

**Kernochan Symposium 2017
Columbia Law School, 6 October 2017**

Fair Remuneration Rights in Germany and the Netherlands



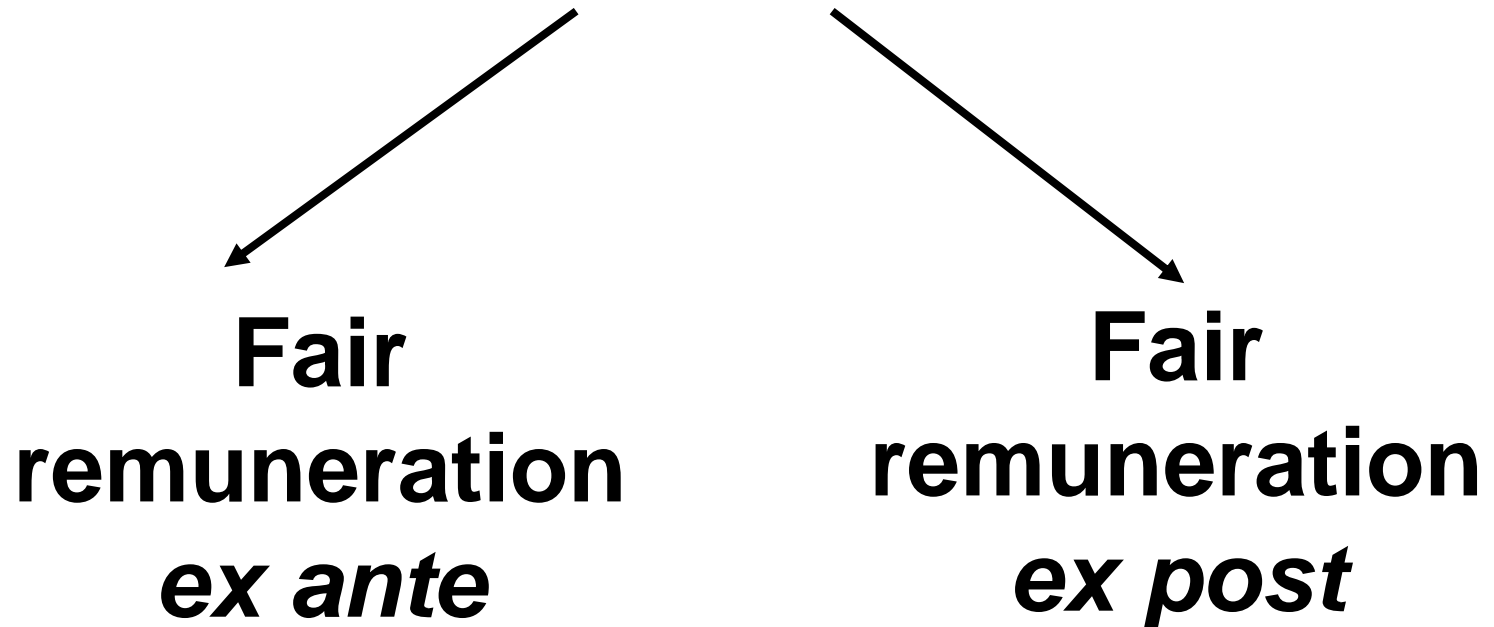
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EU Copyright Reform

- Article 15 Proposed DSM Directive provides for a 'contract adjustment mechanism'
- 'Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.'

Most advanced national systems

Germany and the Netherlands



Fair remuneration *ex ante*



More bargaining power for creators?

- German Copyright Contract Act 2002
 - § 32(1): right to fair remuneration
 - contract modification in case of insufficient remuneration
 - § 32(2): ‘fair’ = customary and *honest* remuneration in the sector concerned
- Dutch Copyright Contract Act 2015
 - Art. 25c(1): right to fair remuneration
 - no need for contract modification because directly enforceable?

Toothless tiger?



Burden of proof

- claimant = individual creator
 - evidence of customary remuneration?
 - evidence of fair remuneration in *comparable* circumstances
- ‘common remuneration rules’ as a solution
 - result of negotiations between exploiter(s) and a representative association of creators
 - legally presumed to be ‘fair’
 - sufficient evidence for fair remuneration standard (benchmark function)

Encouragement of cartel formation?

- Germany unimpressed
 - §§ 32(2), 36 German Copyright Act
 - direct establishment of ‘common remuneration rules’ by the parties
- The Netherlands more careful
 - Art. 25c(2) and (3) Dutch Copyright Act
 - establishment of ‘common remuneration rules’ by the Minister of Teaching, Culture and Science
 - on request of the parties
- EU competition authorities silent so far

Impact in practice

- 2005: 'Common Remuneration Rules for Writers of German Fiction'
 - compromise after long and difficult negotiations
 - intervention by Ministry of Justice
 - signed by several publishers but not by the German Publishers' Association
 - application to translated works explicitly excluded

German Supreme Court, 7 October 2009, 'Talking to Addison'

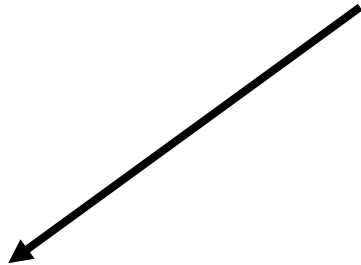
- at issue: fair remuneration for translators of fiction
- analogous use of common remuneration rules for writers of fiction as a guideline
- concrete result: right to one fifth of the remuneration of writers
 - 2% sale's price hardcover
 - 1% sale's price pocket editions
 - if fixed honorarium guaranteed: 0,8% hardcover; 0,4% pocket after 5000 copies have been sold

German Supreme Court, 7 October 2009, 'Clash of Fundamentalisms'

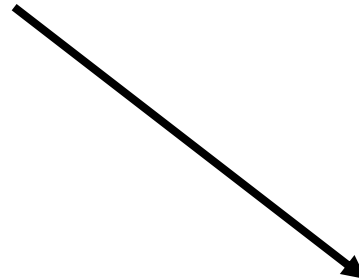
- at issue: fair remuneration for translation of a book of popular science
- analogous application of remuneration rules for writers of fiction as a guideline
- double analogy
 - translators instead of writers
 - science instead of fiction
- approach confirmed in later decisions
 - German Supreme Court, 21 May 2015, 'GVR Tageszeitungen I'

= impact on the whole sector

**Does this jurisprudence
make sense?**



**broadening of
beneficial effect
of *existing* CRRs**



**deterrent effect
on conclusion
of *new* CRRs**

Fair remuneration *ex post*



Bestseller clauses

- § 32a German Copyright Act
 - requires ‘striking’ disproportionality between honorarium and revenue accruing from sales
 - former bestseller clause required ‘gross’ disproportionality
 - debate about right percentage (20%? 50%?)
- Art. 25d(1) Dutch Copyright Act
 - requires ‘severe’ disproportionality
- challenge in both jurisdictions: passing on responsibility in distribution chain

Impact in practice

**from fixed
lumpsum
honoraria**

**to revenue share
reflecting market
success**



The end. Thank you!



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