

German Copyright Law Sets Limitations on Exclusive Licenses

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Authors and creators in Germany are given a leg up in dealing with the copyright industry and their publishers. The new rules introduced into German copyright law late last year focus on “full buy-out” contracts where rights are granted to the publisher exclusively in consideration of a one-off lump sum payment (with no running royalties being payable). The new law tackles situations where authors give away the whole value of their work before its true commercial potential is tested in the market and will also help authors and creators in case of under-exploitation or under-investment by the publisher.

The following new rules will apply to licensing contracts for German copyright works concluded as from **1 March 2017**:

1. **Exclusivity reduced to 10 years:** Where exclusive license rights are granted against the payment of a **lump sum** (a flat licence fee) with no obligation to pay ongoing royalties, by law after an initial **10-year**-period the license will be deemed non-exclusive and the author will be free to exploit the licensed work and to grant licenses to other parties. The new rule will significantly strengthen authors’ rights, particularly in “full buy-out” scenarios.
2. **Reporting obligations:** The new rules provide authors the statutory right to require licensees to provide **annual** reports setting out details of the manner in which the licensed works are being used and the proceeds generated by the licensees from such exploitation. This also will apply in “full buy-out” contracts (that is, a license in consideration of the payment of a one-off lump sum). It is envisaged that authors would use such information to obtain additional compensation under statutory rules.
3. **Exemption for collective arrangements, software and other sectors:** The new rules provide that collective arrangements concluded between authors’ associations

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and licensees/users/user trade associations and trade union agreements may derogate from the new rules above. Exemptions apply largely to **software** and **film** rights. Furthermore, the 10 year exclusivity time limit may be derogated from in contracts relating to works of **architecture**, works to be used as **trademarks** or **designs**, or works not intended for publication.

What to do: Existing contracts are not affected, but new contracts (and possibly amendments to existing contracts) that are concluded from 1 March 2017 will be subject to the new law. Assuming the application of German law, the economics of copyright contracts in non-exempted sectors will have to take account of the maximum 10 year exclusivity period for one-off payment “buy-out-“ contracts and the additional costs arising from the annual reporting obligations (which would normally apply only in royalty contracts). To the extent not already done, licensees would need to put in place procedures to document the exploitation of licensed rights in order to be able to comply with the reporting obligations. Contracts with sub-licensees should reflect the shortened exclusivity period and should impose corresponding reporting obligations on sub-licensees (backed-up by suitable indemnification clauses). Where appropriate or necessary to avoid problems arising from the shortened exclusivity period, licensees should consider royalty based models as opposed to lump sum payments. Where applicable, contract drafting should reflect the factors that would support an exemption.

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