H e a d n o t e s

to the order of the First Senate of 23 October 2013

- 1 BvR 1842/11 -

- 1 BvR 1843/11 -

1. **To counteract social or economic imbalances, the legislature may limit by mandatory statutory provisions the freedom to agree on the payment for professional services in individual contracts, which is protected by Article 12 section 1 of the Basic Law.**

2. **A copyright provision that grants the right to have the adequacy of contractually agreed remuneration for the exploitation of a work reviewed by a court is compatible with the Basic Law.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1842/11 -

- 1 BvR 1843/11 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

of C. GmbH & Co. KG,

- authorised representatives: Rechtsanwälte Redeker, Sellner, Dahs, Willy-Brandt-Allee 11, 53113 Bonn -

I. 1. directly against

a) the order of the Federal Court of Justice (*Bundesgerichtshof*) of 7 April 2011 - I ZR 20/09 -,

b) the judgment of the Federal Court of Justice of 20 January 2011 in the version of the order mandating a correction of 7 April 2011 - I ZR 20/09 -,

2. indirectly against

a) § 32 sec. 1 sentence 3 and sec. 2 sentence 2 of the Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte*, Copyright Act, Urheberrechtsgesetz) of 9 September 1965 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1273) in the version of the Act to Strengthen the Contractual Position of Authors and Performing Artists (*Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*) of 22 March 2002 (BGBl I p. 1155),

b) § 132 sec. 3 sentence 3 of the Act on Copyright and Related Rights (Copyright Act) of 9 September 1965 (BGBl I p. 1273) in the version of the Act to Strengthen the Contractual Position of Authors and Performing Artists of 22 March 2002 (BGBl I p. 1155), as amended by Art. 1 No. 48 letter b of the Act to Regulate Copyright in the Information Society (*Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft*) of 10 September 2003 (BGBl I p. 1774)

- 1 BvR 1842/11 -,

II. 1. directly against

a) the order of the Federal Court of Justice of 7 April 2011 - I ZR 19/09 -,

b) the judgment of the Federal Court of Justice of 20 January 2011 in the version of the order mandating a correction of 7 April 2011 - I ZR 19/09 -,

2. indirectly against

§ 32 sec. 1 sentence 3 and sec. 2 sentence 2 of the Act on Copyright and Related Rights (Copyright Act) of 9 September 1965 (BGBl I p. 1273) in the version of the Act to Strengthen the Contractual Position of Authors and Performing Artists of 22 March 2002 (BGBl I p. 1155).

- 1 BvR 1843/11 -

the Federal Constitutional Court - First Senate -

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 23 October 2013:

The constitutional complaints are rejected.

R e a s o n s:

A.

The constitutional complaints are directed against a provision in the Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte*, Copyright Act, Urheberrechtsgesetz – UrhG) of 9 September 1965 (BGBl I p. 1273), which was amended in 2002, […] and two decisions of the Federal Court of Justice on the adequacy of translators' fees in publishing, which are based on this provision. 1

I.

[Excerpt from the Court's press release no. 71/2013 of 28 November 2013]

§ 32 of the Copyright Act (Urheberrechtsgesetz - UrhG) gives authors the opportunity to ask the courts for a review of the adequacy of their remuneration for contracts on the granting of exploitation rights and permission for the exploitation of their work. If the agreed compensation is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration. This provision entered into force on 1 July 2002. In addition to this, § 132 sec. 3 sentence 3 UrhG stipulated that the provision also applies to contracts concluded between 1 June 2001 and 30 June 2002, provided that the right or permission granted is used after 30 June 2002.

With the new regulation, the legislature meant to strengthen the legal position of the authors, who tend to be in a weaker bargaining position than the companies exploiting their works. According to the legislature, copyright law is based on the general principle that authors are to share equitably in the economic success of their labour and their works. While this principle had been implemented to some degree, this was not the case where freelance authors, such as literary translators, were facing structurally superior exploiters of their works.

Under a contract with the complainant, the plaintiff in the initial proceedings 1 BvR 1843/11 translated the non-fiction book "Destructive Emotions: A Dialogue with the Dalai Lama". The agreement included a page fee of EUR 19 per standard page, a percentage-based sales fee for sales of more than 15,000 copies, and an interest in licensing revenues from the exploitation of ancillary rights. The complainant paid the plaintiff about EUR 13,500. The plaintiff's motion for an adjustment of the contract was unsuccessful before both the Regional Court (*Landgericht*) and the Higher Regional Court (*Oberlandesgericht*). The Federal Court of Justice reversed the judgments in part and ordered the complainant to accept to an increase of the plaintiff's share in sales fees and ancillary rights, to provide certain information, and to pay an additional EUR 6,841.22 (judgment of 20 January 2011 - I ZR 19/ 09 -).

Under a contract with the complainant of February/March 2002, the plaintiff in the initial proceedings 1 BvR 1842/11 translated the novel "Drop City" by T.C. Boyle. They agreed on a fee of EUR 18.50 per standard page, a percentage-based sales fee

for sales of more than 20,000 copies, and an interest in licensing revenues. The plaintiff received approximately EUR 18,000 from the complainant. Also in these proceedings, the Federal Court of Justice partially reversed the judgments of the Regional Court and the Higher Regional Court, which had rejected the plaintiff's motions (judgment of 20 January 2011 - I ZR 20/ 09 -). It ordered the complainant to consent to an increase of the plaintiff's share in sales fees and ancillary rights, to provide certain information, and to pay an additional EUR 13,073.04.

[End of Excerpt]

[…] 2-15

II.

[…] 16-17

III.

[…] 18-38

IV.

With its constitutional complaints, the complainant claims violation of its fundamental rights under Art. 12 sec. 1 of the Basic Law (*Grundgesetz* – GG), alternatively under Art. 2 sec. 1 GG, as well as under Art. 3 sec. 1 GG; on the facts, it also claims violation of Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG by inadmissible development of the law (*unzulässige Rechtsfortbildung*). With its constitutional complaint in the proceedings 1 BvR 1842/11 it further claims violation of its protected fundamental right of trust in the former legal situation. 39

The complainant directly challenges the judgments of the Federal Court of Justice in the cases “Destructive Emotions” and “Drop City” […]. Indirectly, the constitutional complaints are directed against § 32 sec. 1 sentence 3 and sec. 2 sentence 2 UrhG […] and, in the proceedings 1 BvR 1842/11 (“Drop City”), also against § 132 sec. 3 sentence 3 UrhG […]. 40

[…] 41-49

V.

[…] 50-63

B.

The constitutional complaints are admissible, but unfounded. Neither the provisions of § 32 sec. 1 sentence 3 and sec. 2 sentence 2 UrhG (I.) nor those of § 132 sec. 3 sentence 3 UrhG (II.) nor the challenged decisions of the Federal Court of Justice (III.) violate the fundamental rights of the complainant. 64

I.

§ 32 sec. 1 sentence 3 and sec. 2 sentence 2 UrhG are compatible with Art. 12 sec. 1 GG. The Constitution does not hinder the legislature from passing a law with a provision that gives authors the right to have the adequacy of their contractually agreed remuneration reviewed by a court. 65

1. The challenged provisions concern the right to occupational freedom of the exploiters. Art. 12 sec. 1 GG protects the freedom to practice an occupation as the basis of personal and economic life. The fundamental right also encompasses the freedom to bindingly negotiate remuneration for professional services (cf. Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 101, 331 <347>; 117, 163 <181> with further references). Provisions regulating remuneration and decisions based on them which take into account the income that may be generated by professional activity - and thus also have a significant effect on the maintaining of one's existence -, limit the freedom to practice an occupation (cf. BVerfGE 101, 331 <347>). As a legal entity in accordance with Art. 19 sec. 3 GG, the complainant may invoke the protection of Art. 12 sec. 1 GG (cf. BVerfGE 106, 275 <298> with further references; established case-law). 66

Freedom of contract is also protected by the fundamental right to general freedom of action under Art. 2 sec. 1 GG (cf. BVerfGE 65, 196 <210>; 74, 129 <151 and 152>). However, general freedom of action is subsidiary as a standard of review in the present case in which a provision of law concerns freedom of contract in the context of occupational activity that enjoys special protection under Art. 12 sec. 1 GG (cf. BVerfGE 68, 193 <223 and 224>; 77, 84 <118>; 95, 173 <188>; 116, 202 <221>). 67

2. In order to counteract social and economic imbalances, the legislature may, however, limit by mandatory statutory provisions the freedom to agree on the payment for professional services in individual contracts, which is protected by Article 12 sec. 1 GG (cf. BVerfGE 81, 242 <255>). As is the case with other provisions of private law placing limits on contractual freedom, private law provisions regulating prices aim to balance conflicting interests (cf. BVerfGE 97, 169 <176>). This is not a matter of unilateral interference by the state in one party's exercise of freedom, but rather one of balance intended to reconcile the freedom of one party with the freedom of the other. To achieve this, the legislature must recognise the interplay of conflicting fundamental rights positions and - taking into account its mandate for ensuring a social state - balance them according to the principle of practical concordance in such a way that they are as effective as possible for all affected parties (cf. BVerfGE 89, 214 <232>; 97, 169 <176>; 129, 78 <101 and 102>). 68

Accordingly, the required review of proportionality and balancing of interests cannot be undertaken from the perspective of one single fundamental right, but must consider the balance between equal fundamental rights holders. If it is the wish of the legislature to entrust the courts with the responsibility for this balance in individual cases, it is sufficient for them to be able to arrive on the basis of the relevant provisions at an 69

arrangement between the conflicting legal interests in line with the Constitution (cf. BVerfGE 115, 205 <235>).

The legislature has a broad margin of assessment and design for achieving such a balance (cf. BVerfGE 97, 169 <176>; 129, 78 <101>). It is the legislature's political responsibility to assess the economic and social factors relevant to the conflict, as well as to forecast future developments and the effects of its regulations. The same is true for the assessment of the interests involved, that is, the weighing of opposing interests and the determination of their need for protection (cf. BVerfGE 81, 242 <255>; 97, 169 <176 and 177>). Even if there is no constitutional duty to protect fundamental rights, the legislature is free to introduce specific protective mechanisms beyond the general clauses of civil law. In particular, it may enact specific protective measures favouring the contracting party that is typically in a weaker bargaining position in order to provide it with a stronger protection than that which the courts would be able to provide by applying the general clauses in place to a specific case. In such a situation, fundamental rights would be violated only if one fundamental rights position were subordinated to the interests of the other contracting party in such a manner that, in view of the significance and scope of the fundamental right concerned, an adequate balance would no longer be possible (cf. BVerfGE 97, 169 <176 and 177>). 70

3. The provision of § 32 sec. 1 sentence 3 UrhG does not unduly impair the exploiters' freedom of occupation. 71

a) The provision of § 32 UrhG seeks to reconcile the exploiter's interests – in this case the complainant publisher – on the one hand with the interests of the author on the other hand by allowing the author to demand equitable remuneration from the exploiter for the granting of exploitation rights and by entitling the author to have the adequacy of the remuneration reviewed by a court. In the provision for remunerating authors under § 32 sec. 1 UrhG the freedom of exploiters to practice an occupation stands in opposition to the likewise constitutionally protected freedom of contract enjoyed by the authors as well as their right to exploit their intellectual property within the meaning of Art. 14 sec. 1 GG. The constituent features of a copyright as property within the meaning of the Constitution include both the general attribution of the assets resulting from creative work to its author by way of normative regulation under private law as well as the freedom of authors to freely dispose of those assets (cf. BVerfGE 31, 229 <240 and 241>; 79, 1 <25>). 72

b) The solution chosen by the legislature meets the constitutional requirements. It carefully balances the conflicting fundamental rights and thus satisfies the requirements of proportionality. By counteracting social and economic imbalances, these provisions also implement the objective fundamental policies of the Constitution's chapter on fundamental rights and at the same time the constitutional principle of the social state enshrined in Art. 20 sec. 1 and Art. 28 sec. 1 GG (cf. BVerfGE 8, 274 <329>; 81, 242 <255>). 73

aa) In view of the imbalance in contractual parity, the legislature has justifiably re- 74

garded the conflicting interests of exploiters and authors as requiring regulation.

§ 32 UrhG is intended to help low-income authors, in particular those in a weak negotiating position, to put their copyright to economic use. The amended Act can thus claim to fulfil the protective purpose of Art. 14 sec. 1 GG and of the principle of the social state […]. Moreover, the protection of private autonomy (*Privatautonomie*) as a fundamental right under Art. 12 sec. 1 and Art. 2 sec. 1 GG requires that the self-determination inherent in entering into a contract is not turned into domination of one party by the other party due to the latter's greater economic prowess (cf. BVerfGE 81, 242 <255>; 89, 214 <232>; 103, 89 <100 and 101>). 75

The relationship between authors and exploiters is one of mutual dependence […], since the authors' personal works must be commercialised. The legislature comprehensibly assumed that the authors' equitable participation in the economic success of their labour and their works (principle of participation) was only partially guaranteed (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 14/6433, p. 7 et seq. […]). According to the reasoning in the draft bill, authors are generally the weaker party and their economic situation is often difficult. According to the draft bill, freelance literary translators in most cases receive only meagre lump-sum fees. Accordingly, some freelance authors are as dependent on their clients as an employee might be. The exploiting companies, meanwhile, are of varying size, some being large global corporations. According to the draft bill, authors frequently sign away the rights required for marketing their works at many levels in their very first contract, in order not to jeopardise its conclusion; ancillary rights are then frequently exploited without equitable participation of the authors (cf. BTDrucks 14/6433, p. 9 and 10). 76

The legislature cannot be reproached with not having examined in greater depth the factual existence of structural imbalances between authors and exploiters before drafting legislation […]. The amendment relied on clear signs of such imbalances whose existence in parts of the media sector had been established several years prior to the amendment, […] as well as a large number of pertinent statements from interested groups and researchers (cf. BTDrucks 14/6433, p. 7 and 8). 77

bb) Judicial review of the adequacy of an author's remuneration pursuant to § 32 sec. 1 sentence 3 and sec. 2 sentence 2 UrhG is an appropriate instrument for achieving the balance intended by the legislature. 78

An instrument is deemed appropriate under constitutional law if its use is capable of promoting the desired result; it is sufficient that the achievement of the aim be possible. With regard to the regulation of the labour market, social order and the economy, the legislature enjoys a particularly broad margin of appreciation and latitude for prognosis (cf. BVerfGE 63, 88 <115>; 67, 157 <175>; 96, 10 <23>; 103, 293 <307>). Its scope covers copyright contract law, at least to the extent that the legal arrangements are intended, as in this case, to apply in areas that are in part characterised by dependency comparable to employer-employee relationships and by structural disparities between contracting parties (cf. BVerfGE 129, 78 <102>). 79

cc) There are no equally effective means for achieving the intended protection of authors which would at the same time spare the interests of the exploiters. 80

A legal provision making judicial intervention dependent on whether, in a specific case, the authors are in a clearly inequitable negotiating position putting them at an unusual disadvantage, or whether a conspicuous disparity exists, would not be capable of correcting, in an equally effective way, the structural inequality between authors and exploiters presumed by the legislature; moreover, the authors would be burdened with providing evidence of a “clearly inequitable negotiating position”, which is difficult to assess in individual cases. 81

The same is true of the “small solution” proposed by the exploiters’ associations in the course of the legislative process, which aimed for a less extensive protection for authors by way of, for example, the “bestseller paragraph” in the earlier version of § 36 UrhG or through the application of § 138 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) […]. The legislature did not intend the reform to protect authors merely in cases of the blatant abuse of negotiating power by the exploiters, but to create legal arrangements for bringing about a general and comprehensive balancing of interests between authors and exploiters with regard to remuneration (cf. BTDrucks 14/6433, p. 8 […]). 82

dd) The judicial review of the adequacy of an author’s remuneration adequately balances the fundamental rights of the different parties. 83

(1) This is not precluded by the fact that it is left to the courts to interpret the indeterminate legal concept of “adequacy”. 84

The legislature’s assumption that the courts will be able to interpret the concept of adequacy with sufficient legal certainty, taking into consideration the circumstances of the individual case […], cannot be considered as being refuted simply because the lower instance courts favoured differing remuneration models prior to the “Talking to Addison” decision by the Federal Court of Justice. It is the task of the Federal Court of Justice as the highest civil court to ensure uniform jurisprudence (cf. § 543 sec. 2 sentence 1 no. 2 of the Code of Civil Procedure, *Zivilprozessordung* – ZPO). 85

Nor is the concept of equitable remuneration entirely new to copyright law (cf. § 22 sec. 2 of the Publishing Act, *Verlagsgesetz* – VerlagsG […]). It is recognised in established case-law that where copyright and other intellectual property rights are infringed, authors or other rights holders may demand damages in the amount of an adequate license fee (cf., e.g., BGH, judgment of 30 May 1995 - X ZR 54/93 -, *Gewerblicher Rechtschutz und Urheberrecht* – GRUR 1995, p. 578 and 579; cf. now § 97 sec. 2 UrhG). The concept of equitable remuneration is also addressed in numerous other copyright provisions (cf., e.g., § 46 sec. 4, § 47 sec. 2 sentence 2, § 49 sec. 1 sentence 2, § 53a sec. 2 UrhG). § 32 sec. 2 sentence 2 UrhG and the draft bill’s explanatory memorandum also contain suggestions for the interpretation of the provision. 86

(2) (a) The reasons which motivated the legislature to draft the provisions submitted for review carry considerable weight. The fundamental idea of German copyright law is that authors should share equitably in the economic success of their works (cf. Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofs in Zivilsachen* – BGHZ) 11, 135 <143>; 17, 266 <282>; 141, 13 <35>), which is now explicitly regulated in § 11 sentence 2 UrhG. The general attribution of the assets resulting from creative work to the authors as well as their freedom to dispose of them freely and to be able to exploit their work financially on equitable terms enjoy the protection of the fundamental right to property; they are the constitutionally protected core of copyright law; (cf. BVerfGE 31, 229 <240 and 241>; 79, 1 <25>; 129, 78 <101>; on earlier substantiation of this right in natural law cf. BGHZ 17, 266 <278> - *Magnettonband*). 87

The author's right to equitable remuneration is also subject to European and international guarantees. Art. 27 of the Universal Declaration of Human Rights established the right of authors to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author. Art. 15 sec. 1 letter (c) of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (UNTS 993, p. 3, BGBl 1973 II p. 1570), stipulates the right "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". From this, the committee responsible for interpreting and applying the Covenant derives the necessity to enable the author to enjoy an adequate standard of living and the payment of adequate compensation 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), nos. 23 and 24). The requirement of appropriate reward is also expressed in Recital 10 of 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 (Official Journal – OJ L 167, 22 June 2001, p. 10). 88

(b) However, the provision in § 32 sec. 1 sentence 3 UrhG significantly impairs the exploiters' freedom to practice an occupation. For exploiters of copyrighted works, the freedom to negotiate the content of remuneration agreements with authors is an essential part of their professional practice. These contractual terms contribute to the exploiters' economic success and are thus characteristic of the occupation establishing and maintaining their livelihood, which is protected under Art. 12 sec. 1 GG (cf. BVerfGE 116, 202 <226>). Yet, the agreement on a price for a service also constitutes an essential part of private autonomy and is usually left to the market. Generally, it is thus not the task of the regular courts to review contractually-agreed standards for calculating and setting a price as to whether they result in an "equitable" price (cf. BGHZ 143, 128 <140>). Here, the legislature deviates from this principle by assigning this task to the civil courts. 89

It hereby affects the function of a contract to provide security for both parties with regard to legal questions and planning […]. Until the limitation period on a possible claim arising from § 32 sec. 1 sentence 3 UrhG has expired, exploiters cannot be sure whether the basis for their calculation for determining the fee for the translator will endure. Generally, a higher fee for the translator brought about by a subsequent amendment of the contract cannot be compensated for elsewhere by means of higher income or lower expenditure. 90

(c) An overall assessment of the interests and legal positions affected by the provision of § 32 sec. 1 sentence 3, sec. 2 sentence 2 UrhG shows that the limitation of the exploiters' freedom to practice an occupation is not disproportionate to the protection of the authors' interest in an equitable share of the economic success of their works. § 32 UrhG does not entirely dictate the exploiters' scope of action with regard to the amount and conditions of the authors' remuneration, but merely does not allow them to use their strong negotiating position to conclude agreements with inequitably low remuneration […]. 91

This does not constitute a general restriction of freedom of contract in economic life but rather an exceptional arrangement for an area in which the legislature had reason to assume that a typical imbalance existed in negotiating strength between the parties. 92

Even if equitable remuneration is determined by the courts in individual cases, this still leaves sufficient discretion for taking into account the interests of exploiters. The wording of § 32 sec. 1 sentence 3, sec. 2 sentence 2 UrhG requires comprehensive consideration of all circumstances which may affect the nature and scope of the exploitation being granted (cf. BGHZ 182, 337 <358 and 359>). The fact that it is the author who must demonstrate and prove the necessity of an adjustment of the contract constitutes a procedural safeguard against unreasonable alteration requests […]. 93

The interests of the exploiters are also taken into account by the option of establishing joint remuneration agreements with the authors pursuant to § 36 UrhG, and by the irrefutable presumption that the remuneration determined on such a basis is adequate (cf. BTDrucks 14/8058, p. 18). While this may not fully compensate for the loss of individual freedom suffered by individual exploiters […], given the legislature’s broad margin of design, the overall arrangement does, however, provide for an adequate balance between the opposing interests. 94

(d) There is no objection in constitutional terms to the fact that only authors, and not exploiters, may be granted a review of adequacy under § 32 sec. 1 sentence 3 UrhG. The provision aims to correct a structural disparity that is typically occurring. Examining this branch of the economy from a generalising perspective (cf. BVerfGE 68, 193 <219>; 70, 1 <30>), the legislature was free to react to what it considered a structural imbalance between authors and exploiters in many sectors of the media by enacting the challenged provision (cf. BVerfGE 75, 108 <159>; regarding the legislature’s authority to use typification with regard to equality aspects see BVerfGE 100, 138 95

<174>; 103, 310 <319>; 112, 268 <280>). Since the legislature reasonably assumes that this disparity typically disadvantages the authors (cf. BTDrucks 14/6433, pp. 7 et seq.), it was not obliged to also provide price controls to the benefit of the exploiters. Protective mechanisms favouring only one party are not alien to civil law (cf. § 312d sec. 1 sentence 1 BGB; § 495 sec. 1 BGB; with regard to protection against unfair dismissal under employment law see BVerfGE 97, 169 <176 et seq.>). Moreover, the definition of adequacy given in § 32 sec. 2 sentence 2 UrhG does not exclude that, within the scope of a judicial review of adequacy, the exploiting companies' need for protection also be considered (cf. BTDrucks 14/6433, p. 8 and 9).

II.

The fact that the transitional provisions of § 132 sec. 3 sentence 3 UrhG require § 32 UrhG to also apply to contracts concluded before the new regulation's entry into force does not, in the present case, violate the constitutional principle of non-retroactivity enshrined in Art. 20 sec. 3 GG. Pursuant to § 132 sec. 3 sentence 3 UrhG, § 32 UrhG also applies to contracts entered into between 1 June 2001 and the entry into force of the Copyright Act on 1 July 2002, if the right granted is used after 30 June 2002. […] 96

1. […] 97

2. According to the standards for evaluating provisions with quasi-retroactive effect (*unechte Rückwirkung*) (cf. BVerfGE 95, 64 <86>; 101, 239 <263>; 122, 374 <394 and 395>; 132, 302 <318>), § 132 sec. 3 sentence 3 UrhG does not violate the constitutional principle of non-retroactivity. Apart from the fact that it is doubtful whether reliance on the application of a provision envisaging an inequitably low remuneration is at all worthy of constitutional protection, the slight disadvantage resulting from the retroactivity of the provision of § 32 UrhG regarding the occupational practice is in any case justified by the legislative aim it pursues (cf. BVerfGE 123, 186 <261>). 98

a) The retroactive effect of § 132 sec. 3 sentence 3 UrhG was intended by the legislature to prevent the new regulation of § 32 UrhG from taking effect in the distant future, thus forcing works for which contracts had already been signed, and for which no additional compensation would have to be paid, to compete with other works whose exploitation rights were assigned according to the new regulation (cf. BTDrucks 14/6433, p. 19 and 20). 99

b) The legislative design underlying § 32 sec. 1 sentence 3 and sec. 2 sentence 2 UrhG has sufficient weight to justify the retroactivity of the new regulation, which only extends over a short period of time. The provision denies legal protection to remuneration agreements in work exploitation contracts which inappropriately disadvantage the author as a party to the contract and which were entered into within the reasonably short period of 13 months before the Act's coming into force (1 July 2002). As creators of intellectual property (Art. 14 sec. 1 GG), authors also require protection from clauses in earlier contracts granting rights to exploit their creations without equitable remuneration, in particular because exploitation contracts, due to the protection 100

period of copyright, generally have a long-term effect (cf. BTDrucks 14/7564, p. 13).

III.

The interpretation and application of the law by the Federal Court of Justice in both judgments stands up to constitutional review. This applies with regard to the right to equal treatment derived from Art. 3 sec. 1 GG, which must be considered in the present case because it prohibits arbitrary application of the law (1.), with regard to freedom of competition (2.) and with regard to the limits on judicial development of the law (3.). The complainant can invoke the corresponding fundamental rights pursuant to Art. 19 sec. 3 GG. 101

1. The challenged decisions of the Federal Court of Justice do not violate the complainant's right under Art. 3 sec. 1 GG because of an objectively arbitrary application of the law. 102

It is not for the Federal Constitutional Court to regularly instruct the civil courts on the outcome of their decisions (cf. BVerfGE 129, 78 <102>). The threshold of a violation of constitutional law, which the Federal Constitutional Court must correct, is only reached when errors of interpretation by the civil courts are clearly based on a fundamentally incorrect view of the significance of the fundamental rights in question and when the substantive significance of these rights carries some weight in the specific legal case; this applies in particular in cases where such errors have an adverse effect on the balancing of the two different legal positions within the scope of private law provisions (cf. BVerfGE 89, 1 <9 and 10>; 95, 28 <37>; 97, 391 <401>; 112, 332 <358 and 359>; 129, 78 <102>). 103

a) By this measure, there is no reason to object to the fact that, rather than referring to the recommendations issued by the translators' association (*Mittelstandsempfehlungen*), the Federal Court of Justice instead used the rules for the remuneration of authors for the assessment of an equitable remuneration within the meaning of § 32 sec. 2 sentence 2 UrhG (cf. also BTDrucks 14/8058, p. 18). […] 104

b) Nor did the Federal Court of Justice violate the Constitution by differentiating between the page fee on the one hand and the remuneration owed pursuant to § 32 UrhG for the granting of exploitation rights and permission to exploit works on the other hand. […] 105

c) It is also not arbitrary within the meaning of Art. 3 sec. 1 GG to calculate the translator's share of the proceeds from ancillary rights on the basis of the foreign author's share. 106

The Federal Court of Justice proceeds from the principle that a translator's remuneration should be reduced to one-fifth of an author's remuneration; in doing so, it does not however, base its calculation on the remuneration (hypothetically) owed to a German-language author under the rules for the payment of authors, but on the share actually paid to a foreign author. This does not meet with any constitutional objec- 107

tions. Ultimately, this also applies to the understanding of the term “author’s share” underlying the calculation of shares in ancillary rights in the judgments of the Federal Court of Justice.

aa) In both judgments, the Federal Court of Justice takes the term “author’s share”, of which the translator generally receives one-fifth, to mean the share in the proceeds from the ancillary rights in full which the complainant has to spend to acquire them from the original author. The calculation by the Federal Court of Justice implies that the translator receives an additional share in the paperback licensing proceeds amounting to one-fifth of the remuneration paid to the foreign publisher and to any agent(s) involved. This means that the Federal Court of Justice attributed the same broad meaning to the author’s share as did the parties to the initial proceedings including the shares for agents and the publisher. 108

bb) […] 109-110

cc) It will be for the regular courts to determine the author’s share in more detail, taking into account the Federal Court of Justice’s orders with regard to the complaints for violation of the right to be heard (Anhörungsrügebeschlüsse). In doing so, it seems justifiable that they consider not only the remuneration paid to the original author, but also the shares of any agents used by the original author. For, the sales-based remuneration of the translator is generally related to the author’s remuneration, even if the author has used an agent to whom they must pay part of the remuneration. However, this does not apply in the same way when considering the share payable to a foreign publisher . 111

d) The interpretation of § 32 sec. 2 sentence 2 UrhG by the Federal Court of Justice is also not objectively arbitrary in indirectly bringing about unequal treatment of purely hardcover publishers as opposed to large publishing groups which are themselves in a position to publish a paperback edition. It is true that, according to the complainant’s calculation, the use of different calculation models for sales shares and ancillary rights results in the complainant having to pay approximately double the price for the translation when externally granting paperback rights rather than publishing its own paperback edition, given the same retail price. However, the unequal treatment of purely hardcover publishers in comparison to large publishing groups thus brought about in the marketing of paperback editions can be justified by the different level of risk each has to bear. A hardcover publisher receives proceeds from the licensing of paperback rights without any financial risk and without any investment of its own. A publishing group, on the other hand, must bear its own financial risk when publishing its own paperback edition. 112

e) Concerning the complainant’s argument that the overall remuneration of the plaintiff in parts far exceeds one-fifth of an author’s remuneration and that this demonstrates the inadequacy of the Federal Court of Justice’s legal view, it must be kept in mind that the determination of equitable remuneration only considers the point in time at which the contract was concluded (cf. BGHZ 182, 337 <345>). Since the ac- 113

tual remuneration may develop differently than anticipated by the parties at the time the contract was concluded, it is generally not a useful measure for the subsequent adjustment of remuneration agreements. […]

2. The claim that the freedom of competition (Art. 12 sec. 1 GG) of hardcover publishers in relation to large publishing groups has been violated is unfounded. While the provision in § 32 UrhG may affect the competitive position of the complainant, the effects are factual and indirect and do not have any bearing on the protection afforded by Art. 12 sec. 1 GG (cf. BVerfGE 105, 252 <273>; 105, 279 <303>; 116, 135 <153>). 114

3. Finally, the Federal Court of Justice has not taken part in an impermissible development of the law. This would only be the case if its interpretation were to disregard the clear wording of the Act, were to have no bearing in the Act, and were not approved by the legislature either explicitly or tacitly, in the case of a recognisably unplanned legislative gap (cf. BVerfGE 128, 193 <209 et seq.> with further references). By means of § 32 sec. 1 sentence 3 and sec. 2 sentence 2 UrhG the legislature has transferred to the courts the task of determining a remuneration which is equitable and appropriate in individual cases in the absence of joint rules governing payment within the meaning of § 36 UrhG. It is incumbent upon the regular courts to shape the undefined legal concept of adequacy. Not even the complainant claimed that the Federal Court of Justice thus distanced itself from the spirit and purpose of the Act. 115

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Baer Britz

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