More than 15 years ago, Germany enacted new copyright laws. Since then, sections 32, 32a, 32b of the German Copyright Act (GCA) grant authors and performing artists rights to claim adjustment of their license and buy out agreements ensuring their fair remuneration and participation in the profits. This article sheds a light on those, who can claim these rights, reflecting the extent to which US citizens can profit from them and US licensees are afflicted by them. It also shows how German law can ensure fair remuneration for exploitations in Germany and beyond. The role of the relevant international conventions is analyzed along with their limiting effects. Further, the author confirms the chances of application of sections 32, 32a, 32b GCA in the United States as well as recognition of German judgments based on them. Finally, producers and exploiters, just like authors and performing artists, will be able deduce from this contribution, how to economically and legally tackle the challenges related to Germany’s unique copyright laws.

1. This article is based on the author’s findings in his PhD thesis: TIMM NEU, DER ZWANG ZUR ANGEMESSENEN VERGÜTUNG UND WEITEREN BETEILIGUNG NACH DER URHEBERRECHTSREFORM (2012).

2. GESETZ ÜBER URHEBERRECHT UND VERWANDTE SCHUTZRECHTE [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBL. I at 1273, last amended by Gesetz [G], Dec. 12, 2016, BGBL I at 3037, art. 1 [hereinafter GCA].
A. INTRODUCTION AND LEGAL GROUNDS ................................................. 447
   I. The Letter of the Law of Sections 32, 32a, and 32b GCA ........ 450
   II. The Contents of Sections 32 and 32a GCA ............................. 452
   III. The Contents of Section 32b GCA ........................................... 454
B. POTENTIAL CLAIMANTS ........................................................................ 455
   I. The GCA’s Alien Law Provisions ............................................ 455
   II. The Rights Granted by Section 32b GCA and the Applicable
       International Copyright Treaties ............................................. 456
       1. The Revised Berne Convention ........................................... 457
          a) Rights and Protections According to Article 5 RBC .... 457
          b) Historical Interpretation ............................................... 458
          c) The Nature of the Claims Under Copyright Contract
             Law ............................................................................... 459
          d) The Suggested Member States’ Unwillingness to
             Accept Sections 32, 32a, and 32b GCA ....................... 459
          e) Conclusion and Individual Rights Holders ................. 460
       2. TRIPS ................................................................................. 461
       3. Rome Convention ............................................................... 462
C. RECOGNITION AND ENFORCEMENT OF GERMAN JUDGMENTS BASED
   ON SECTION 32B GCA IN THE US...................................................... 462
   I. German Jurisdiction Grounds and US Foreign Judgment
      Recognition ............................................................................... 463
   II. German Material Law and US Foreign Judgment Recognition 465
D. THE APPLICATION OF SECTIONS 32, 32A, AND 32B GCA BY US
   COURTS .................................................................................................. 473
   I. The Application of Sections 32, 32a, and 32b GCA According
      to the Conflict of Laws .............................................................. 473
   II. Choice of Law and the Enforcement of German Law .......... 475
E. JUDGMENT RECOGNITION IN GERMANY ............................................. 476
F. CONCLUSION .......................................................................................... 478
A. INTRODUCTION AND LEGAL GROUNDS

In 2002, Germany implemented a dramatic and yet unparalleled copyright law reform.\(^3\) The country introduced sections 32, 32a, 32b of the German Copyright Act (GCA). To the benefit of authors and performing artists, these laws aim to secure equitable remuneration\(^4\) continued profit participation,\(^5\) as well as the non-circumvention (by choice of law) of these objectives in the international licensing arena.\(^6\) This legislation has now been reinforced by further GCA amendments, which went into effect on March 1, 2017.\(^7\)

Imagine how Germany’s law could help your favorite fallen star back on his feet! Unlike David Hasselhoff, he would not have to replace his Malibu lifeguard look with a LED-lit leather jacket and reunite Germany by singing *Looking for Freedom*. This time, some legal action will suffice.

While practical and industry—in contrast to scholarly—reactions to this reform have been timid for some time, jurisprudence\(^8\) and collective interest organization\(^9\) in the field have increased in the past years. In

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4. GCA § 32.
5. Id. § 32a.
6. Id. § 32b.
Germany, authors, freelance software developers, and performing artists are usually not union or guild members. For them, the benefit related to these developments is mostly indirect: The evolution in private interest organization and law has not only forced exploiters of creative works to adjust their boiler plate licensing agreements but also their negotiation tactics.

Simultaneously, exploiters’, publishers’ and producers’ general fears that Germany would lose international competitiveness through the new anti-exploiter legislation have not materialized. The international dominance of English language media and especially the US entertainment industry in the fields of film, television, press and book publishing, software, radio, music, and image rights remains established. The German market is no exception. Consequently, the US entertainment industry’s big players also have become major targets for claims and litigation based on sections 32, 32a, 32b GCA: The dubbing


13. See Equitable Remuneration, supra note 11, at 403–404.


15. Frank Hornig, Akt der Rebellion, DER SPIEGEL, No. 6, 2008, at 68, 68; Wandtke, supra note 11, at 158.
actor, who lent his voice to Johnny Depp in *Pirates of the Caribbean* I, II, and III was awarded ten times the originally agreed upon remuneration,\(^{16}\) with TV exploitations not even considered. In a more local case, the director of photography of Wolfgang Petersen’s 1981 motion picture *Das Boot* successfully claimed five times what he was originally paid plus continued profit participation and rerun remunerations.\(^{17}\)

US law is regularly pre-selected as the law applicable to international (standard) license agreements involving US exploiters. An exclusive US venue is selected along with it. Agreements with German authors and performing artists are no exception to this rule. They usually involve an extensive buy out of exploitation rights, which authors and performing artists are practically given no choice but to agree to.\(^{18}\) In contrast, German law and a German venue are usually pre-selected for (standard) license agreements drafted by German subsidiaries of US entertainment entities.

In conjunction with section 32b, sections 32 and 32a GCA apply to most international (co-)productions in Germany, overriding any license agreement’s choice-of-law provision. Section 32b GCA is almost unknown in the US, where many internationally standardized entertainment license agreements, which are later dictated to local transaction lawyers all over the globe, are drafted.\(^{19}\) Deterred by section 32b GCA however, an increasing number of corporate licensees already refrain from including US choice-of-law provisions favoring them unilaterally in their license agreements.

Recently, the international scope and aim of sections 32, 32a, 32b GCA have thus drawn significant interest.\(^{20}\) Considering these laws’ broad personal applicability and the increase in internationally relevant creative productions like *The Hunger Games - Mockingjay Part 1*,

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\(^{17}\) LG München I, June 2, 2016, 7 O 17694/08.


\(^{19}\) See BGH, Oct. 17, 2013, I ZR 41/12.

Monuments Men, Cloud Atlas, Grand Budapest Hotel, The Bourne Ultimatum, or Inglorious Basterds originating in Germany,²¹ this trend is bound to intensify. Therefore, the extent to which these laws should concern US exploiters abroad and on their home turf, how US litigation can be influenced by them, and under which circumstances US authors and performers can profit from sections 32, 32a, and 32b GCA shall be analyzed herein.

I. The Letter of the Law of Sections 32, 32a, and 32b GCA

The original wording of the central sections discussed in this article, as recently amended, is:

**Section 32 GCA**  
**Equitable remuneration**

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

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

(2a) To determine the equitable remuneration for contracts, a joint remuneration agreement can also be referred to, if such contracts have been concluded before the timely scope of application of such joint remuneration agreement.

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

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

Section 32a GCA
Author’s further participation

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

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

(3) The rights under paragraphs (1) and (2) may not be waived in advance. An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective. The author may, however, grant an unremunerated non-exclusive exploitation right for every person.

(4) The author shall not have a right pursuant to paragraph (1) if the remuneration has been determined in accordance with a joint remuneration agreement (Sec. 36 GCA) or in a collective bargaining agreement and explicitly provides for a further equitable participation
in cases under paragraph (1). Sec. 32 (2a) GCA is to be applied correspondingly.

### Section 32b GCA
**Compulsory application**

The application of Sec. 32 and 32a shall be compulsory

1. if German law would be applicable to the exploitation agreement in the absence of a choice of law, or

2. to the extent that the agreement covers significant acts of exploitation within the territory to which this [German Copyright] Act applies.

### II. The Contents of Sections 32 and 32a GCA

Sections 32, 32a, and 32b GCA generally aim to secure equitable contractual remuneration of authors and performing artists. This concept is rooted in section 11, sentence 2 GCA, which emphasizes the copyright law’s purpose of ensuring equitable participation of these groups in the exploitation of their works. These laws’ constitutional basis is provided by Article 14 of the German Constitution pertaining to the right to property.

Section 32(1), (2) GCA represents the core of the original legislative intention. According to this law any license agreement can be reviewed by the courts. They can, upon claimant’s request and before any exploitation of the respective work, analyze the remuneration set forth in any copyright license agreement ex ante. In case a judgment is sought, the respective court first has to identify any applicable collective labor

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agreements or joint remuneration agreements. However, more than ten years after the enactment of sections 32, 32a, and 32b GCA those agreements remain the exception. If no such agreements exist, the court will review the customary remuneration in analogous license agreements and can confirm an agreement modification claim to the disadvantaged author or performing artist analogous in amount to the customary remuneration. Such remuneration is unrelated to the actual gains made through the licensed work’s exploitation.

However, customary remuneration can, potentially because of intrinsic or developed unequal bargaining positions, still be considered insufficient or unfair. When that is the case, the court can, in its sole and independent discretion set forth in section 287 of the German Code of Civil Procedure (GCP), confirm the agreement modification claim to a higher, fair and thus truly equitable remuneration. In practice however, customary remuneration is usually deemed to be fair or not legally contested.

Section 32a GCA addresses the practically even more relevant constellation of an agreed upon remuneration becoming inequitable over time. This law provides that the courts can analyze the discrepancies between the originally agreed upon remuneration and the de facto commercial success of the respective work ex post. Under section 32d and 32e GCA, authors and performing artists can now demand a report on the proceeds and benefits from a work’s exploitation. Unless the claimant only made a minor contribution to the respective work, its exploiter, the exploiter’s licensee, or any third person significantly determining the work’s exploitation economically or receiving the proceeds or benefits making the remuneration conspicuously disproportionate to the proceeds and benefits derived has to provide such

27. GCA § 32(2).
a report to the claimant.\textsuperscript{30} If the original remuneration then actually proves to be conspicuously disproportionate\textsuperscript{31} to the proceeds and benefits derived from the exploitation, the court will grant further equitable participation to the claimant (e.g., in the form of percentage-based royalties or an additional lump sum payment).\textsuperscript{32} It has been confirmed that such disproportionality does exist, if the equitable remuneration would equal twice the remuneration agreed upon.\textsuperscript{33} Section 32a GCA thus establishes that any author or performing artist shall fairly partake in the success of their work.\textsuperscript{34} This also applies to works for hire.\textsuperscript{35} Importantly, the resulting statutory obligation, according to section 32a (2) GCA, also afflicts any licensee of the original producer.\textsuperscript{36} This is crucial in the context of the film industry’s distribution deals, for example.\textsuperscript{37} The former section 36 GCA ("best-seller law") enacted on January 1, 1966 had already provided for an analogous principle for (commercially) unusually successful works.\textsuperscript{38} This concept is therefore not new to German courts, and related jurisprudence exists already.

\section*{III. The Contents of Section 32b GCA}

Exploitations of licensed content regularly occur in multiple territories. Exploitations outside of Germany and the related revenue are thus financially considered when German law, according to German choice-of-law principles, would have been applicable to the original

\begin{itemize}
\item \textsuperscript{30} Deutscher Bundestag: Beschlussempfehlung und Bericht [BT] 18/10637, 22–23.
\item \textsuperscript{31} OLG Köln, Jan. 17, 2014, 6 U 86/13.
\item \textsuperscript{32} BGH, May 5, 2012, I ZR 145/11.
\item \textsuperscript{33} See Jörg Wimmers & Tibor Rode, Der Angestellte Softwareprogrammierer und die Neuen Urheberrechtlichen Vergütungsansprüche, 19 Computer & Recht 399, 400 (2003).
\item \textsuperscript{34} See Christian Berger, Das Neue Urhebervertragsrecht 42 (2003).
\item \textsuperscript{35} See Case C-277/10, Luksan v. van der Let, ECLI:EU:C:2012:65.
\item \textsuperscript{36} Contra Sprang, supra note 11, at 116–18.
\item \textsuperscript{37} See Entertainment Law 369–77 (Howard Siegel ed., 4th ed. 2013).
\end{itemize}
license agreement.\textsuperscript{39} This is the case for most outsourced Hollywood studio film productions shot in Germany’s Babelsberg or Bavaria Filmstudios.\textsuperscript{40}

If, according to German choice-of-law principles, German law would not have been applicable to the original license agreement,\textsuperscript{41} but some significant exploitation of the work still occurred in Germany, under section 32b No. 2 GCA, sections 32 and 32a GCA will also apply. Any exploitation under sections 32 and 32a GCA should be considered significant under section 32b No. 2 GCA.\textsuperscript{42} Only revenue from exploitations in Germany will be considered in these cases, however.\textsuperscript{43} Finally, should a court determine that a claim generally exists against an exploiter, it will have to assess whether the (possibly generous) partial remuneration paid for foreign exploitation under the respective agreement counterbalances and thus invalidates the claim.\textsuperscript{44}

B. POTENTIAL CLAIMANTS

I. The GCA’s Alien Law Provisions

The GCA’s alien law contains a limitation of the GCA’s applicability.\textsuperscript{45} Further, the GCA’s alien law denies the rights granted in sections 32, 32a, and 32b GCA to all non-nationals of European Community (EC) and European Economic Area (EEA) member

\textsuperscript{39} GCA § 32b(1); URHEBERRECHT 422 (Artur-Axel Wandke & Claire Dietz et al. eds., 2d ed. 2010). But see Deutscher Urheberschutz auf Internationalem Kollisionskurs 2003 KUNST & RECHT 118, 126.
\textsuperscript{41} SILKE PÜTZ, PARTEIAUTONOMIE IM INTERNATIONALEN URHEBERVERTRAGSRECHT 160–61 (Bernd von Hoffman et al. eds., 2005); see also Obergfell, supra note 39, at 125–26.
\textsuperscript{42} PRAXISKOMMENTAR ZUM URHEBERRECHT, supra note 26, UrhG § 32b, No.4; Obergfell, supra note 39, at 125.
\textsuperscript{44} Nordemann-Schiffel, supra note 43, at 479, 484.
\textsuperscript{45} E.g., GCA, § 32b.
countries. These non-privileged nationals can only claim such rights under sections 121(1),(2) and 125(1),(2) GCA, if their work or its translation is published in Germany first or within thirty days after its first publication abroad or if their work is one of fine art and is firmly installed on German territory or its immediate performance takes place where German law applies.

Section 121(4), sentence 1, and section 125(5) GCA further refer foreign nationals to the protection (and rights) resulting from international treaties and conventions. Such treaty-based protections and rights therefore exist in addition to those granted by the GCA’s alien law. Thus, in effect, they can represent a counterbalance to the discrimination of for example, US nationals, manifested in the GCA’s alien law.

II. The Rights Granted by Section 32b GCA and the Applicable International Copyright Treaties

German law and the restricted contents of sections 32, 32a, and 32b GCA, the Revised Berne Convention (RBC), and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are applicable to the US. Still, it is a matter of dispute if the cited copyright law treaties address and cover sections 32, 32a, and 32b GCA, because these laws are qualified by most German scholars to be separate copyright contract law. In contrast, US jurisprudence and legal scholars do usually not

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48. Urheberrecht § 121 UrhG, No.18 (Gunda Dreyer et al. eds., 2013).
employ such strict and dogmatic categorizations. Further, any international treaty is exclusively subject to autonomous interpretation.

I. The Revised Berne Convention

Article 5(1) RBC secures national treatment to all nationals of its member states in any other member state. This includes all rights granted currently or in the future to authors who are nationals of the respective member state. The grant of rights by sections 32, 32a, and 32b GCA could therefore be covered by the RBC as well.

a) Rights and Protections According to Article 5 RBC

Brand focuses on the wording “rights in respect of works” and solely the protection of the works. He therefore does not believe that copyright contract law is covered by article 5(1) RBC. Fawcett and Torremans find that the wording “means of redress afforded to the author to protect his rights” in article 5(2), sentence 2 RBC indicates an exclusive reference to absolute as well as non-exclusively contract-related rights.

52. See Mireille van Eechoud, Choice of Law in Copyright and Related Rights 109 (2003); Paul Katzenberger, Urheberrechtsverträge im Internationalen Privatrecht und Konventionsrecht, in Urhebervertragsrecht 225, 247–251 (Friedrich-Karl Beier et al. eds., 1995); Equitable Remuneration, supra note 11, at 443. See also Anke Beining, Der Schutz Ausübender Künstler im Internationalen und Supranationalen Recht 267, 268 (2000).


55. Id.

Certainly, absolute exploitation rights and statutory compensation claims are covered by article 5 RBC.\(^{57}\) The cited wording, however, is not relevant with regard to the differentiation between copyright and copyright contract law in terms of language or content. Also, this is not its aim. Analyzing the wording “works for which they are protected” (“œuvres pour lesquelles ils sont protégés”) of article 5(1) RBC, in contrast, indicates broad protection coverage, including work-related equitable remuneration and continued profit participation claims.

b) Historical Interpretation

Some consider the development of the wording in the original draft of article 2 of the Berne Convention of 1886 from basically equal protection against every infringement of their rights to “protection of this Convention . . . for their works” in article 3(1)(a) RBC an adjustment towards exclusive coverage of absolute rights.\(^{58}\)

However, first, statutory mandatory copyright contract law did not exist as a regulatory mechanism at the time of the original Berne Convention. It could thus not be explicitly mentioned. Overly narrow and restrictive interpretation of draft terminology older than 130 years cannot lead to practice-oriented results. Second, the wording of the Berne Convention of 1886 can be interpreted to be inclusive of copyright contract law. An infringement of the rights granted through sections 32, 32a, and 32b GCA is conclusive linguistically, historically, and legally.\(^{59}\) Third, the wording “may hereafter grant” in article 5(1) RBC manifests openness and flexibility towards further developments in national copyright laws.\(^{60}\) Thus, in conclusion, the exclusion of copyright contract law from national treatment would contradict the RBC’s future-oriented spirit of broad applicability.\(^{61}\)

\(^{57}\) See Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte [Draft Law on Copyright and Related Rights], Deutscher Bundestag: Bundesrepublik Deutschland Der Bundeskanzler IV/270, 31 et seq., 70 et seq.; Deutscher Bundestag: Gesetzenwurf [BT] 10/837, 9 et seq.

\(^{58}\) Hilty & Peukert, supra note 47, 654.

\(^{59}\) See id.

\(^{60}\) Walter Dillenz, The Remuneration for Home Taping and the Principle of National Treatment, 26 Copyright 186, 197.

c) The Nature of the Claims Under Copyright Contract Law

The singular and subsequent adoption of claims under copyright contract law into the RBC indicates to some commentators that other claims under copyright contract law shall be excluded. For example, according to Ulmer, Vaver, and Katzenberger, the isolated inclusion of the resale right in article 14ter (2) RBC demonstrates that not even all inter omnes copyrights can automatically be considered covered by the principle of national treatment. However, while both nature and content of laws are essential in the international context and the interpretation of the RBC, national qualification and nationally accorded terminology are not. Finally, the resale right has been included in the RBC because this legal concept had not yet been established internationally at the time.

d) The Suggested Member States’ Unwillingness to Accept Sections 32, 32a, and 32b GCA

Hilty and Peukert insist that since Germany created an international anomaly in sections 32, 32a, and 32b GCA and there is no international consensus about the existence of such non-absolute claims, it cannot be assumed that these claims are covered by the member states’ consent to the RBC. However, in the case of international treaties, only signatory agreement on the language of the treaty is required, not the national laws covered or influenced by such treaty. The RBC is not a final rulebook of international material law requiring such approval. No state is obliged to

62. RBC, supra note 49, art. 11bis, ¶ 3, art. 14bis, ¶¶ 2(b)–(c).
64. David Vaver, Die Inländerbehandlung nach der Berner Übereinkunft und dem Welturheberrechtsabkommen, 1988 GRUR INT. 191, 207.
69. Hilty & Peukert, supra note 47, at 654.
sign it or agree with all national laws covered by it. Accordingly, many exceptions and transition rules have been offered to and taken advantage of by member states.  

The RBC’s major aim is to increase international copyright protection levels as well as equality of application. Accordingly, national treatment is an expression of the principle of comitas and as such open to the development of national law.

e) Conclusion and Individual Rights Holders

In sum, for the above-enumerated reasons, the systematic inclusion of the laws in the GCA, and the close relation to the work of the author emphasized by sections 11, 32, 32a, and 32b GCA, are sufficient grounds to establish coverage of sections 32, 32a, and 32b GCA by article 5(1) RBC. US authors thus possess the same rights and claims under sections 32, 32a, and 32b GCA as their German peers. This also applies to works made for hire, of which the producer, as the “employer” of the author, is the copyright holder. This holds true because German copyright jurisprudence does not recognize the work made for hire doctrine’s effects with respect to moral rights. Based on the creator principle (Schöpferprinzip), in terms of moral rights, only the actual creator of the work can be considered its author under German law.

70. See RBC, supra note 49, art. 38, Appendix.
71. See id. at Preamble.
72. See Pütz, supra note 41, at 256; Grosheide, supra note 12, at 460; Steup, supra note 53, at 287; Katzenberger, supra note 52, at 247; Dillenz, supra note 60, at 195.
76. Maximilian Wilhelm Haedicke, Urheberrecht und die Handelspolitik der Vereinigten Staaten von Amerika 7 (Friedrich-Karl Beier & Gerhard Schricker eds., 1997).
producer or “employer” of the author or performing artist can still become the exclusive commercial exploitation rights holder starting with the work’s creation.\textsuperscript{78} He or she never retains all moral rights in the work, however. US “author-creators” as genuine copyright assignors are thus granted rights and claims by sections 32, 32a, and 32b GCA because of their personal moral connection to the work under German law.\textsuperscript{79} Performing artists, however, are not covered by the RBC and can thus deduce no claims from this treaty.

2. TRIPS

Article 3(1) TRIPS provides that TRIPS’ national treatment principle does not grant more rights than the RBC’s provisions.\textsuperscript{80} The advantages of sections 32, 32a, and 32b GCA are however doubly secured for US authors by TRIPS in conjunction with the RBC. This can be deduced from article 4 TRIPS and article 5 RBC, containing a most favored nation clause, as well as article 9 TRIPS and article 5 RBC,\textsuperscript{81} by reference. There also exists no prohibiting notification of the RBC under article 4, sentence 2(d) TRIPS.\textsuperscript{82}

As under the RBC, performing artists are not granted all rights authors are under TRIPS. Under article 4, sentence 2(c) TRIPS, any advantage, favor, privilege, or immunity granted by a member state to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other member states, with the exception of the rights of performers not provided under TRIPS. Since equitable

\textsuperscript{78} See Rainer Hausmann, Möglichkeiten und Grenzen der Rechtswahl in Internationalen Urheberrechtsverträgen, in Beiträge zum Film und Medienrecht 47, 64 (Manfred Rehbinde ed., 1988); Nordemann, supra note 77, at 618.

\textsuperscript{79} GCA §§ 7, 11–27.

\textsuperscript{80} See BGH, Apr. 21, 2016, I ZR 43/14; Hilty & Peukert, supra note 47, 655.

\textsuperscript{81} See URHEBERRECHT, supra note 39, 417.

\textsuperscript{82} Permanent Mission of Germany, Notification Under Article 4(d) of the Agreement, WTO Doc. IP/N/4/DEU/3 (Nov. 17, 1997).
remuneration and continued profit participation of performing artists are not addressed in article 9–14 TRIPS, article 4 TRIPS does not declare section 32, 32a, or 32b GCA applicable to them.

3. **Rome Convention**

Articles 2 and 4(a) of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations secures national treatment for performing artists, if their respective performance has been delivered in a member state. This also applies to performers, who are not nationals of EC and EEA member countries anymore. There are prominent examples: In 1939, dedicated to opposing the Nazis, Marlene Dietrich became an American citizen and lost her German citizenship. Through the Rome Convention however, national treatment in Germany remains applicable to her London performance from 1972. Sections 32, 32a, and 32b GCA therefore also apply to US actors starring in Hollywood productions filmed in Rome Convention member states. Actors from the fifth season of “Homeland” could thus attempt to claim further profit participation from FOX 21 Television Studios since the show was shot in Berlin, Germany.

C. **RECOGNITION AND ENFORCEMENT OF GERMAN JUDGMENTS BASED ON SECTION 32B GCA IN THE US**

A German judgment benefitting an author or performing artist based on section 32b GCA is only truly beneficial if the benefit is and will actually be accrued to such author or performing artist. If a US defendant does not hold sufficient funds in Germany, the claimant may therefore attempt to obtain recognition of the judgment in the US.

Various obstacles exist in such constellations: A first hurdle to US recognition could be the original jurisdiction of the German courts. Second, sections 32 and 32a GCA may be considered too alien to the US

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84. *Id.*

85. *See generally id.*

86. BGH, Apr. 21, 2016, I ZR 43/14.
legal system and theory to grant recognition to a foreign judgment based on them. Third, if this is not the case, section 32b GCA, as mandatory law limiting choice of law and the principle of freedom of contract, could prevent recognition in the US as a matter of public policy.

I. German Jurisdiction Grounds and US Foreign Judgment Recognition

There exists no bilateral treaty or convention binding the US and Germany which governs international jurisdiction. Article 4(1) of 23 Regulation (EC) No. 44/2001 thus applies to US defendants. These EC laws allow choosing an EC jurisdiction if at least one party to the agreement is domiciled in the EC. US exploiters and producers can take advantage of this law. In contrast to their creative licensors, they may have an interest in avoiding German jurisdiction. If a jurisdiction which features choice-of-law rules not affirming the applicability of section 32, 32a, and 32b GCA is selected, the potentially resulting claims will not benefit their opponents. This regulatory vacuum has been described as Achille’s heel of section 32b GCA. In this context, only article 21 of Regulation (EC) No. 44/2001, which regulates employment agreements, includes effective protection against any jurisdiction clause (jurisdiction derogation) not in the interest of the employee.

Alternatively, if the Germany-based licensor and the US licensee do not include a jurisdiction clause in their license agreement, section 12 GCP and the following will govern local and international jurisdiction. These rules are neither limited by internationally mandatory law, nor does the wording of section 32b GCA suggest a general prohibition of jurisdiction derogation at the expense of the otherwise existing jurisdiction of the German courts. Section 32b GCA pertains to international private law as well as choice-of-law but not international civil procedure. Only in very drastic cases would the German Federal

88. Id.
89. Hilty & Peukert, supra note 47, 661; see also Nordemann-Schiffel, supra note 43, at 488.
High Court of Justice (BGH) be likely to declare a derogation of jurisdiction invalid to ensure applicability of German internationally mandatory law. It did so only in a singular decision pertaining to (now revised) security exchange laws. However, labor law jurisprudence, in equivalent cases, reveals a less predictable case-by-case approach in such constellations.

If the exploiter or producer owns property or funds in Germany, jurisdiction can also be based on section 23 GCP. The BGH requires only minimum contacts (“Inlandsbezug”) with Germany, which regularly exist for German or foreign authors and performing artists based or with permanent residency in Germany. This also applies to the rights and claims resulting from sections 32b No.2, 32, and 32a GCA. However, if the German court bases its jurisdiction on section 23 GCP, the judgment will not be recognized in the US. Thus, if it is apparent that future judgment recognition in the US may be required, claimant should call the attention of the German court to alternate jurisdiction grounds.


94. Haimo Schack, International Zwingende Normen im Urhebervertragsrecht, in FESTSCHRIFT FÜR ANDREAS HELDRICH ZUM 70. GEBURTSTAG 997, 1000 (Stephan Lorenz et al. eds., 2005).


II. German Material Law and US Foreign Judgment Recognition

German judgments will usually be recognized in the US. Recognition thereby occurs based on different state laws. However, the Uniform Foreign Money-Judgments Recognition Act creates a reliable uniformity in practice for non-default judgments granting monetary relief. Further, the recognition reciprocity requirement originally pronounced in Hilton v. Guyot today only persists in few states. Only in singular cases does recognition practice unpredictability exist due to inconsistent jurisprudence and possible conflicts between the German judgment and legal precedents in such state.


103. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(e)(g) (AM. LAW INST. 1986); Ackerman v. Ackerman, 517 F. Supp. 614, 625 (S.D.N.Y 1981); Treinies v. Sunshine Mining Co., 308 U.S. 66, 68 (1939); FRIEDRICH K.
Still, most legal scholars have claimed that a German judgment based on section 32 or 32a GCA, and particularly section 32b GCA, will not be recognized in the US due to public policy considerations.\textsuperscript{104} They specifically advance that section 32b GCA limits the principle of freedom of contract too severely.\textsuperscript{105} US public policy will in fact generally bar recognition if the contents of the foreign judgment, the cause of action, or the claim for relief would violate some fundamental principle of justice, prevalent conception of good morals, or deep-rooted tradition of the common weal.\textsuperscript{106} Freedom of contract is certainly a central principle in US private law. Also, the common law principle of consideration does generally not require any license agreement’s fee or remuneration to be equitable.\textsuperscript{107} Like in most European countries,\textsuperscript{108} such fees and remuneration are to be agreed upon autonomously by the

\begin{flushright}
\textsuperscript{104} Nordemann-Schiffel, supra note 43 at 489–90; PÜTZ, supra note 41, at 301 (indicating further sources).
\textsuperscript{105} Equitable Remuneration, supra note 11, at 445–46.
\textsuperscript{108} See DUSOLLIER, ET. AL., supra note 3, at 36.
\end{flushright}
parties. In addition, there is no (full) equivalent to sections 32, 32a, 32b GCA in US law.\textsuperscript{109}

In practice however, the proposed conclusion would prove incorrect for the following reasons: First, the principle of public policy in US jurisprudence and judgment recognition is very rarely employed.\textsuperscript{110} State courts have in some cases even enforced judgments based on laws seemingly contrary to the state’s public policy.\textsuperscript{111} US scholars and courts can generally be considered open to foreign legal principles.\textsuperscript{112} This attitude has been reinforced in US jurisprudence emphasizing that “[u]nfettered trade, good will among nations, and a vigorous and stable international—and national—economy demand no less.”\textsuperscript{113}

Second, in many cases in the US entertainment industry, additional compensation\textsuperscript{114} or further participation comparable to the one provided for by section 32a GCA is granted to authors and performers for additional use of the licensed work, projects resulting from the original cooperation (e.g., musicals, remakes, TV shows), and sequels.\textsuperscript{115} Profit participation is also not as rare as it used to be for authors and performers.\textsuperscript{116} In some instances, however, this form of remuneration

\begin{thebibliography}{116}
\bibitem{112} Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986); indicating further sources \textit{Equitable Remuneration, supra} note 11, at 448; Hranitzky, \textit{supra} note 103, at 79-22–79-23.
\bibitem{113} Milhoux, 902 P.2d at 860.
\bibitem{114} Mark Litwak, \textit{Contracts for the Film & Television Industry} 131 (2d ed. 1998).
\bibitem{115} Muller, \textit{supra} note 18, at 53.
\bibitem{116} See Mark Halloran, \textit{Film Composing Agreements: Business and Legal Concerns}, 5 Loy. L.A. Ent. L. Rev. 1, 12, 18, 39 (1985) (regarding composer remuneration).
\end{thebibliography}
takes the place of all other forms of compensation and must then\textsuperscript{117} be considered a mere form of risk sharing.\textsuperscript{118}

Third, there are further industry-specific limitations of the freedom of contract.\textsuperscript{119} The US film industry’s guilds, such as Writers Guild of America (WGA), Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), International Alliance of Theatrical Stage Employees (IATSE), or Directors Guild of America (DGA), and their basic agreements with producers, represented by Alliance of Motion Picture and Television Producers (AMPTP), e.g., dominate much of current Hollywood contracting. The basic agreements are also applied to the guild members’ peers (who are not guild members) if at least one guild member participates in the respective project.\textsuperscript{120} Regularly, basic agreements provide for equitable author and performer remuneration by fixing the customary minimum compensation as well as continued compensation if the work is repeatedly or firstly exploited or exploited through additional media or channels (residuals).\textsuperscript{121} In some instances, rights can then even be retained or shared by authors and performers through a separation of rights.\textsuperscript{122} Also, the term and concept “equitable remuneration” is used\textsuperscript{123} frequently in the US entertainment industry.\textsuperscript{124} For author and performer remuneration, a direct and indirect industry-based limitation of the freedom of contract can thus be observed.

\begin{enumerate}
\item \textsuperscript{118} Because of the immense commercial success of the respective works, Danny DeVito and Arnold Schwarzenegger (“Twins”) and Tom Hanks (“Forrest Gump”) benefitted from such agreement provisions. \textit{Id.}
\item \textsuperscript{120} See ENTERTAINMENT LAW, supra note 37, at 353–58.
\item \textsuperscript{121} Kernochan, supra note 117, at 396.
\item \textsuperscript{122} Equitable Remuneration, supra note 11, at 422.
\item \textsuperscript{123} See United States v. ASCAP, 562 F. Supp. 2d 413 (S.D.N.Y. 2008) (discussing the concept without referring to the term); Bodewig, supra note 109, at 882.
\item \textsuperscript{124} See ENTERTAINMENT LAW, supra note 37, at 293.
\end{enumerate}
Fourth, choice of law, as an expression of the freedom of contract, is also limited by some US laws, which, simultaneously, provide for mechanisms securing equitable remuneration for structurally disadvantaged licensing agreement parties. For example, sections 6750–6753 of the California Family Code and section 2855 of the California Labor Code, grant a confirmation right regarding entertainment agreements of minors to the superior courts, which have personal jurisdiction over these minors. These courts can assess whether the minor’s respective contract and contractual remuneration are fair and reasonable. However, just like under sections 32, 32a, and 32b GCA, this only occurs if one of the parties calls upon this court to render such a decision. Still, this occurs rarely in states in which such laws exist.

Fifth, it has been recognized in the US that foreign mandatory laws may limit the parties’ contractual autonomy. Clearly, if section 32b GCA provided for the most author- or performing artist-friendly of two potentially applicable laws or legal bodies to apply, it would limit the principle of international judgment consistency (internationalen Entscheidungseinklang) less prominently. The exclusive reference to sections 32 and 32a GCA and not merely the abstract principles expressed by these laws can be considered unusually restrictive from a


127. CAL. LAB. CODE § 2855 (Deering 2017).


US legal perspective. However, if compared to US mandatory laws, this increased specification of limitation does not result in a violation of US public policy. Particularly, section 32b GCA objectively requires a strong connection of the respective case to German law. Thus, a more generous US perspective on recognition must be presumed.

Sixth, in the US, as under section 313 of the German Commercial Code, if the remuneration or the choice of law in cases of frustration is “so unreasonable, unjustified, or one-sided as to shock the conscience,” the court can declare these provisions unenforceable as well. In the licensing context, many thus support analogous protection of authors, who signed agreements due to duress or undue influence. In Rossiter v. Vogel, for example, the assignment of a renewal right for one dollar was declared inequitable and thus void. Further, courts can declare contracts non-enforceable and provide for quasi-contractual damages.

Seventh, inequitable contractual remuneration can be declared void and be newly defined on the basis of the unconscionability doctrine.


132. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) cmt. g (AM. LAW INST. 1971).

133. See Gerd F. Hegemann, Das Nachforderungsrecht im Deutschen und der Rückruf im Amerikanischen Urheberrecht 231 (1987); Bodewig, supra note 109, at 875–76.


135. See Bodewig, supra note 109, at 875; Reber, supra note 12, at 285; McKinnon v. Benedict, 157 N.W.2d 665, 669 (Wis. 1968); Marks v. Gates, 154 F. 481 (9th Cir. 1907).


Section 187, comment b of the Restatement (Second) Conflict of Laws declares a choice-of-law provision void, if it was unconscionable and agreed upon to the detriment of the weaker party. For this rule to apply, an abusive boilerplate contract (of adhesion) containing, e.g., unfair, harsh, unjustifiably biased and one-sided, oppressive, or overly hard provisions must have been agreed to. Many standardized agreements containing a broad buyout of rights are contracts of adhesion. These considerations resemble those of the German legislators leading up to the implementation of sections 32, 32a, and 32b GCA.

Finally, freedom of contract has been rightly transformed from the paramount principle of public and private law into a prominent but limited concept of private law. In this context, some scholars like

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143. See Urheberrecht, supra note 26, at 422.

Rosen, even cite a “Rawlsian approach” according to which recognition could be denied only to those “un-American” judgments not reflecting “values consistent with liberal or decent hierarchical societies.” A judgment based on section 32b GCA would clearly qualify for recognition according to this standard, since it would merely protect authors, who have a structurally disadvantaged contractual bargaining position both in the US and in Germany. Kernochan took this concept to another level and considered it necessary that equitable remuneration and continued profit participation of authors be insisted upon and enforced by US courts.

However, the far-reaching section 32a(2) GCA, which obliges the assignee to completely assume a potential future payment obligation triggered by the assignor, severely infringes upon the freedom of contract. Court decisions in New York, section 1-301 of the Uniform Commercial Code, and tendencies in California’s jurisprudence suggest that the recognition of judgments based on section 32a(2) or 32b GCA is improbable.

Still, in sum, no violation of the principle of freedom of contract in its current interpretations can be detected in or occurs through the grant, recognition, or enforcement of claims based on section 32 or 32a(1) GCA in conjunction with section 32b GCA.

148. U.C.C. § 1-301 (UNIF. LAW COMM’N 2017).
D. THE APPLICATION OF SECTIONS 32, 32A, AND 32B GCA BY US COURTS

I. The Application of Sections 32, 32a, and 32b GCA According to the Conflict of Laws

In general, US courts may decide copyright disputes on the basis of foreign law. The choice of German law will therefore usually be accepted by US courts. However, by means of dépeçage, these courts could also recognize and apply German law but ignore section 32, 32a, and 32b GCA. Exploiters and producers could attempt to take advantage of this and proactively attain judgments declaring the inexistence of such claims against them. Such or equivalent tendencies are however currently not being observed.

The legal circumstances under which US courts could apply section 32, 32a, or 32b GCA are revealing. Application and review of foreign law rarely occurs ex officio. Motions or formal party initiatives are regularly required. There are also case-specific procedural hurdles, such as a possible dépeçage. Finally, the application of sections 32, 32a, or 32b GCA is subject to the discretion of the court. US judges are

151. See Equitable Remuneration, supra note 11, at 444–45.
152. See Willis L. M. Reese, Dépeçage: A Common Phenomenon in Choice of Law, 73 COLUM. L. REV. 58, 74 (1973); PUTZ, supra note 41, at 162.
154. PUTZ, supra note 41, at 320.
156. PUTZ, supra note 41, at 172; Reese, supra note 152, at 74; Scherer, supra note 155, at 75.
157. See e.g., N.Y. C.P.L.R. 4511(b) (McKinney 2017).
often reluctant to apply foreign law.\textsuperscript{158} Von Welser predicted rather early in this context that non-German courts would not pay section 32b GCA much respect.\textsuperscript{159}

In the US, more than ten approaches to the conflict of laws are applied commutatively or partially.\textsuperscript{160} It is therefore impossible to reliably predict how the relevant conflict of law factors will be weighed by an average US court and guide towards the application of sections 32, 32a, and 32b GCA.\textsuperscript{161} Except in a few cases\textsuperscript{162}, US courts have not generally rejected the application of foreign law.\textsuperscript{163} Generally, just as under article 4 of Regulation (EC) 593/2008,\textsuperscript{164} the law with the closest relations\textsuperscript{165} to

\begin{thebibliography}{99}
\bibitem{159} \textit{Praxiskommentar zum Urheberrecht}, \textit{supra} note 26, UrhG § 32b, No.11.
\bibitem{160} \textit{Id}.
\bibitem{162} Kennington Truck Serv. Ltd., 562 N.W.2d at 475; Reyno, 454 U.S. at 251; See McDougal III, \textit{supra} note 158.
\end{thebibliography}
the transaction and the parties will be considered applicable. For the fact-patterns covered by sections 32, 32a, and 32b No.1 GCA, this is regularly the case for German law. This is because section 32b No.1 GCA explicitly covers cases, to which “German law would be applicable . . . in the absence of a choice of law.” It can thus be concluded that the application of sections 32, 32a(1), or 32b GCA is not precluded by law or, considering past jurisprudence, entirely improbable.

II. Choice of Law and the Enforcement of German Law

Section 187(1) Restatement (Second) Conflict of Laws determines that the parties’ choice of law shall rule the respective agreement. Further, even without any relation to the state of New York, e.g., the choice of its laws will be effective if the transaction value in dispute exceeds $250,000.166 This can easily be the case for international license agreements.

There are exceptional cases however, in which the contents of a chosen law must167 conform to the fundamental policy of another (foreign) law. This concept is expressed by Section 187(2)(b) Restatement (Second) Conflict of Laws, its comment g, as well as Section 1-301(c) UCC. It is to be applied, if the “state of the otherwise applicable law” has the “materially greater interest” in the application of its laws.168 Presuming the absence of a choice of law, the other, not selected (foreign) law must also be applicable according to section 188 Restatement (Second) Conflict of Laws.169 In most licensing constellations addressed herein, this is regularly the case, since Section 188 Restatement (Second) Conflict of Laws, in this context, points to the law bearing the most significant relationship to the transaction and the parties, the place of contracting, the place of

166. N.Y. GEN. OBLIG. LAW § 5-1401 (2010).
167. RESTATEMENT (SECOND) CONFLICT OF LAWS § 186 cmt. b (AM. LAW INST. 1971); Pütz, supra note 41, at 290.
168. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. g (AM. LAW INST. 1971).
negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties.

Laws which partially declare agreements illegal to protect the weaker party from the exploitation of superior bargaining power can express German fundamental or public policy.\textsuperscript{170} Section 32b GCA is such a law.\textsuperscript{171} It essentially declares certain choice-of-law clauses ineffective and therefore illegal. It thereby reflects the attempt to balance the bargaining powers of exploiters and authors as well as performing artists in international licensing. It also mirrors the central legislative policy of equitable remuneration expressed by section 11 GCA.\textsuperscript{172} Its internationally mandatory character finally underlines this fundamental and international aim. An isolated review of sections 32 and 32a GCA, in contrast, shows that these laws are also unwaivable\textsuperscript{173} but of merely nationally mandatory\textsuperscript{174} character. Only when section 32b GCA applies, the US courts should thus assume that a choice of law providing for the applicability of US law violates German fundamental policy. They could then apply section 32 or 32a GCA via section 32b GCA and declare the contractual choice of law partially void.

E. JUDGMENT RECOGNITION IN GERMANY

If a US court assumed original jurisdiction in a copyright case, ignored the per se applicable section 32b GCA in its subsequent judgment and recognition would be sought in Germany later, such recognition is very doubtful.\textsuperscript{175} In such cases, recognition in Germany is determined by section 328 GCP (Exequaturverfahren). This law manifests several hurdles to foreign judgment recognition. If the foreign

\begin{footnotes}
\footnote{170.\textit{See Restatement (Second) Conflict of Laws} § 187 cmt. g (Am. Law Inst. 1971); Putz, \textit{supra} note 41, at 291.}
\footnote{171. Putz, \textit{supra} note 41, at 262.}
\footnote{172. GCA § 11 ("Copyright protects the author in his intellectual and personal relationships to the work and in respect of the use of the work. It shall also serve to ensure equitable remuneration for the exploitation of the work.").}
\footnote{173. \textit{See Dusollier, et. al., supra} note 3, at 88.}
\footnote{175. Hilty & Peukert, \textit{supra} note 47, at 660.}
\end{footnotes}
The additional reciprocity requirement\textsuperscript{177} in past and current practice\textsuperscript{178} generally does not represent a significant problem for recognition of a judgment ignoring section 32b GCA.\textsuperscript{179} However, no US judgment clearly ignoring section 32b GCA has yet been up for recognition in Germany. Further, from the perspective of German procedural law, the US court must have had jurisdiction (Spiegelbildprinzip), which limits the number of recognizable judgments.\textsuperscript{180}

Finally, a review of the potentially recognizable decision’s result must occur (Ergebniskontrolle) based on German public policy or ordre public,\textsuperscript{181} which includes Germany’s internationally mandatory laws.\textsuperscript{182} With section 32b GCA being internationally mandatory, this rule bars US judgments ignoring the otherwise applicable section 32b GCA from recognition in Germany.

Some scholars propose that recognition should only be denied if basic conceptions of justice, elementary competencies, and interests of the German state or basic constitutional rights are infringed upon.\textsuperscript{183} However, it suffices if the ignored German laws mirror important legal

\begin{itemize}
  \item[176.] GCP § 328(1).
  \item[179.] GCP § 328(1).
  \item[180.] Id. See Wurmnest, supra note 178, at 190–91.
  \item[181.] GCP § 328(1).
  \item[182.] See ULMER-EILFORT, supra note 63, at 143.
\end{itemize}
policy considerations and are of essential importance in the German justice system\textsuperscript{184} to meet these conditions. Section 32b GCA, as demonstrated above, fulfills these requirements.

This result is also mirrored by the German Federal High Court of Justice’s decision regarding the internationally mandatory rules of Germany’s former security exchange laws. Their broad mandatory character was interpreted to prevail in the context of recognition.\textsuperscript{185} Still, for judgment recognition, the principle of \textit{comitas} remains crucial. However, this important guideline should not be employed to invalidate important social developments in Germany, which are reflected in protective legislation for disadvantaged groups. This applies especially in relation to non-EC or EEA member states and reflects the legal qualification of judgment recognition as a sovereign act of the state. Seeking a favorable and recognizable declaratory US judgment to bar authors from claims based on section 32b GCA in Germany would therefore be futile.

\textbf{F. CONCLUSION}

Section 32b GCA in conjunction with sections 32, and 32a GCA can gain significant impact on transactions and licenses relating to Germany and the US. The internationally dominant US exploiters need to be aware of these legal threats. They should consider drafting and calculating license agreement clauses securing minimum but equitable remuneration and future profit participation of potential claimants. More than a decade after the enactment of sections 32, 32a, and 32b GCA, they are about to miss the last opportunity to set industry standards and thereby broadly define customary equitable participation. If they do not make such industry-wide propositions swiftly, German courts will do the job for them. This will not and cannot be to their advantage.

Exploiters can further avoid the broad claims under section 32b No.1 GCA if they relocate outside Germany and include a


\textsuperscript{185} BGH, June 4, 1975, NJW 1975, 1600, 1601.
choice-of-law provision in the respective agreement, declaring the law of their place of business applicable. This is because it is the law of the place of business of the party rendering the characteristic contractual performance, which, based on section 32b No.1 GCA and article 4(2) Regulation (EC) 593/2008, is considered applicable to the agreement. The producer’s exploitation represents this main characteristic performance. Exploiters generally also have a contractual duty to actually exploit the licensed work economically. Thus, if they license a work, their performance is bound to occur (at or from their place of business).

However, German exploiters and even US entertainment industry subsidiaries in Germany are rooted in the German market. Consequently, over the past twelve years that the discussed legislation has been in effect, no significant exploiter relocations abroad have been reported. In some industries, e.g., the film industry, the substantial and much sought-after government subsidies in Germany also preclude most producers from moving abroad.

There is further opportunity to include a jurisdiction clause in the license agreement, determining that US or other non-German courts will have exclusive jurisdiction in relation to the agreement. US courts will regularly uphold such jurisdiction clauses as well as related choice-of-law clauses. The applicability of section 32b GCA, in such cases, will have to be vigorously established and demanded by claimant’s counsel. However, section 32b GCA will be referred to by German courts during recognition proceedings and bar US judgments ignoring this law from recognition.

Until today, sections 32, 32a, and 32b GCA have not balanced the bargaining powers of exploiters and producers on the one hand and authors and performing artists on the other. In Germany, buyouts, adhesion contracts, and unnecessarily extensive licenses and/or ineffective assignments are still being signed without individual changes by most creative personnel and freelancers. In addition, exploiters frequently use standard contractual language, aimed at weakening the

186. See Entertainment Law, supra note 37, at 488; BGH, June 17, 2004, I ZR 136/01.

effects of section 32b GCA. Even if such clauses are mostly void, creative licensors are often under the impression that they are powerlessly trapped in a net of excessive universal licensing. Relatively few high instance court decisions have been rendered in this area.\textsuperscript{188} Thus, legal orientation remains difficult because remuneration practice is very industry- and project-specific, often confidential, and depends on the means and prominence of the parties involved. Lawsuits also regularly end with confidential settlements, which allow no insight into the remunerations eventually accorded.

Still, especially in the film industry, major US and German exploiters are increasingly involved in extensive litigation as well as settlement negotiations related to sections 32, 32a, 32b GCA. Claimants are emboldened by their colleagues’ recent legal victories\textsuperscript{189} and the financial support of several German guilds covering legal fees. Producers are starting to feel this pressure and should be conscious of it.

Further, US citizens can claim equitable remuneration and further equitable participation under sections 32, 32a, and 32b GCA based on the RBC (and TRIPS) or the Rome Convention. Enforcement of these international rights to set legal precedents could even be financially supported by US guilds to benefit their US members.

From a German talent perspective, guild pressure represents the only broadly effective way to more equitable remuneration for German authors and performing artists. Still, most authors and performing artists in Germany lack the will to universally compromise and unionize. Guilds have only recently succeeded in effectively playing the proactive role the legislator has accorded to them in section 32(2) GCA through negotiating collective bargaining agreements.\textsuperscript{190} Hollywood’s guilds are certainly much more powerful at this point and should serve as an inspiration,\textsuperscript{191} especially considering that the US is otherwise not exactly famous for their mighty guilds and unions.


\textsuperscript{190} See LG München I, Nov. 6, 2012, 33 O 1081/12.

\textsuperscript{191} Safrath, \textit{supra} note 125, at 126; Wilson, \textit{supra} note 119, at 429.
Individual claims based on sections 32, 32a, 32b GCA will not suffice to resist the growing pressure and increased remuneration dumping exercised by exploiters. To many, the reputational danger of (legally) attacking one’s (temporary) employer in a relatively small industry seems too high. In the relatively large German dubbing sector, e.g., litigious dubbing actors have even found their names on industry blacklists. This led to dubbing studios not hiring blacklisted actors anymore. A broad right of guilds and unions to institute court proceedings would be required. While many have lobbied for it, only a watered-down version of such right has been included in the GCA through its recent amendment: Under section 36b GCA, authors’ and performing artists’ collective interest organizations can now sue, if the joint remuneration agreements they have negotiated are not adhered to by exploiters.

There is not only bad news for producers and exploiters. While some may have to review their remuneration practices and even business models, the outlined legal developments can be appropriately addressed. Litigation risks can be reduced to tolerable levels. Flexible remuneration clauses as well as higher and continued payments to creative contributors are increasingly becoming part of lead cast agreements. Continued remuneration thresholds for each industry need to be fairly defined. Only if these thresholds are included in the respective standard agreements, can the related business and legal risks will be reduced to minimum levels. If first proposals for these come from exploiters, it will be to their advantage in the long run. They will shape the framework of expectation.

While the wind of change can be felt, it is still a long way to truly equitable remuneration of all authors and performing artists in Germany. Interestingly, this legal revolution may well not be containable to Germany. US performers and authors may one day reflect on their past successes and once again make their mark in Europe’s largest market—this time on the legal stage. That, in turn, could inspire the US copyright practice and theory to further argue for equal levels of protection and profit participation in the US.

