implementation of the Directive 92/100/EEC in 1995.[38]

§ 79 a UrhG provides additional remuneration rights for performing artists against the producer of sound recordings according to Article 3 (2b) – (2e) Term of Protection Directive as amended by Directive 2011/77. Apart from that, the right under § 27 (1) UrhG applies also to performing artists, § 77 (2) phr. 2 UrhG.

The right under § 79 a UrhG is relevant for buyout contracts and provides for additional remuneration in favor of performing artists and for the use of sound recording between the 50th and the 70th year of the protection period. The law differentiates between a performing artist having granted the exploitation rights to the producer of sound recordings in return either for a single or for a recurring remuneration. If a single remuneration payment was agreed to, the producer of sound recordings has to pay to the performing artist 20% of the proceeds, § 79 a (1) phr. 1 UrhG. If a recurrent remuneration was agreed to, advance payments and contractual deductions may not be subtracted from the remuneration (§ 79 a (5) UrhG). The background of this provisions is the prolongation of the protection period within the framework of Directive 2011/77/EU, which entered into force in Germany in 2013.[39]

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

No, in general only the equitableness of the remuneration is determined, see above, B.1.

In the particular case of remuneration rights of performing artists against the producer of sound recordings arising during the prolonged protection period, however, § 79 a (1) UrhG directly determines the percentage to be paid, see above B.1.

[38] *Dreier/Schulze,* UrhG, 2013, § 27 UrhG, para 1.
[39] Stang in Beck'scher Onlinekommentar Urheberrecht, 2014, §79a, paras 1 et seq.

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

It is not easy to answer the question whether the rules mentioned in B.1 are efficient. One always has to consider that the contractual parity of authors is constantly fading, when the market concentration of exploitation businesses is increasing and the authors' remuneration (nominal and especially inflation-adjusted) is decreasing. As it is unknown what the situation would be like without the existing legal provisions, a general statement can barely be made. For instance, while the remuneration rules for authors were introduced in order to countervail a (specific, significant) decline of the remuneration, the authors' and performing artists' situations are still precarious; this also has been realized by the German legislator, which thus plans to undertake a general review of these rules. However, the particular rights to equitable remuneration explained under B.1 at the end above ("in other cases") are successfully working in practice.

I. Individual agreements

To secure an equitable remuneration at the time of the conclusion of the agreement ("ex ante") meets resistance because this would restrict the market power of the exploitation businesses in general and also "abstractly" in advance (thus without having knowledge of the actual acts of exploitation and revenues). Exploitation businesses, even those within the same industry but with different profiles (e.g. hardcover-books publisher vs. paperback-books publisher), object that they need to be treated unequally because of economic reasons. This however, would lead to a 'fragmentation' of the equitable remuneration. Consequently, each procedure has to be discussed anew and on an overall basis; the efforts and cost are beyond what is bearable for most authors.

In particular cases, courts, exploitation business, and authors are barely able to determine an equitable remuneration retrospectively. Courts criticize that they did not have enough concrete criteria for a proper decisions. In the end, they have to determine prices, which necessitates not only defining the objective but also the equitable or "fair" price of performance and consideration on the sole basis of the contractual transfer of rights.

To secure a success-related participation is problematic for the mere reason that the remuneration, which is "abstractly" equitable under § 32 UrhG at the time of the conclusion of the agreement, serves as a starting point but is difficult to determine (see above). Often, questions of limitation periods are discussed since a certain period of time will go by until the success will be visible. Though, in comparison to the previous situation, the situation improved from the authors' perspective (an unexpected success is no longer a precondition; a significant discrepancy is sufficient and also performing artists benefit).

The claims are subject to a short limitation. According to the systematic interpretation it is argued that statute-barred claims to achieve contractual amendments cannot revive and that consequently no further remuneration rights may result from the thus not amended contract.

II. Other aspects

1. Common Remuneration Rules

The establishment of common remuneration rules occurs very slowly. Until 2010, i.e., eight years after the long discussed reform, only common remuneration rules for certain kinds of writers existed (2005). Most recently, some remuneration rules in the areas of film and commissioned broadcasts were established. But partly they already were cancelled one year after their introduction.

Even if common remuneration rules were established, they are not always respected throughout the relevant, entire industry. Currently, for instance, book publishers argue that the common remuneration rules for translators ("Gemeinsamen Vergütungsregeln für Übersetzer"), which were established in 2014, only concern certain publishers for hardcover books. These publishers also do not comply with the minimum standard for an equitable remuneration as stipulated by the BGH, but refer to their room to manoeuvre. It was similar in the area of journalism.[40]

As associations do not have standing to sue ("Verbandsklagerecht"), the authors have to claim their rights individually, if they wish to invoke an equitable remuneration according to a remuneration rule and thus give a chance for remuneration rules or requirements set by the court to prevail. However, they then run the risk of losing their economic existence. It is difficult to obtain equal treatment and legal certainty.

2. The Market

In addition to that, exploitation businesses argue that they cannot allocate the higher costs to the consumer due to pricing pressure. In fact, any exploitation business that first introduces such a change would bear an increased pricing competition or would be confronted with its colleagues' hostility, in the case of the establishment of equitable remuneration rules.

From the author's point of view there are similar problems. The remuneration rules are binding for individual authors although they might not be appropriate in every individual case. The irrefutable determination of an equitable remuneration will also lead to disputes on distribution within the respective groups of authors. Even if most of the remuneration rules highlight their intention to establish a minimum standard only, they in fact narrow the margin of negotiation to the detriment of authors with strong bargaining powers.

In some industries, where many authors are involved, e.g. in the area of film, the different groups of authors are even divided about the distribution amongst themselves (as are sometimes also the different associations of competing authors' representatives among each other).

As there is no obligation to publish rules on remuneration, it is difficult to get an overview of the existing remuneration rules.

3. No standing to sue of associations

It is a high burden for authors to sue their own (and most often only) exploitation business. Seldom, suing authors receive further jobs, so that their existence is severely threatened. Associations do not have standing to sue with regard to equitable remuneration. Even associations of authors, who are able to establish common remuneration rules (§ 36 (1) UrhG), apparently do not have their own right of having the contractual clauses and the compliance with remuneration rules be reviewed.

[40] Cf. equitable remuneration of a full-time freelance journalist, OLG Brandenburg of 22/December/2014 – 6 U 30/13; remuneration rules for freelance journalists in Eastern Germany, OLG Köln of 17/January/2014 – 6 U 145/13.

4. No Abstract Control of Model Contracts by Associations

Contrary to initial aspirations, the legal provisions protecting authors do not serve associations as a standard for the judicial control of general terms and conditions (AGB-Kontrolle), according to § 307 BGB. Contracts relating to the usage of protected works are usually pre-formulated for a multitude of contracts and are subject to a particular review according to §§ 307 et seq. BGB. However, the jurisprudence rejects to monitor remuneration rules within (model) contracts in favour of associations or organizations[41], although this was one of the goals of the reform of copyright contract law reform[42]. Of course, it could be doubtful if a remuneration, which is the main obligation under a given contract, could be invalidated via a contractual review through associations that are not parties of such a contract.

Within the past 13 years, the "new" contract law provisions for authors' rights have at least shown that the consolidation period for legal rules regarding equitable remuneration is a long one and is still far from being concluded.

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

Particular cases ("other rights of an author" and rights based on the model of Article 4 EC Directive 1992/100)[43]:

- *Droit de suite/resale right (§ 26 UrhG)*
- *Public lending rights (§ 27 (2) UrhG)*
- *Cable retranmission (§ 20 b UrhG)*
- *Rental rights (§ 27 (1) UrhG), see above, B.1.*

Remuneration rights within the context of limitations of exclusive rights (so called legal licenses[44]):

- *Special reproduction for disabled persons (§ 45 a UrhG)*
- *Collections for use in churches or schools or for teaching purposes (§ 46 UrhG)*
- *School broadcasts (§ 47 UrhG)*
- *Newspaper articles and radio commentaries (§ 49 UrhG)*

---

[41] Cf. solely BGH, I ZR 73/10 – *Honorarbedingungen Freie Journalisten* = GRUR 2012, 1031, there from para 32 on, also – in a different context – BGH GRUR 2014, 556, with references *Wandtke* in ZUM 2014, 585.

[42] Beschlussempfehlung und Bericht des Rechtsausschusses des Deutschen Bundestags, BT-Drs. 14/8058, p. 17, see also *Hoeren*, „Schade: Der BGH und das Ende der AGB-Kontrolle von Rechtebuyout-Verträgen", GRUR-Prax. 2012, 402 (GRUR-Prax 2012, 336309).

[43] Dreier/*Schulze,* UrhG, 4th ed 2013,§ 20b para 14, § 26 para 2, § 27, paras 10, 14.

[44] *Dreier*/Schulze, UrhG, 4th ed 2013, preliminary note to §§ 44a et seq., para 11.

- *Communication to the public in certain cases (§ 52 UrhG)*
- *Making available to the public for teaching and research purposes (§ 52 a UrhG)*
- *Communication of works at electronic reading desks in public libraries, museums and archives (§ 52 b UrhG)*
- *Dispatching of copies upon request (§ 53 a UrhG)*
- *Reproductions for private and other personal use (§§ 54, 54 c UrhG)*

Under particular conditions, remuneration has to be paid for usecovered by a legal license of orphan works (§ 61 b UrhG).

Furthermore, remuneration rights exist for neighboring rights owners, e.g.:

- *Pursuant to § 78 (2) UrhG for performing artists in certain cases referring to the communication to the public and broadcasting, in which phonogram producers have the right to participate (§ 86 UrhG)*
- *Additionally, there are the same remuneration rights as for authors within the context of limitations of exclusive rights (see above), (§ 83 UrhG), and for performing artists those under §§ 27, 20 b UrhG (see §§ 77 (2), 78 (3) UrhG).*

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

In Germany the law provides for the following compulsory licenses:

- *§ 5 (3) UrhG determines compulsory licenses concerning copyright in 'private stsandard' works, if acts, ordinances, decrees or official announcements refer to them without using their wording. Then, the author is obliged to grant any publisher a non-exclusive right of reproduction and distribution.*
- *According to § 42 a UrhG, after a work has been published by a producer of sound recordings on the basis of a license by the author, the author is obliged equally to grant an exploitation right to this effect and on reasonable terms to any other producer of sound recordings.*[45]
- *Pursuant to § 87 (5) UrhG broadcasting organizations and cable distributors are mutually obliged to conclude a contract for cable retransmission on reasonable terms.*

3.

i. For which statutory remuneration rights does your law provide for obligatory collective management?

Obligatory collective management is provided by law for the following remuneration rights:

- *Cable retransmission (§ 20 b UrhG)*
- *Rental (remuneration right only) and lending (§ 27 UrhG)*
- *Special reproduction for disabled persons (§ 45 a UrhG)*
- *Newspaper articles and radio commentaries (§ 49 UrhG)*
- *Making works available to the public for teaching and research purposes (§ 52 a UrhG)*

[45] Schack, Urheber- und Urhebervertragsrecht, 6th ed 2013, para 897.

- *Communication of works at electronic reading desks in public libraries, museums and archives (§ 52 b UrhG)*
- *Dispatching of copies upon request (§ 53 a UrhG)*
- *Reproduction for private and other personal use (§§ 54, 54 c UrhG)*

Apart from that, claims referring to the request of information of the droit de suite (§ 26 (4), (5) UrhG) may only be asserted by a CMO, § 26 (6) UrhG.

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

In general, the droit de suite is exercised by a CMO although it may also be exercised individually. The same applies to the following remuneration rights (in context with limitations of exclusive rights), for which obligatory collective management has not been provided:

- *§ 46 (4) (collections for use in churches or for teaching purposes*
- *§ 47 (2) (school broadcasts)*
- *§ 52 (1) phr. 2, (2) phr. 2 UrhG (making works available to the public for teaching and research purposes)*

However, § 63 a UrhG also applies to those rights (accordingly, the author (and performer) cannot waive his statutory remuneration rights under chapter 6 (limitations) and can in advance only transferred them to a CMO or, together with the grant of the publishing right, to the publisher, if the latter mandates a CMO, which collectively administers rights of authors and publishers, with the collective administration of the remuneration rights).

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

Regarding cable retransmission (§ 20 b UrhG) the user has to pay a reasonable remuneration and thus, the person carrying out the retransmission.

Concerning droit de suite (§ 26 UrhG) the seller needs to pay the remuneration.

In the case of remuneration for rental and lending (§ 27 UrhG) the lessor is obliged to pay the remuneration.

And the user has to pay remuneration regarding the following remuneration rights based on limitations:

- *Special reproduction for disabled persons (§ 45 a UrhG)*
- *Newspaper articles and radio commentaries (§ 49 UrhG)*
- *Making works available to the public for teaching and research purposes (§ 52 a UrhG)*
- *Communication of works at electronic reading desks in public libraries, museums and archives (§ 52 b UrhG)*
- *Dispatching of copies upon request (§ 53 a UrhG)*

But concerning reproduction for private and other personal use (§§ 54, 54 c UrhG) the manufacturer, importer, dealer or operator, thus a third party, is obliged to pay the remuneration.

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

As far as remuneration rights are asserted by CMOs, the law obliges them to establish tariffs (§ 13 UrhWahrnG) (Urheberwahrnehmungsgesetz – law on collective administration of authors' rights and related rights). § 13 (3) UrhWahrnG contains criteria for establishing tariffs. Accordingly, the basis of tariff calculating shall generally be the pecuniary advantage achieved by the exploitation of the work.

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

Pursuant to § 18 et seq. UrhWahrnG, the Federal Patent Office supervises the CMOs with regard to the compliance of the duties imposed on them by the UrhWahrnG (for tarriffs, see answer to previous question). In addition, other the Federal Cartel Authority is the relevant body on the basis of cartel law provisions regarding the abuse of a dominant position, but has to act in coordination with the Patent Office (§ 18 (2) UrhWahrnG).

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

If a user or a user association denies the adequacy of the remuneration respectively the adequacy of a tariff, the CMO is forced to assert its claim in court. According to the experiences so far it takes at least about five years until a legally binding or a provisionally enforceable ruling is obtained. In the meantime the user has the right to pursue the exploitation by making use of the statutory license. According to the German Urheberwahrnehmungsgesetz, CMOs cannot invoke the ordinary courts until arbitration proceedings have been conducted in case the adequacy of a tariff is in dispute. This obligation intensifies the problem, because arbitration courts do not have the right to issue enforceable decisions. Since there is no obligation to deposit the license fee for statutory remuneration claims during court proceedings, the CMO and its members bear the risk of the insolvency of the user.

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

The German Authors' Rights Act provides an obligation to deposit the license fee in case the adequacy of a tariff concerning usage rights based on exclusive rights is in dispute. With reference to statutory remuneration claims no such duty exits.

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

No, the law only requires the CMOs to distribute their income amongst their members according to fixed rules (so called distribution schemes), which exclude an arbitrary approach (§ 7 UrhWahrnG). Besides, the principles of distribution have to be fixed in the by-laws of the CMO (§ 7 phr. 1 UrhWahrnG).

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

Every CMO draws up its own distribution scheme, which does not allow that the CMO would behave in an arbitrary manner. The distribution scheme sets out the distribution keys.

For instance, VG Wort distributes its income basically as follows[46] (these are only the principles; in some sections, there may be strong deviations):

- *Concerning public lending right (general public libraries), photocopying in schools, cable retransmissions, making works available to the public for teaching and research purposes (belles letters, daily newspapers, children and juvenile books, etc.):*
  - *For works which are not (anymore)subject to a publishing contract: author 100 %*
  - *For works subject to a publishing contract: author 70 %, publisher 30 %*

[46] Cf. VG Worts actual distribution plan of 24/May/2014; http://www.vgwort.de/fileadmin/pdf/verteilungsplan/Verteilungsplan_in_der_Fassung_vom_24._Mai_2014.pdf.

- *Concerning public lending right (scientific libraries with exception of the journals), dispatching of copies upon request, making works available to the public for teaching and research purposes (scientific, reference and non-fiction books):*
    - *Author 50 %, publisher 50 %*
- *Press reviews, journal part of public lending right (scientific libraries)*
    - *Author 100 %*
- *Public lending right for publishers producing sound recordings*
    - *Publisher 100 %*
- *Reproduction of texts (online publication)*
    - *Author 60 %, publisher 40 %*
- *Licensing of commercial uses in companies and authorities*
    - *For scientific works: author 25 %, publisher 75 %*
    - *For non-scientific works: author 70 %, publisher 30 %*

In principle, GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten, CMO for performing artists and producers of sound recordings and video clips) distributes the income as follows:[47]

- *For performing artists and producers of sound recordings and video clips :*
    - *For broadcasting of published sound recordings, remuneration for rental and lending: author 50 %, producer 45 %*
    - *For communication to the public:*
        - *In general: performer 55 %, producer 45 %*
        - *Video clips: performer 50 %, producer 50 %*
        - *Radio broadcasts: performer 60 %, producer 40 %*
        - *TV productions: performer 90 %, producer 10 %*

For other kinds of use, the distribution keys are much more differentiated and in part are calculated via a points-based system.

Likewise, the distribution schemes of other CMOs are very differentiated in detail.

In order to commonly assert certain rights exercised by different CMOs, the relevant CMOs are organized in central agencies for this very purpose (e.g. ZPÜ, ZBT). The keys for distribution among the participating CMOs in these cases are determined by negotiations among the CMOs within the collection agencies; the distribution keys are not provided by law. [48]

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

[47] Cf. preliminary distribution plan of GVL of 2013 on https://www.gvl.de/verteilungsplaene-2013-inklusive-anlagen-0.
[48] *Melichar* in Loewenheim, Handbuch des Urheberrechts, 2nd ed 2010, § 46 paras 21 et seq.

According to the current practice, publishers are also able to transfer derived rights to a CMO. They participate in the revenue according to the distribution scheme.

However, the legal situation is currently disputed[49]. According to the jurisprudence of the Regional Court LG München I (ZUM-RD 2012, 410 et seq.) and the Higher Regional Court OLG München (GRUR 2014, 272 et seq.), a publisher can only participate in remuneration from statutory remuneration rights in context with limitations, if these rights have first been transferred from the author to the publisher who then transfers them to the CMO. By contrast, according to this jurisprudence, a general rule on participation of the publisher in the revenues, irrespective of who has transferred them to the CMO, would be unlawful. A final decision of the Federal Supreme Court has not yet been rendered; [50] *rather, the BGH has suspended the proceeding, because of a case pending at the CJEU (Az. C-572/13) which concerns a legal question in Belgium relevant for the BGH case.*

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

Pursuant to § 18 UrhWahrnG, the Federal Patent Office controls CMOs. It investigates whether the CMO acts according to the UrhWahrnG; thereby, arbitrary actions are to be excluded within an abstract control.[51]

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

Music, books, audiobooks, movies as well as TV series can be viewed on the internet. There are various methods, for example the classical download of a file or (in the movie and music fields) on demand streaming. The streaming services differ from each other, offering the possibilities of purchase, rental of individual works or of using a flat rate.

Partly new forms of works emerge, see, e.g., www.onilo.de. Here, classical picture books adapted to electronic animations attain an interim state as 'picture book cinema', in order to promote reading through such partial animation. ONILO is distributed through schools and libraries.

Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

[49] Cf. in detail: Antwort der Bundesregierung BT Drucks. 18/1555 of 27/May/2014.
[50] BGH, 18 December 2014, Az. I ZR 198/13; press declaration: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2014&Sort=3&nr=69760&pos=0&anz=193&Blank=1.
[51] *Gerlach* in Wandtke/Bullinger, 4th ed 2014, § 7 WahrnG, para 1.

Business Models und their Remuneration System

Supplier	*Payment Model*	*Remuneration of the Author*
Spotify	*1. Free of charge* *All music on all devices (PC, tablet and smartphone), limited functions, and advertisement* *2. Monthly 9.99 €* *Unlimited access to music and functions for all devices, no advertisement*[52]	- *Artists receive between $ 0,006 and $ 0,0084 per stream, depending on various factors, e.g., in which country the music is being streamed* - *In total 70% of Spotify´s income is paid to the labels*[53]
Deezer	*1. Free of charge* *All music on PC and tablet (smartphone only limited), limited functions, worse sound quality, and advertisement* *2. Monthly 9.99 €* *Unlimited access to music and functions for all devices, no advertisement, high sound quality*[54]	- *Deezer has to pay a revenue participation of 8,2 % to GEMA* - *Possibly higher charges, unless an inclusive contract exists with GEMA* - *Minimum remuneration depends on the data volume, scaled at 0,02 cent, 0,25 cent, and 0,48 cent per stream* - *Depending on the piece of music, license fees amount to a price between 6 and 9 cent net, members of BITKOM (i.a. Deezer and Spotify) may get a discount*[55]
Sound-cloud	*1. Free of charge* *Unlimited access to all music, upload limited to 120 minutes; only basic statistics available* *2. Per month 3.00 € or per year 29.00 €* *Unlimited access to all music, upload limited to 4 hours; extended statistics of own songs available* *3. Unlimited, per month 9. 00 € or per year 99 €* *Unlimited access to all music, unlimited upload and extensive statistics of own songs*[56]	- *No remuneration for artists!* - *„Download on iTunes“ button offers at least the possibility to make a profit → unknown musicians therefore have low profit chance*

[52] https://www.vetalio.de/musik-streaming.
[53] https://www.spotifyartists.com/spotify-explained/#wait-i-thought-spotify-paid-a-per-stream-rate.
[54] https://www.vetalio.de/musik-streaming.
[55] http://www.zdnet.de/41558909/gema-veroeffentlicht-tarifbestimmungen-fuer-streamingdienste/.
[56] https://www.vetalio.de/soundcloud-test.

Netflix	*1. Basic subscription, monthly 7.99 €* *Unlimited movies and TV series on all devices, no HD/Ultra HD, no simultaneous use of multiple devices* *2. Standard subscription, monthly 8.99 €* *Unlimited movies and TV series on all devices, no Ultra HD; simultaneous use of two devices* *3. Premium subscription, monthly 11.99 €* *Unlimited movies and TV series on all devices, HD/Ultra HD included, simultaneous use of four devices*[57]	- *Netflix negotiates individual contracts with film production companies → in 2010 Netflix paid one billion dollar to the companies Paramount, Lionsgate and MGM for five-year broadcasting licenses*[58] - *Netflix gets movies and TV series produced exclusively*

In Germany further different services are available.

In the movie sector, the following services are i.a. available:

- *videoload.de: Movies and TV series are available on demand. They can be rented or purchased in various qualities. A flat rate is not offered.*
- *maxdome.de: Movies and TV series are available on demand. They can be rented or purchased. The possibility of a monthly flat rate exists.*
- *amazon.de: Movies and TV series are offered on demand and for download. They can be purchased as well as rented in various qualities.*
- *iTunes.com: Movies and TV series are available on demand and via a cloud. They can be purchased or rented.*
- *watchever.de: Movies and TV-Series are available on demand and for download. A flat rate is offered.*

In the music sector, the following services are i.a. available:

- *musicload.de: Music can be purchased as an MP3 file for download.*
- *amazon.de: Music is offered for sale as a stream or for download.*
- *itunes.com: Music is available as stream and for download. It can be purchased.*
- *napster.de: Music is offered for a flat rate, as a stream or for download.*

In the book sector[59]:

- *Kindle Unlimited*
- *Skoobe*

[57] https://www.netflix.com/getstarted?locale=de-DE.
[58] http://www.spiegel.de/netzwelt/web/der-netflix-deal-eine-milliarde-dollar-fuer-web-stream-filme-a-711315.html.
[59] Cf. http://www.spiegel.de/netzwelt/apps/amazon-kindle-unlimited-e-book-flatrate-vergleich-mit-skoobe-readfy-a-995600.html.

- ***BEAM (Lübbe AG)***[60]*: BEAM is to be built up to form a globally working platform for digital content of TV series to read and to listen to. In this way Bastei Lübbe is able to merchandise its contents. The company focuses on the merchandise of their own TV series and a monthly flat rate of 4.99 € for the use of their contents free of advertisement. From 2016 on the contents is to be offered in German and English, then also in Spanish and Portuguese (2017), as well as in Mandarin (2018). Until 2020 Bastei Lübbe wants to obtain globally 24 million platform users*
- *Readfy*

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

Ad funded streaming services that exploit content uploaded by users have been in the focus of jurisprudence. The question came to the fore whether these services can rely on the provider privileges in general and in addition under which circumstances the provider can be held liable for the information uploaded by the users.

Some authors are sceptical about the necessary redesign of the presentation of their works for electronic use. For instance, an artistic movie can be watched on a smartphone or a piece of music is converted in a trivial ringtone[61]*.*

3. In your country, are there offers that are based on flat rates, 'pay-per-click' or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

Different payment models are offered, in particular individual purchases and flat rates. See above E.1.

4. Within these business models, how do authors and performers get paid?

E.g. between GEMA and the industry association BITKOM there is an inclusive contract regarding the remuneration of music in the context of video on demand services on the internet. However, this agreement only refers to the purchase or rent of individual videos but not to flat rates or solely advertisement-funded offers.[62]

Apart from that, suppliers of business models in part remunerate authors and performers, cf. E.1

Authors consider it as a problem that their works - on the one hand – are offered on a large scale and thus excluded from the market, but – on the other hand – are not able to gain the necessary attention (also economically) within a flat rate model.

[60] http://www.boersenblatt.net/artikel-bastei_luebbe_gibt_mehrheitsbeteiligung_ab.952634.html.
[61] Cf. BGH, decision of 18/December/2008 - I ZR 23/06, GRUR 2009, 395 = WRP 2009, 313 - *Klingeltöne für Mobiltelefone I*; BGH, decision of 11/March/2010 - I ZR 18/08 – *Klingeltöne für Mobiltelefone II*.
[62] Press releases, GEMA (https://www.gema.de/aktuelles/bitkom_und_gema_einigen_sich_bei_video_on_demand/) and BITKOM (http://www.bitkom.org/de/presse/81149_79054.aspx).