

National report for Germany: selected new cases (Constitutional Court, Supreme Court)

Silke von Lewinski

1. Remuneration for private reproduction

Several decisions related to the question of whether particular devices would be subject to this remuneration right. These decisions were rendered on the basis of the previous version of the relevant provision (§ 54a of the CA) and thus in principle are no longer relevant for the remuneration right under the new provision (§ 54), which entered into force on 1 January 2008. While the old version was limited to devices that were used for photomechanical reproductions ('Ablichtung') or reproductions made in a similar procedure, the new version extends to devices used for reproductions also on the basis of digital copies. The Supreme Court held that the remuneration right applied to so-called devices having multiple functions<sup>1</sup> and confirmed this for scanners,<sup>2</sup> but rejected a remuneration right for printers and plotters,<sup>3</sup> personal computers,<sup>4</sup> digital cameras,<sup>5</sup> and so-called copying stations;<sup>6</sup> copying stations are constituted of a computer drive to insert the copy from which a copy is to be made and several computer drives for burners, in which the blank CDs, CD-ROMs or DVDs are inserted in order to make copies. The Supreme Court interpreted the old version of the provision as being limited to copies made from analogue (print) documents (irrespective of whether the copying procedure was analogue or digital). The related decisions may be and have been criticised. It seems that the Supreme Court wanted to limit the application of the remuneration right to certain devices, given the previous decision according to which a scanner was the

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<sup>1</sup> Equipment that, if linked to a computer, may print and scan and, without a computer, may make copies and send them by telefax, see Supreme Court, 30 January 2008, GRUR 2008, 786 – *Multifunktionsgeräte*.

<sup>2</sup> Supreme Court, 29 October 2009, GRUR 2010, p. 57, nos. 22 ss. – *Scannertarif*. See already in the same sense Supreme Court, 5 July 2001, GRUR 2002, p. 246 – *Scanner*.

<sup>3</sup> Supreme Court, 6 December 2007, GRUR 2008, p. 245 – *Drucker und Plotter* (note von Ungern-Sternberg).

<sup>4</sup> Supreme Court, 2 October 2008, GRUR 2009, p. 53 – *PC*, MMR 2009, p. 182 (note Artl); ZUM 2009, p. 152 (note Wandtke/C. Dietz).

<sup>5</sup> Supreme Court, op.cit. (*Scannertarif*), no. 24, on the grounds that cameras are not designed to reproduce works, as required by § 54a (1) of the CA (old version).

<sup>6</sup> Public equipment offered to make copies of CDs and DVDs, Supreme Court, 17 July 2008, GRUR 2008, p. 993 – *Kopierstationen*.

main instrument in the chain 'scanner – personal computer – printer' and not all of the three devices in this chain would be covered by the remuneration right.<sup>7</sup>

In fact, the collecting society VG Wort, which administers the remuneration right in literary works for private and one's own reproduction, submitted a complaint to the Constitutional Court against those decisions of the Supreme Court that rejected the remuneration right. In the meantime, the Constitutional Court has rendered its decisions regarding printers and plotters, PCs, and copying stations. It quite strongly criticised, reversed and referred back to the Court the two first-mentioned judgements.<sup>8</sup>

Regarding printers and plotters, it held that the Supreme Court had violated the constitutional right to a lawful judge in the meaning of Article 101(1), sentence 2 of the constitution (Grundgesetz). It motivated this violation by recalling the obligation of any court of last instance of an EU Member State to submit questions of European law that are relevant for the decision of the national case to the European Court of Justice (Article 267(3) of the TFEU/previously: Article 234(3) of the EC Treaty). The Court noted that the Supreme Court had not indicated in any way whether it had at all considered to submit a question for preliminary ruling to the European Court of Justice, while in this case, an obligation for such submission seemed obvious, given the possibility of a different interpretation on the basis of the Information Society Directive.<sup>9</sup> It also mentioned that the Supreme Court had an obligation to interpret the national law in conformity with the directive.

In respect of the fundamental right of property guaranteed under Article 14(1), sentence 1 of the constitution (Grundgesetz), the Constitutional Court, in remarkably clear words, criticised the Supreme Court for not having taken into account this fundamental right in order to extend the remuneration right to devices used to make private copies on the basis of digital copies. In particular, it stated that 'among the constituent features of authors' rights as property in the meaning of the constitution

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<sup>7</sup> Supreme Court, 5 July 2001, GRUR 2002, p. 246 – ‚Scanner‘. For criticism, see, e.g., Wandtke/C. Dietz (fn 4, above).

<sup>8</sup> Printers and plotters: Constitutional Court, 30 August 2010, GRUR 2010, p. 999 (note Dreier); GRUR Int. 2011, p. 72; PCs: Constitutional Court, 21 December 2010, 1 BvR 506/09; copying stations: Constitutional Court, 21 December 2010, 1 BvR 3461/08.

<sup>9</sup> Op.cit., nos. 50 et ss.

are the principal allocation of assets resulting from the creative achievement to the author on the basis of civil law norms and his freedom to make use of such assets under his own responsibility'.<sup>10</sup> The Constitutional Court reversed the decision of the Supreme Court and referred it back to it, accompanied by a number of principles that the Supreme Court would have to respect. It mentioned in particular that the Supreme Court should also discuss whether Article 14(1) of the constitution requires an interpretation of § 54a of the CA (old version) leading to the recognition of the remuneration right and thus making obsolete a question for preliminary ruling to the European Court of Justice.<sup>11</sup>

Also in the decision on PCs, the Constitutional Court reversed the judgment of the Supreme Court on the remuneration right and referred it back to the Supreme Court.<sup>12</sup> While it often referred to the decision in the above *printer and plotter*-case, it also pointed at the particularity in this case, namely, that for personal computers, probably only Article 5(2)b of the Information Society Directive would apply. Also, it clarified that the 'Padavan'-case of the European Court of Justice<sup>13</sup> had not fully clarified the scope of the remuneration right for private reproduction and in any case had not excluded digital media or equipment from such remuneration. It also noted that the Supreme Court could be faced with question of whether § 54a(1), sentence 1 of the CA (old version) should be interpreted in conformity with the directive, given its narrow wording that is limited to photographic copies.<sup>14</sup>

In contrast, the Constitutional Court did not admit the constitutional complaint against the judgment of the Supreme Court regarding copying stations.<sup>15</sup> Firstly, it did not consider Article 14(1) of the constitution (Grundgesetz) on the property right to be violated, because the computer drives and the DVDs were already subject to a remuneration. It also did not consider Article 101(1), sentence 2 of the Constitution (Grundgesetz) on the right to the lawful judge to be violated, because the European Court of Justice had already decided the similar, above mentioned case 'Padavan', so that the fact of not having submitted a question for preliminary ruling to the

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<sup>10</sup> Op.cit., no. 60 (translation by the author).

<sup>11</sup> Op.cit., no 59.

<sup>12</sup> Constitutional Court, case BvR 506/09 of 21 December 2010.

<sup>13</sup> ECJ, 21 October 2010, case C-467/08.

<sup>14</sup> Op.cit., nos. 19, 22, 25.

<sup>15</sup> See above, fn 6 (Supreme Court), fn 8 (Constitutional Court).

Supreme Court to the European Court of Justice was not untenable in the meaning of the case law of the Constitutional Court regarding Article 101(1), sentence 2 of the Constitution.<sup>16</sup>

## 2. Adequate remuneration under the Law of 2002

In respect of the question of what would be an equitable remuneration under the new rules of the 2002 amendment to the German Copyright Act, decisions by the Supreme Court had been expected after numerous lower instance courts had dealt with this question. The first decision on the new § 32 of the CA, under which the author enjoys a right to equitable remuneration for the licensing of rights, even the contract does not provide an equitable remuneration, and may require the consent of his contractual partner to modify the contract accordingly, related to the rights of translators. In this case,<sup>17</sup> no relevant common standard under § 36 of the CA existed (such standards would indicate what is equitable, see § 32(2), sentence 1 of the CA). Therefore, the Supreme Court had to decide whether the contract provided for an equitable remuneration in the meaning of § 32(2), sentence 2 of the CA, according to which the remuneration is equitable, if it corresponds, at the time of conclusion of the contract, to the remuneration that is customary and fair (*'redlich'*) in the relevant industry, taking into account the kind and volume of uses covered by the license, including its duration and point in time.

Even if the remuneration in this case corresponded to what was usual in the relevant industry at the time of conclusion of the contract, the Supreme Court held that it was not 'fair' (*'redlich'*).<sup>18</sup> Among others, the Supreme Court stated that the author as a matter of principle must adequately participate in each economic use of his work; in cases of ongoing uses, this principle is best realised by a success-oriented remuneration. While a lump sum may amount to an equitable remuneration, if it represents (from an objective point of view taken at the time of conclusion of the contract) and equitable participation in the entire revenues to be expected from the

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<sup>16</sup> Op.cit, nos. 4, 7 and 8.

<sup>17</sup> Supreme Court, 7 October 2009, GRUR 2009, p. 1148 (note Jacobs); NJW 2010, p. 771 (note Wandtke); ZUM 2010, p. 48 (note von Becker) – *Talking to Addison*; the Supreme Court rendered four additional judgments with nearly the same wording (I ZR 230/06, I ZR 39/07, and ZR 40/07, ZR 41/07, see ZUM-RD 210, p. 16, ZUM-RD 2010, p. 8, (for non-fiction works), ZUM-RD 2010, p. 62 and ZUM 2010, p. 255, respectively.

<sup>18</sup> Nos. 20 ss.

use, the Supreme Court decided that in this case, where the translator only had received a lump sum of around 15 Euro per page and the work was exploited during a long time, an equitable remuneration would require an additional remuneration, starting with the 5.000<sup>th</sup> sold, paid, and not rendered copy, calculated as a certain percentage of the net retail price, namely, for hardcover books 0,8% and for pocket books 0,4%. The Supreme Court, however, admitted that particular circumstances of a given case could result in the need to lower or increase these percentages in order to consider a remuneration as equitable. Moreover, the court stated that a translator of fiction works, as in this case, in principle may claim 50% of the net proceeds that the publisher receives on the basis of sublicensing the translated work to a third party. The net proceeds here are to be understood as the amount remaining after deduction of remuneration for other right owners.

The Supreme Court confirmed and further developed this decision in another case regarding a translator.<sup>19</sup> In particular, the additional remuneration to be paid above the 5000<sup>th</sup> copy applies each to a hard cover and soft cover edition separately. Also, in deviation from former case law of the Supreme Court, a translator may in principle claim one fifth of the share of the author of a work in a foreign language.

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<sup>19</sup> Supreme Court of 20 January 2011, I ZR 19/09 – *Destructive Emotions*; not yet reported.