Collective bargaining agreements in the film industry: U.S. guild agreements for Germany?

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INTRODUCTION

Two films, which fundamentally differ from each other with regards to their genre and making, were recently at the center of two lawsuits in Germany.[1] The first, *Das Boot*, is an internationally-recognized German film classic from 1981, which was nominated for six Academy Awards.[2] It deals with a German submarine, its crew and their battles during the Second World War. The second, *Pirates of the Caribbean*, is a United States film series with its first release in 2003. The series features a pirate, Captain Jack Sparrow, and chronicles his adventures at sea. In 2011 and 2012, both films led to decisions by the Bundesgerichtshof, the highest appellate court in Germany for civil and criminal cases. The Bundesgerichtshof decisions dealt with the extent to which authors and performing artists need to share in the financial success of their films.[3] German copyright scholars and practitioners awaited the outcome of the proceedings with great anticipation because they were the Bundesgerichtshof's first film production and exploitation judgments under the 2002 German Copyright Act ("German CA") reform.[4] In return for granting their respective rights to the production companies, both plaintiffs—the cinematographer in *Das Boot* and the dubbing actor in *Pirates of the Caribbean*—had received a flat payment, essentially forgoing further financial participation in the success of their respective films.[5] These so-called "buy-out" contracts are a prevalent practice in German film and television production.[6]

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1. BGH GRUR 496 et seq. (2012) – "Das Boot"; BGH GRUR 1248 et seq. (2012) – "Fluch der Karibik".

2. Http://www.oscars.org/awards/academyawards/legacy/ceremony/55th-winners.html.

3. BGH GRUR 496 et seq. (2012) – "Das Boot"; BGH GRUR 1248 et seq. (2012) – "Fluch der Karibik".

4. "Act on strengthening the contractual situation of authors and performing artists," BGBL. I, 1155.

5. Interesting issues are raised concerning the question of to what extent the different conceptions of copyright law in both jurisdictions have an impact on the realization and success of the described compensation scheme. Unfortunately, this important issue does not fit within the scope of this article. However, it has to be mentioned that in the U.S. film production industry, the work-made-for-hire doctrine mostly applies in favor of the employer (for a definition of the doctrine see 17 U.S.C. § 101). In most cases this enables the employer to exploit a film extensively and without trouble because he is the only copyright owner. The situation in Germany is very different because in Germany the author cannot assign his copyright as such but can grant only exploitation rights.

6. *Mathias Schwarz*, "Die Vereinbarung angemessener Vergütungen und der Anspruch auf Bestsellervergütungen aus Sicht der Film- und Fernsehbranche", ZUM 107 (109) (2010).

I. THE 2002 REFORM OF THE GERMAN COPYRIGHT ACT

In an effort to counteract the prevalence of buy-out contracts, the German Legislature amended the German CA in 2002.[7] The Legislature designed the amendment to accord authors greater economic participation in the success of their works. The centerpiece of this reform was the implementation and modification of sections 32, 32a and 36 of the German CA.[8] First, section 32 of the German CA entitles an author to an equitable remuneration in exchange for the granting of exploitation rights.[9] The conclusion of the contract is the decisive moment for determining if the remuneration is equitable. Thus, the actual revenues are not relevant to determining if the author's compensation is equitable. Second, section 32a of the German CA entitles the author to change the terms of the contract in order to receive additional financial participation in the case of a striking disproportion between the agreed payment and the actual revenues and advantages,[10] such as advertising revenue, the other party received due to the exploitation of the work. Third, under section 36 of the German CA, associations of authors and exploiters can set "common remuneration standards" to determine the equitable remuneration.

The plaintiffs in the *Das Boot* and *Pirates of the Caribbean* cases based their respective actions on section 32a of the German CA. Their complains noted the striking disproportion between the films' huge financial successes and the flat sum received by the respective plaintiffs. The Bundesgerichtshof held that the requirements of section 32a of the German CA might be met and the plaintiffs therefore eventually eligible for a further financial participation. The Bundesgerichtshof referred the cases back to the lower court to deliver a judgment in which the specifications of the Bundesgerichtshof are considered. In its decision, the Bundesgerichtshof also made it clear that the defendants might have to disclose the revenues and advantages received due to the exploitation of the work. Depending on these information the defendants might have to pay a further financial participation to the plaintiffs.

This begs the question of whether the *Das Boot* and *Pirates of the Caribbean* disputes and the resulting negative consequences for the exploiters[11] were avoidable. Furthermore, how can both sides—the creatives and the exploiters—prevent such costly and time-consuming legal proceedings in the future? Section 36 of the German CA, added as part of the 2002 German

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7. Draft of the "Act on strengthening the contractual situation of authors and performing artists" from 26.06.2001, BT-Drucks. 14/6433, 11.

8. German Copyright Act from 9.09.1965 (BGBl. I, 1273), as revised on 23.06.2013 (BGBl. I, 2586).

9. The Legislature provides in section 32 II 2 German CA a vague definition of the equitable remuneration if there are no common remuneration standards.

10. Such advantages include other monetary benefits connected to the exploitation of the works cf. *Mathias Schwarz/Gerd Hansen* in: von Hartlieb/Schwarz, Handbuch des Film-, Fernseh- und Videorechts, 5th Ed., Chapter 54 No.15 (2011).

11. The negative consequences included having to calculate and reveal the films' respective revenues, as well as eventually having to make additional payments to the plaintiffs

Copyright Act amendment, could provide the answer to these questions due to its legal implications. An agreed remuneration which is in accordance with applicable common remuneration standards is deemed equitable according to section 32 II 1 of the German CA, thereby eliminating the ability for a creative to bring a section 32 I claim. A similar exclusion can be applied to claims arising under section 32a. Thus far there have been only a few cases in the film industry in which section 36 agreements have been reached

II. THE APPROACH: GUILD AGREEMENTS AS A MODEL FOR COMMON REMUNERATION STANDARDS

Guild agreements are heavily-negotiated collective bargaining agreements in the U.S. entertainment industry between creatives—represented by their guilds—and production companies. Such agreements stipulate the parties' rights and obligations.[12] Guild agreements, which are predominant in the U.S., provide an interesting approach for the German film industry because the U.S. film market enjoys great international economic and cultural importance, especially in the European market.[13] Furthermore, the U.S. industry has a tradition of extensive and complex collective bargaining agreements between the film studios and production companies on one side and creatives (represented by their respective guild) on the other side.[14] These guild agreements play an important role in determining the creatives' compensation, in part, by setting minimum compensation standards.

The predominant payment structure in the U.S. differs fundamentally from the common practice of buy-out contracts in Germany. In contrast to the compensation system in the U.S. film industry, there is no collective bargaining compensation model in the German film industry that could serve as a prototype for the development of "common remuneration standards." This raises the question of to what extent, if any, it makes sense to model the German compensation structure based on the guild agreements? The German Legislator who proposed the amendments to the German CA pointed to the guild agreements in his proposed amendments and highlighted the successful combination of individual copyright contracts with participation regulations in the U.S. film industry guild agreements.[15]

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12. *Robert Lind/Mel Simensky/Tom Selz/Patricia Acton*, Entertainment Law 3d: Legal Concepts and Business Practices, § 8:14.

13. *Nils Borstnar/Eckhard Pabst/Hans Jürgen Wulff*, Einführung in die Film- und Fernsehwissenschaft, 200f. (2002).

14. A creative in this context can be defined as a person who is involved creatively in the makings of films and contributes elements which are traditionally considered artistic and copyrightable or otherwise protectable, cf. *John M. Kernochan*, Ownership and control of intellectual property rights in motion pictures and audiovisual works: Contractual and practical aspects – Response of the United States to the ALAI Questionnaire, ALAI Congress, Paris, Sept. 20, 1995, 20 Colum.-VLA J. L. & Arts 379 (383) (1996) with a list of potential creative contributors.

15. Draft of the "Act on strengthening the contractual situation of authors and performing artists" from 26.06.2001, BT-Drucks. 14/6433, 9; further reference id. at 11.

A. The U.S. film production market

Traditionally, the film production market has been controlled by a few dominant production companies (the "Majors"). In the first half of the 20th century, the Majors produced and distributed the vast majority of films and owned the theaters that showed the films.[16] In 1948, the U.S. Supreme Court ruling in *United States v. Paramount Pictures* brought this system to an end by ruling that it violated antitrust law.[17] *United States v. Paramount Pictures* led to the introduction of "Independents" and "Mini-Majors" into the film industry.[18] Although Independents were traditionally defined as production companies which conducted the film production without the influence of Majors, the line between Majors and Independents has blurred over time due to mergers and partnerships between the different production entities.[19] In addition, Independents often use the Majors' distribution channels.[20] Although Independents produce many films today, one cannot deny the Majors' huge financial and distribution influence.[21]

B. The guild agreements

1. The parties

The guild agreements are conducted between the guilds, who represent the creative contributors, and the production studios.

a. The guilds

There are at least a dozen different unions and guilds in the entertainment industry.[22] The following examination is limited to the three most important U.S. guilds (the "Guilds"): (1) The Screen Actors Guild of America / American Federation of Television and Radio Artists ("SAG/AFTRA"), (2) the Writers

16. *Gail Frommer*, Hooray for. . . Toronto? Hollywood, collective bargaining, and extraterritorial union rules in an era of globalization, 6 U. Pa. J. Lab. & Emp. L. 55 (72) (2003); *Andrew T. Coyle*, Finding a better analogy for the right of publicity, 77 Brook. L. Rev. 1133 (1141) (2012); for the pre-Major period see *Howard M. Frumes*, Surviving Titanic: Independent production in an increasingly centralized film industry, 19 Loy. L.A. Ent. L. J. 523 (527 et seq.) (1999).

17. United States v. Paramount Pictures, 68 S. Ct. 915 (1948); *Coyle*, supra note 16, at 1142f.; *Emily C. Chi*, Star quality and job security: The role of the performers' unions in controlling access to the acting profession, 18 Cardozo Arts & Ent. L. J. 1 (31f.) (2000).

18. *Alan Paul/Archie Kleingartner*, Flexible production and the transformation of industrial relations in the motion picture and television industry, 47 Indus. & Lab. Rel. Rev. 663 (666) (1994).

19. On this and the history of *Independent Productions* see *Frumes*, supra note 166, at 527 et seq.; *Kernochan*, supra note 14, at 387 et seq.

20. *Frumes*, supra note 16, at 531 et seq.

21. *Frommer*, supra note 16, at 72; cf. *Sharlene A. McEvoy/William Windom*, SAG and AFTRA: The case for merger of the entertainment unions, 12 U. Miami Bus. L. Rev. 59 (74) (2004).

22. *David P. White*, High stakes – Negotiators for the Guilds and Studios are locked in a showdown over the allocation of new media revenues, 30-MAY L.A. Law. 22 (24) (2007).

Guild of America ("WGA") and (3) the Directors Guild of America ("DGA").

In many cases, guilds were established in reaction to the extremely powerful Majors, which had been able to unilaterally enforce their interests at the expense of the creative contributors.[23] Dissatisfied with such a system, some of the creatives united to form guilds in order to avoid the Majors' dictation of the contract terms and working conditions.[24] Even today, guilds serve as a counterbalance to the Majors and have the resources and power to negotiate with the Majors at eye level.[25] Almost every creative contributor in the film industry can join the guilds and indeed, many creatives have done so, contributing to the collective power of the guilds.[26] The guilds' bargaining power derives partially from their ability to organize strikes; when the guilds announce or execute a strike, the resulting public pressure is extremely high because of consumers' demand for new series and films.[27]

b. The studios

Generally, the production companies do not negotiate individually with each Guild. Instead, the production companies united to create the *Alliance of Motion Picture and Television Producers* ("*AMPTP"*) which includes more than 350 production companies and has negotiated agreements with almost all of the guilds since 1982.[28] Nearly every employer in the film production signs these industry-wide contracts, in large part, because a production company can only hire guild members if the company has signed the guild agreement.[29] Vice versa, a production company who has signed such a guild agreement may basically only hire creatives who are (or become) members of the relevant guild.[30] However the company retains the option to hire members of any

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23. Http://www.sagaftra.org/history/how-sag-was-founded/how-sag-was-founded; *Kernochan*, supra note 14, at 443.

24. Http://www.sagaftra.org/history/how-sag-was-founded/how-sag-was-founded; *Kernochan*, supra note 14, at 443.

25. *Lind et al.*, supra note 12, at §§ 20:13, 21:17.

26. *Frommer*, supra note 16, at 71, 75; *Kernochan*, supra note 144, at 443; *Chi*, supra note 177, at 16 et seq.

27. *Chi*, supra note 17, at 20f.; *Nikolaus Reber*, "Gemeinsame Vergütungsregelungen" in den Guild Agreements der Film- und Fernsehbranche in den USA – ein Vorbild für Deutschland (§§ 32, 32a, 36 UrhG), GRUR Int. 9 (11) (2006).

28. *Jillian N. Morphis*, Negotiations between the WGA and AMPTP: How to avoid strikes and still promote members' needs, 12 Pepp. Disp. Resol. L. J. 525 (526) (2012); http://www.amptp.org/index.html.

29. *Frommer*, supra note 16 at 73, 76; *Schuyler M. Moore*, The Biz: the basic business, legal, and financial aspects of the film industry, 4th Ed., 61 (2011); *Chi*, supra note 17, at 4, 42; Ent. Industry Contracts, Vol.1, Form 11-1A P.11-51 (2012).

30. Art. 6 *WGA-BA* (2011); Sec. 1-400, 17-206 *DGA-BA*; Sec. 2 *SAG-BA* (2011); *Nikolaus Reber*, Die Pläne der Bundesregierung zu einer gesetzlichen Regelung des Urhebervertragsrechts – Ein Beitrag aus rechtsvergleichender Sicht (Deutschland/USA), ZUM 282 (283) (2001); *Nikolaus Reber*, Film Copyright, Contracts and Profit Participation, 110 (2000); *Reto M. Hilty/ Alexander Peukert*, "Equitable Remuneration" in copyright law: The amended German Copyright Act as a trap for the entertainment industry in the U.S. 22 Cardozo Arts & Ent. L. J. 401 (422f.) (2004); *Moore*, supra note 29, at 61; a different view has *Chi*, supra note 17, at 38 et seq.

particular guild (e.g. SAG members) while hiring non-guild members for a different aspect of the production (e.g. directing).[31]

2. The content and the compensation model

Almost every aspect of U.S. film production is governed by a collective bargaining agreement between a guild and the *AMPTP*.[32] The guild agreements are very extensive and include provisions regarding compensation, working conditions, arbitration and many other aspects.[33] In most cases, the contract terms cover three to four years and the provisions are normally renegotiated before the initial contract period expires.[34] Although these contracts are negotiated individually between each guild and the *AMPTP*, a certain level of consultation among the guilds is common, leading to some similarities in guild agreement provisions.[35]

The guild agreement negotiations have established a standard differentiated compensation scheme which is codified in many guild agreements. This differentiated compensation model is often referred to as a *three-tier compensation scheme* because the creative contributors' compensation is based on three different aspects.[36]

First, the guild agreements require an initial mandatory minimum compensation for creatives.[37] This primarily advantages the newer, less-known and less-established contributors who would otherwise likely have been unable to negotiate such favorable terms with the production company. [38] Second, the guild agreements only provide for a minimum level of the initial compensation, leaving an individual guild member free to negotiate additional favorable terms.[39] Third, the creative benefits from additional payments for the continuous exploitation of the film ("residuals").[40]

Residuals are payments the creative receives in addition to the initial compensation if the film is reused in the same medium or exploited through a new medium.[41] For example, if a theatrical motion picture is distributed in the home-video market after its theatrical release, the guild member would receive an additional (residual) payment. The residual calculation is based on a percentage of the initial (or prescribed minimum) compensation for each

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31. *Ethan Bordman*, Lights, camera, contract! Entertainment, film and TV contracts: Be ready for your client's close-up, 91-SEP Mich. B.J. 27 (29f.) (2012).
32. *Frommer*, supra note 16, at 71.
33. *White*, supra note 22, at 24.
34. See id. at 24; *Reber*, supra note 30-ZUM, at 285.
35. *Frommer*, supra note 16, at 74f.
36. See *Paul/Kleingartner*, supra note 18, at 667.
37. *Frommer*, supra note 16, at 78; *Reber*, supra note 27, at 11.
38. Cf. *Paul/Kleingartner*, supra note 18, at 667f.; *Lind et al.*, supra note 12, at § 8:14.
39. *Frommer*, supra note 16, at 78; *Paul/Kleingartner*, supra note 19, at 668; e.g. Art. 9 *WGA-BA* (2011).
40. *Coyle*, supra note 16, at 1150.
41. *Paul/Kleingartner*, supra note 18, at 669.

rerun[42] or on a percentage of the revenues in the new exploitation.[43] In the latter case, the gross revenues are crucial because, if the net profits were relevant to the calculation, creative accounting practices could allow production companies to avoid having to pay additional financial compensation to the contributor.[44] For example the production studio declared *Forrest Gump*, an extremely successful film, as a deficit project[45] which allowed it to avoid the payment of the otherwise-due profit participation to the creative.[46]

Almost all film industry guild agreements include residual provisions.[47] Additionally, total residuals often exceed a creative's initial compensation, especially in the area of commercials.[48] Such provisions are often critically important to creatives because the majority of creative contributors are not permanent employees and instead remain employed only for the duration of a specific film project.[49] They often do not have continuous employment between projects and the residuals help bridge any such employment gaps.[50] Therefore, residual payments can constitute a fundamental contribution towards achieving a living wage.[51] This is particularly cruical for the less-established guild member who only receives the minimum compensation.[52]

Unlike under the protections of a guild agreement where particular compensation mechanisms (and protections) apply to the employment of guild members, other non-guild creative contributors will often only receive a freely-negotiated flat sum.[53] Therefore, a production with guild members increases production costs that a production company could otherwise avoid by employing non-guild members.[54] Accordingly, financial considerations often drive the determination of whether a production company should employ guild

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42. See e.g. Art. 15 B. 1. b. *WGA-BA* (2011).

43. *Paul/Kleingartner*, supra note 18, at (669); Cable News Network, Inc. v. CSC Holdings, Inc., 2008 WL 4843616 (2008) - SAG/WGAW Amicus Curiae, 1 (8).

44. *White*, supra note 22, at 28; *Moore*, supra note 29, at 63.

45. In detail to the landmark decision Buchwald v. Paramount Pictures Corp., *Reber*, supra note 30 (Film Copyright), 93 et seq.; *Nikolaus Reber*, Die Beteiligung von Urhebern und ausübenden Künstlern an der Verwertung von Filmwerken in Deutschland und den USA, 294 et seq. (1998).

46. *Kernochan*, supra note 14, at 393f.; with further examples *Nikolaus Reber*, Der "Ertrag" als Grundlage der angemessenen Vergütung/Beteiligung des Urhebers (§§ 32, 32a, 32c UrhG) in der Film- und Fernsehbranche – Keine "monkey points" nach Art US-amerikanischer Filmvertragsklauseln, GRUR Int. 569 (574f.) (2011); regarding profit participation *Victor P. Goldberg*, The net profits puzzle, 97 Colum. L. Rev. 524 (524 et seq.) (1997); *Lind et al.*, supra note 12, at §§ 21:12, 21:13.

47. *Coyle*, supra note 16, at 1150f.

48. *Paul/Kleingartner*, supra note 18, at (672); *Craig J. Ackermann*, E-Issues take center stage: The 2000 SAG/AFTRA strike, 8 Vill. Sports & Ent. L.J. 293 (293f.) (2002).

49. *Chi*, supra note 17, at 74f., 82f.; Cable News Network, Inc. v. CSC Holdings, Inc., 2008 WL 4843616 (2008) - SAG/WGAW Amicus Curiae, 1 (10f.).

50. *Chi*, supra note 17, at 74f., 82f.; Cable News Network, Inc. v. CSC Holdings, Inc., 2008 WL 4843616 (2008) - SAG/WGAW Amicus Curiae, 1 (10f.).

51. *Paul/Kleingartner*, supra note 18, at (668).

52. *Paul/Kleingartner*, supra note 18, at (668, 672); *White*, supra note 24, at 28f.

53. *Bordman*, supra note 31, at 30.

54. Ent. Industry Contracts, Vol.1, 1.01 P.1-6 (2012).

members.[55]

C. The transfer of the guild compensation scheme to the German film market

1. Preliminary considerations

The above description and analysis of the guild agreements shows that the guilds employ a complex and differentiated compensation scheme. The parameters of the residuals differ according to the professional category the creative belongs to, the type, length and budget of the film, and the initial and the secondary exploitation markets. Both the construction of the guild agreement compensation terms and the efficient enforcement and distribution of the residuals advantage a qualified creative. However, one must examine whether the same positive outcomes for creatives would occur in Germany if a similar compensation scheme would be introduced in common remuneration standards according to section 36 of the German CA.

2. Factors for the success of guild agreements

a. The power of the guilds

The guilds provide a counter-balance to the economically powerful Majors because—especially for U.S. standards—a large percentage of employees in the film industry are guild members.[56] The guilds' large membership enables them to negotiate production and compensation conditions in the guild agreements. The guilds also have the ability and willingness to declare an organized strike.[57] Such strikes frequently lead to the stagnancy of the whole film industry.

b. The administrative functions of the guilds

Furthermore, the guilds perform important administrative functions which would prove difficult for creatives to perform on their own. First, the production companies deliver statements regarding details of the film production and exploitation to the guilds. In turn, the guilds review the accuracy of the payment statements and confirm the accuracy of the delivered financial statements.[58] If the employer does not satisfy its residual payment obligations, the guild can invoke a variety of sanctions with varying intensity. Penalty options include the ability to require an additional payment or to require the factual stop of the production. This could seriously hinder the

55. *Bordman*, supra note 31, at 29f.

56. *Frommer*, supra note 16, at 71, 75; *Kernochan*, supra note 14, at 443; *Chi*, supra note 17, at 16 et seq.

57. *Reber*, supra note 30, at 15f.

58. *Nikolaus Reber*, Beteiligung der Kreativen an neuen Medien aus der Sicht des Streiks der Drehbuchautoren in den USA 2007/2008, GRUR Int. 798 (805) (2008).

production and success of a continuously-produced series.[59] Therefore, in most cases, employers pay the residuals according to the contract.[60] In addition, if a company does not pay the required residuals, the respective guild might file a lawsuit for the outstanding payment and the litigation costs would be born by the guild.[61] In contrast, without the guild, an individual creative would have to file suit and bear the litigation costs himself. This leads to an enormous advantage for the guild member.

Second, instead of having to deal independently with an employer, the guild deals with the respective employer on behalf of the member. The creative's fear of being stigmatized as a "complicated employee" and therefore losing his employment or not being considered for subsequent projects by this particular employer (or maybe even in the whole industry) is thereby reduced. In contrast, lawsuits in Germany by creative contributors who are still working in the film production are a rare exception, due to the fear of stigmatization and the risk of not being considered for other engagements.[62]

c. Administration of residuals

The guilds are mainly in charge of the administration of residuals. They receive the residual payments and forward them to the entitled creative contributors. The guilds' control in this context should not be underestimated. They can review the accuracy of the payments made by the production company and ensure that the correct creative receives the correct payment sum.[63] Although it is the employer's (or their assignees') obligation to ensure the exact calculation and payment of residuals, this guild administration process also secures the employer that the eligible creative receives the accurate payment.[64]

3. The practical implementation in Germany

a. Consideration of specific production and exploitation circumstances in Germany

To what extent can the U.S. model lead to appropriate results in the German market? It is important to take the constellation into account that the production company is the creative's contractual partner but the exploitation is realized by a third party, such as a broadcasting company or a specialized

59. Broadcast Arts Productions, Inc. v. Screen Actors Guild, Inc., 673 F.Supp. 701 (703f.) (1987).

60. The same in general *Reber*, supra note 30, at 15.

61. See, e.g. Broadcast Arts Productions, Inc. v. Screen Actors Guild, Inc., 673 F.Supp. 701 (701 et seq.) (1987).

62. *Gerald Spindler*, Reformen der Vergütungsregeln im Urhebervertragsrecht, ZUM 921 (933) (2012) also considers the collective execution of rights as the only solution; *Reber*, supra note 58, at 806.

63. *Paul/Kleingartner*, supra note 18, at 674f.

64. See *id*. at 674f.

distributor. Contrary to the situation in the U.S., in Germany a production company is often hired by an exploiter to produce a certain film. Therefore, one must examine how this German system can adequately be considered within collectively-bargained agreements between production companies and representatives of creatives.

The shape of a U.S.-style system in Germany depends mainly on the payment that the production company receives by the exploiter for producing the film. If the production company receives a flat sum for his work, it would be unreasonable if he also had to compensate the contributors for reruns or the exploitation of the work in another market. Under such a system, the producer would have to satisfy these claims out of his own lump-sum remuneration without economic participation of subsequent exploitation of the work. To make the system function in Germany, the exploiter would have to assume the obligation of paying the creative because he manages the exploitation and realizes the additional revenues.[65] Furthermore, this approach would be consistent with the legal principle in section 32a II 1 German CA. This section requires a third party (to which the exploitation rights have been transferred) to pay the creative additional financial compensation in accordance with the work's success if such a third party receives the revenues leading to the striking disproportion.

Under such a scheme, the question becomes how to legally construct the exploiter's obligation. Again, a look at the provisions in the guild agreements might provide the answer to this question. The guild agreements respond to this situation with so-called "assumption agreements." According to an assumption agreement, the signatory of a guild agreement has to ensure that, in case of exploitation by a third party, such third party has contractually to take over the obligations of residual payments to the guild members.[66] One must question whether smaller- and medium-sized German production companies would be able to negotiate such an obligation with the economically-superior exploiters. Ideally, the creative contributors could support the production companies to negotiate the contractual terms between a production company and an exploiter.[67] This would also benefit the creatives because their residual claims would mainly face a solvent debtor: the exploiter.

If the employer is entitled to profit participation, it would be appropriate that it and the exploiter pay the residuals pro rata to the creatives. The extent of each party's residual claim obligation could be tied to the revenues to which each party is entitled.

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65. *Wilhelm Nordemann/Gerhard Pfennig*, Plädoyer für eine neue Vertrags- und Vergütungsstruktur im Film- und Fernsehbereich, ZUM 689 (693) (2005); this is partly already the case for the compensation of reruns and additional payments in the area of productions on behalf of public-service TV broadcaster, see LG München I ZUM 1000 (1003) (2012).

66. See also 28 U.S.C.A. § 4001.

67. Cf. *Nordemann/Pfennig*, supra note 65, at 693f., who consider direct negotiations between exploiter and creatives who are represented by collecting societies.

b. German collecting societies as guilds?

As mentioned above, the German film industry has no organizations that are as significant as the guilds are to the U.S. entertainment industry. A collective association similar to the U.S. guilds is the fundamental prerequisite for the bargaining of such contractual terms and for the efficient enforcement of any such terms. German interest groups, unions and collecting societies[68] might perform these tasks.[69] The greatest benefit might be obtained if collecting societies represent the creative contributors in exercising guild-like contracts for three primary reasons. First, the collecting societies already act in the interest and on behalf of the vast majority of employees of the respective profession.[70] Second, due to their current tasks, the collecting societies possess significant representative information and databases with regard to the exploitation of different works, which they could use to calculate the payment claims.[71] Third, similar to the situation in the U.S., the collecting societies could ensure that due payments are forwarded to the entitled creative contributors which would also protect the employer from third-party claims.

c. Practical consequences

If residuals are negotiated within the framework of common remuneration standards according to section 36 of the German CA, one of the most significant advantages for production companies would occur with regards to potential claims arising from sections 32 and 32a of the German CA. While section 32 of the German CA entitles an author to an equitable remuneration in exchange for the granting of exploitation rights, section 32a of the German CA entitles the author to additional financial participation in the case of a striking disproportion between the payment and the actual revenues and advantages. Because of these collective bargaining agreements, the agreed remuneration is equitable pursuant to section 32 II 1 of the German CA and would exclude a claim arising from section 32 I of the German CA. If these agreements would consider the case described in section 32a of the German CA, this claim would also be excluded under section 32a IV of the German CA. Therefore, the employer benefits from an immense gain regarding legal and financial certainty. This would also lead to the positive side effect that the production company and exploiter would not have to face the practical problems of collecting data and statements over decades to document a film's revenues if the creative contributor files legal actions and base them on section 32a I, II of

68. These are societies which administer some aspects of the copyright and its exploitation fiduciary for the authors.

69. A consideration of collecting societies on behalf of the creatives regarding the negotiations of common remuneration standards according to § 36 German CA has to be faced critically, since they might lack the necessary prerequisite of independence, *Spindler*, supra note 62, at 922f. with further references.

70. *Nordemann/Pfennig*, supra note 65, at 693.

71. *Id.*, at 693f.

the German CA. These could be, for example, the practical consequences of the ruling in the above-mentioned case *Das Boot*. The practical difficulties for the production company as well as for the exploiters to retrace the revenues created by the exploitation of this film are enormous, dating back to its 1981 release.[72]

Allowing the creative to have a greater economic participation in the success of the film would create another important advantage for the employer. While the employer bears the entire financial risk of a buy-out contract, the proposed system would slightly shift this risk to the creative because any monetary participation would only be payable if the work actually generates such revenues.[73] Under the proposed system, the initial production costs are also lower for the employer because if the creative contributor is eligible for future profit participation, he has to accept a lower up-front payment.[74] Although this could provide the creative with additional compensation, it consequently also requires the creative to share the risk of an economic "flop." Under this system, all participants have an interest in the monetary success of the work, which has a positive impact on their dedication during shooting, promotion and press conferences of the film.[75] An alternative to residuals, especially on the home-video market, could be a flat-sum payment for the release on such a secondary market.[76] To ensure equitable participation for the creative concerning the economic success of the film, the parties could agree upon a payment of further flat-sums if certain sale figures are reached. German production companies often argue that the calculation and administration of profit participation with regard to creatives lead to non-bearable costs and effort.[77] This Opinion casts doubt on such statements.

CONCLUSION

The largely-efficient exercise and enforcement of rights and claims in the U.S. entertainment industry is inseparably connected with the extremely powerful status of the U.S. guilds. Their extensive duties and competencies contribute significantly to the success of these collective bargaining agreements. Without a comparable collective association acting on behalf of the German creatives, the practical success of an analogous compensation scheme cannot be ensured. The realization of a similar compensation structure

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72. Http://www.zeit.de/kultur/film/2013-03/das-boot-urteil-kameramann.

73. Cf. *Lind et al.*, supra note 12, at §§ 21:1, 21:16; *Nordemann/Pfennig*, supra note 65, at 694.

74. *Lind et al.*, supra note 12, at §§ 4:40, 21:7, 21:9, 21:16; Ent. Industry Contracts, Vol.1, Form 10-1, P.10-14 (2012).

75. *Nordemann/Pfennig*, supra note 65, at 690.

76. Like this already in the 2001 *WGA* Agreement, see *Lind et al.*, supra note 12, at § 1:173.

77. *Schwarz*, supra note 6, at 109; *Schwarz/Hansen*, supra note 10, at Chapter 54 No.8; *Konstantin Wegner* in: Wegner/Wallenfels/Kaboth, Recht im Verlag, 2nd Ed., Chapter 2 No.98; *Oliver Castendyk,* Buy-out-Klauseln in Honorarbedingungen für Journalisten/innen, AfP 434 (438) (2010).

would be the first step towards a welcome financial participation by the creative contributors in the success of their films. A stronger integration of collective representations for the creatives enables them to better negotiate financial provisions and supports the effective and efficient execution and the enforcement of such contract terms.[78] As shown in this Opinion's examination of the guild agreements and their Assumption Agreements, it is necessary to take the specifics of the respective production and exploitation systems into account.

This Opinion raised the question of whether costly and time-consuming legal disputes—such as those involved in the *Das Boot* and *Pirates of the Caribbean* cases—can be avoided in future. The German Legislature itself answered this question by implementing the concept of common remuneration standards in section 36 of the German CA, which can prevent potential claims arising from sections 32 and 32a of the German CA. Although the U.S. and German film industries differ, this Opinion shows that a thorough examination of the U.S. guild agreements could help shape German common remuneration standards.

78. Cf. to the status quo *Reber*, supra note 45, at 572.