

4. Context

4.1 Economic profile of cultural industries in the UK / Germany

There are still no reliable estimates available about the relative sizes of the cultural or creative industries because of various inconsistencies in classification. In particular, it is doubtful to what extent information technology, and various manufacturing and support activities should contribute to quantifying the sector. On the generous approach of the UK Department for Culture, Media & Sport (DCMS), the constituent parts of the creative industries are: Advertising, Architecture, Art & Antiques, Crafts, Design & Designer Fashion, Video Film & Photography, Music & Visual/Performing Arts, Publishing, Software Computer Games & Electronic Publishing, Radio & TV.

For Gross Value Added (i.e. the contribution of the relevant sectors to GDP), two headline figures are:

<i>Creative Industries</i>	<i>UK 2004</i>	<i>Germany 2004</i>
Gross Value Added (GVA)	£56.9 bn	€58 bn (£40 bn)
% of national GVA	7.3%	2.6%

Sources:

Creative Industries Economic Estimates Statistical Bulletin, DCMS, September 2006

Wertschöpfung der deutschen Kulturwirtschaft, M. Söndermann/Arbeitskreis Kulturstatistik e.V., 2006

For comparing the income of writers, the most straightforward sectors under Standard Industrial Classification (SIC) would appear to be: SIC 22 (publishing), in particular 22.11 (books), 22.12 (newspapers) and 22.13 (journals, periodicals) and SIC 92 (culture, sport and entertainment), in particular SIC 92.11 (film & video production) and 92.20 (radio & TV). At

the European level, equivalent NACE industrial classification codes are used to compare national economies. 2001 national statistics have been analysed for the 2005 Commission Working Paper: *Strengthening the Competitiveness of the EU Publishing Sector* (SEC(2005)1287). In NACE code 22.1, the publishing sector (EU-15) generated output of some €117 billion, with a value added of more than €43 billion, as measured in factor cost. According to SEC(2005)1287, this represents 0.49% of the total Gross Domestic Product (GDP) of the EU, however with great regional differences: “While the publishing sector represents 0.29% of the economy in countries like Ireland and Italy, in the United Kingdom this sector has the highest relative weight in the economy, with 0.82% of the total GDP. With a relative weight of 0.48% (EU average), Germany could be considered a country with a publishing sector representative of the EU in terms of relative economic weight.” (p. 8)

The following table gives comparative figures for the publishing sector for the EU-15 in 2001, i.e. EU member countries before the accession of 10 new members in 2004.

Table 4.1 The publishing sector in the EU-15* countries in 2001

	<i>Production value (€M)</i>	<i>Value added at factor cost (€M)</i>	<i>Number of enterprises</i>	<i>Number of employees</i>
Belgium	2,560.0	739.7	1,119	9,786
Denmark	2,762.3	1,115.8	1,239	32,291
Germany	27,900.8	10,140.4	6,709	185,307
Greece	n/a	n/a	n/a	n/a
Spain	7,019.3	2,595.2	5,897	47,900
France	19,140.2	5,854.9	12,223	88,992
Ireland	567.3	330.4	107	4,245
Italy	11,553.8	3,514.8	6,934	36,692
Luxembourg	n/a	n/a	103	n/a

	<i>Production value (€M)</i>	<i>Value added at factor cost (€M)</i>	<i>Number of enterprises</i>	<i>Number of employees</i>
Netherlands	7,089.2	2,894.7	2,620	38,659
Austria	1,757.7	621.3	538	8,180
Portugal	1,075.0	338.4	1,020	10,814,
Finland	2,384.0	944.0	1,406	17,493
Sweden	4,027.3	1,221.0	4,493	27,016
United Kingdom	28,868.6	13,119.2	9,694	165,430
Total EU-15 ⁺	116,705.5	43,429.8	54,102.0	672,805.0

* Derived from data in NACE 22.1

⁺ Excludes EL, LU for some variables

Source: Eurostat, New Cronos 2004. Data for last year available (2001), except for Italy and Ireland (2000)

The UNESCO World Culture Report 1998 (p. 359) has figures for the number of book titles published per 100,000 people per year: UK = 148; Germany = 86.

Occupational statistics offer an alternative perspective. According to the Labour Force Survey LFS¹ (a quarterly survey of households living at private addresses in Britain), 173,800 people work in publishing occupations. An analysis of 2005 LFS data by the GMB general union² reports that 30,000 are employed as journalists, and 11,000 as authors/writers. According to 2004 Mikrozensus data, 141,000 people (employed and self-employed) work in Germany in publishing

¹ *Creative Industries Economic Estimates Statistical Bulletin*, Dept. for Culture, Media and Sport (DCMS), September 2006, esp. Table 3.

² "Britain's pay league", August 2006.

occupations (occupational group 81.1 –*Publizisten*).³ In 2001, 24,000 paid tax⁴ on income from self-employed writing. According to surveys by the European Federation of Journalists (EFJ)⁵, a total of 70,000 work as journalists in the UK of whom 11,000 are free-lance. The equivalent figures for Germany are 75,000 journalists, of whom 40,000 are said to be free-lance. The methodology of the last study is not clear.

These figures appear to indicate sectors of at least comparable size, although of considerably greater significance to the British national economy.

³ *Ergebnisse des Mikrozensus 2004*, Band 2: Deutschland, Wiesbaden: Statistisches Bundesamt, 2005.

⁴ Commissioned analysis for this study (see Chapter 3, Figure 3.7).

⁵ *Freelance Journalists in the European Media Industry*, Report by Gerd Nies and Roberto Pedersini, October 2003.

4.2 Legal & institutional differences between UK / Germany

For the purposes of this study, there are four potentially significant differences in the legal and institutional framework of copyright between Germany and the UK.

A. Moral rights

Article 6bis of the Berne Convention (1928 Rome revision) states that “[i]ndependently of the author’s economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”⁶ These rights are known as *droit moral* or moral rights. The UK gave formal recognition with the Copyright, Designs and Patents Act (CDPA) 1988. The main provisions are

- the right to be identified as author or director (paternity right) (ss 77-79)
- the right to object to derogatory treatment (integrity right) (ss 80-83)

However, there are extensive exceptions (ss 79 & 81) for computer programs, newspapers, reference works, works produced under employment. Moral rights can be waived (s 87: “any of those rights may be waived by instrument in writing”). Moral rights can fail for lack of assertion (s 77(1): right to be identified “is not infringed unless it has been asserted in accordance with section 78”).

In Germany, moral rights (*Persönlichkeitsrechte*) are inalienable. Retaining this link between work and author may strengthen the bargaining power of writers vis-à-vis exploiters.

⁶ Under Berne Convention Article 5, “[t]he enjoyment and the exercise of these [Berne protected] rights shall not be subject to any formality”.

B. Contract law

In Germany, there is a separate body of law known as copyright contract law (*Urhebervertragsrecht*, new law 2002). This builds on the so-called *Zweckübertragungstheorie* (“theory of the purpose of transfer”) under which author contracts had to specify uses to which a work was put (§31(5) UrhG). Uses not envisaged by the parties at the time of the contract traditionally remained outside the scope of contract (i.e. the rights were retained by the author). Under the new law, authors can now transfer rights to yet unknown exploitations but subject to fair or equitable compensation (*angemessene Beteiligung*).⁷ There is also under §32 a new general entitlement to equitable remuneration (*angemessene Vergütung*) from any copyright contract. §36 provides that collectively negotiated tariffs are deemed to be equitable.

This regulation of copyright contracts intervenes in the contractual freedom of parties with the aim to improve the financial position of authors.

C. Levy system

Some countries, such as Ireland, Malta and the UK, have taken the view that it is primarily the right owner’s choice if private copying is tolerated. Copyright statutes here conceive exceptions very narrowly, for example in the time-shifting provisions under section 70 of the UK’s Copyright, Designs and Patents Act (CDPA) 1988, which allows recording of a broadcast “in domestic premises for private and domestic use... solely for the purpose of enabling it to be viewed or listened to at a more convenient time”.⁸

⁷ §31(5) UrhG also specifies: “If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant. Appropriate factors to consider for the question of whether a right to use is granted, is whether it concerns a simple or exclusive right to use, the extent of the right to use and the right to prohibit, and what restrictions affect the right to use.”

⁸ Following the Gowers Review of Intellectual Property (HM Treasury: December 2006), this provision is currently under review to allow format shifting for music. No levy scheme is being contemplated.

Many civil law jurisdictions have avoided this dichotomy between free use and exclusive rights following the concept of *Vergütungsanspruch*, or claim to remuneration, in the German copyright law of 1965 (UrhG). A statutory claim to remuneration for unauthorised private copying could be seen as an additional debt of the user (i.e. not an exception) or as a compulsory licence. In any case, the income streams attached to this new construction were soon considerable. Levies were set on both copy equipment (such as photocopiers and CD-burners) and media (such as blank tapes, CD-Rs and memory cards). For example, there is currently a levy of €12 on all personal computers sold in Germany. In 2004, the largest collecting societies GEMA (musical works) and VG Wort (literary works) had levy fee income in the region of €30 million each. For details of the levy system as it applies to VG Wort, see Chapter 4.4.

D. Mandate and constitution of collecting societies

Where collecting societies are not mandated by Statute as the only mechanism for exercising certain rights (as is the case for rental and cable re-transmission rights under European Directives 92/100/EEC and 93/83EEC), it is left to individual right owners to decide whether to administer a right collectively, and through which organisation. In Germany, VG Wort is voluntarily constituted as a joint corporation of authors and publishers. In the UK, ALCS only acts for authors while collecting jointly with publishers for specific rights (copying of books, journals, magazines, periodicals) through a third company (the Copyright Licensing Agency: www.cla.co.uk).

These different institutional arrangements are the result of historical accidents and commercial bargaining. They are reflected in differences in the rights administered (ALCS has not mandate for journalists), and different distribution shares between authors and publishers (which are more in favour of authors in Germany). See the following sections for further details of ALCS and VG Wort's mandate and distribution scheme.

4.3 ALCS Licences 1995-2005

Writers' collecting societies administer rights for so-called secondary uses - that is, uses that have not been included in the primary exploitation contract for literary or dramatic works with publishers or producers. Despite their rather limited mandate, collecting societies may support important policy aims.⁹

The Authors' Licensing & Collecting Society (ALCS) was established in 1977 as a not-for-profit company with the cooperation of two professional bodies, the Writers' Guild of Britain and the Society of Authors, who each have four representatives on the ALCS board. A further four independent board members are elected by ballot. Unlike VG Wort, ALCS only represents authors not publishers (it had mandates for about 50,000 writers in 2005 with a target of 100,000 by the end of the decade). However, more than two thirds of ALCS income derives from reprography fees collected through the Copyright Licensing Agency (CLA), acting jointly on behalf of ALCS and the Publishers' Licensing Agency (PLS).

In the UK, the public lending right (created by the Public Lending Act 1979) is administered by a separate agency as an intellectual property right independent of copyright legislation. Under the PLR scheme, the government pays funds to authors for the free borrowing of books from public libraries in the United Kingdom. (For comparative German figures, see Chapter 4.4).

⁹ For further discussion, see M. Kretschmer (2002), "The Failure of Property Rules in Collective Administration: Rethinking copyright societies as regulatory instruments", *European Intellectual Property Review (EIPR)* 24/3: 126-137; and M. Kretschmer (2007), "Access and Reward in the Information Society: Regulating the collective management of copyright" (mimeo, available at www.cippm.org.uk).

Principles of the distribution scheme

The distribution of licence fees collected through the Copyright Licensing Agency (CLA) is negotiated between ALCS and Publishers' Licensing Agency (PLS). For books, authors and publishers split 50/50. For serials (journals, magazines), historically the publishers have retained 100%. Since 1998, this has moved to 75/25 in cases where ALCS could challenge the publisher's claim to ownership. From 2005, a general split of 85/15 has been agreed. The author's share for many broadcasting licences is 22% (of which ALCS receives about half).

Main sources of income

1. Photocopying

Reprographic licences are collected through the Copyright Licensing Agency (CLA) for photocopying in schools, colleges, universities, businesses and the national health service. Certain CLA licences also permit the digital scanning of works. CLA income is split four ways: to publishers, to ALCS, to international reprographic rights organisations (for foreign works copied in the UK) and to DACS, the UK collecting society for visual artists. In 2004/05, ALCS received about £11 million from CLA (70% of total ALCS revenues).

2. Foreign public lending right

Payments are received from German and Dutch collecting societies for works borrowed in the original English language edition or in translation.

3. Cable retransmission

Cable retransmission is the simultaneous showing of one country's television signal in another country via satellite, cable or the Internet. ALCS collects from UK broadcasters and several European countries. Of foreign retransmission licences, broadcasters receive 42%, audio-visual producers receive 34% via AGICOA, copyright authors receive 22%. ALCS gets an overall share of circa 10%.

4. BBC

ALCS licenses BBC Worldwide (the commercial arm of the BBC) for the retransmission of BBC television programmes containing literary and dramatic works. In 2004/05, the BBC paid ALCS a flat fee of about £1,3 million.

5. Radio retransmission

Certain UK radio signals are subject to a number of secondary broadcasts, including retransmission by cable or satellite and streaming on the Internet.

6. Off-air recording

ALCS is a member of the Educational Recording Agency (ERA). ERA operates a licensing scheme for off-air recording of broadcasts of UK channels by educational establishments in the UK. ALCS collects the writers' share of these payments and collects revenues for equivalent schemes operating overseas through reciprocal agreements.

7. Private copying and other small rights

Under its agreements with overseas bodies, ALCS is paid the UK writers' share of remuneration fees collected in those territories for levies charged on recording media and equipment (see Section 4.4 below).

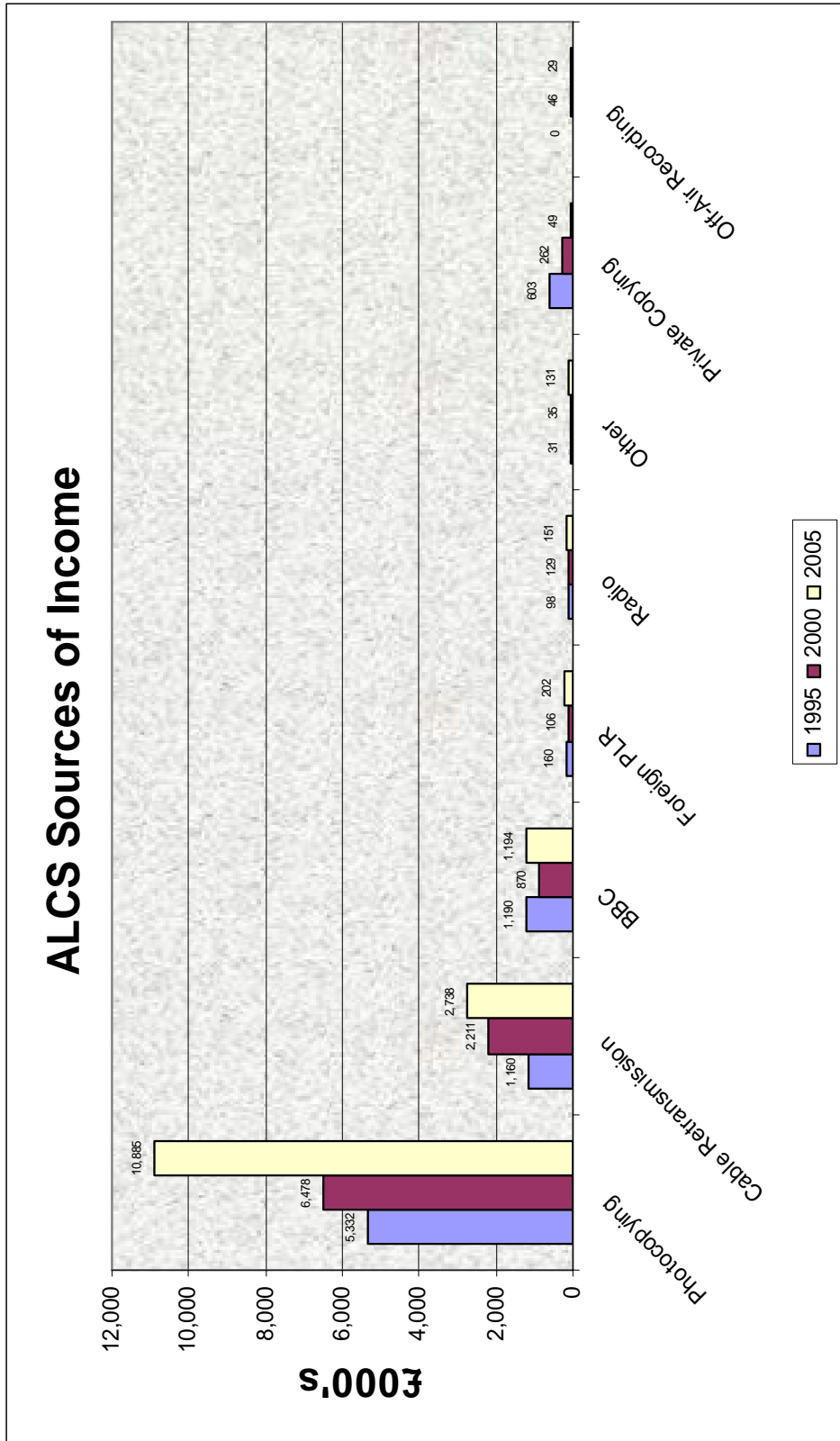


Figure 4.1

4.4 VG WORT Licences 1995-2005

(Friedemann Kawohl)

VG Wort is a corporation formed of authors and publishers. According to VG Wort, there are about 280,000 authors and 7,000 publishers entitled to licences. However, formal membership is constrained by a yearly minimum rate. 310 members, among them 230 authors and 80 publishers, are representing 6 professional groups:

- (1) authors of fiction and drama
- (2) journalists and non-fiction authors
- (3) authors and translators of scholarly literature
- (4) non-fiction publishers
- (5) dramatic publishers
- (6) scholarly publishers

In the members' annual general meeting a distribution scheme is negotiated.

Principles of the distribution scheme

As a matter of principle, authors receive 100% for non-published works (e.g. film scripts). Articles distributed in press reviews (newspaper cuttings) are treated as if there were no publisher involved. For published works, authors receive 70% and publishers 30%. For translations, authors 35%, translators 35%, publishers 30%. For certain licences the distribution scheme deviates from this principle.

Main sources of income

1. Public Lending Right (Bibliothekstantieme)

Since 1972 authors and publishers are entitled to a public lending right (PLR). At that time it was VG Wort's second main source of income (next to radio). PLR systems had earlier been established in Denmark (1946), Sweden (1955), Finland (1961) and Netherlands (1971). However, the German legislation was the first to integrate PLR into the copyright act.

Authors and publishers are entitled to PLR. Claims to payment of PLR can only be made via copyright collecting societies. Due to the German regional states' (Länder) main responsibility for education and research, PLR is supported by 90% Länder and 10% federal government (Bund).

Every other year the total amount of PLR (2002: €13,16m) is negotiated between the Länder's education ministers (Kommission Bibliothekstantieme) and a body formed by several collecting societies (Zentralstelle Bibliothekstantieme).

According to an agreement between the relevant collecting societies, PLR is divided as follows¹⁰:

- 92.3%: VG Wort (authors and publishers of literary works)
- 6.35%: VG Bild-Kunst (authors and publishers of visual works)
- 2.50%: GEMA (authors and publishers of musical works)

Apart from books, public libraries provide a growing amount of non-books, e.g. CDs, DVDs, computer games and other software. Thus in 2002 the Zentralstelle Bibliothekstantieme has been opened to collecting societies of right holders of neighbouring rights: Gesellschaft zur Verwertung von Leistungsschutzrechten m.b.H, Hamburg (GVL), Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten m.b.H., Wiesbaden (VGF), Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten m.b.H., München (GWFF), Verwertungsgesellschaft der Film- und Fernsehproduzenten m.b.H., München (VFF).

13% of total lendings in public libraries are non-books. According to agreements between Zentralstelle Bibliothekstantieme and Kommission

¹⁰ Irmgard Schmitt, Entwicklung des Public Lending Right (PLR) in Deutschland, in; Bibliotheksdienst 37. Jg. (2003), H. 10

Bibliothekstantieme, lending of a Non-book triggers double the book fee. In 2002 Bund and Länder paid a total of €13.16m for books (88.5%) and non-books (11.6%).

In 2002 VG Wort's share of the total PLR € 13.16 m was €9.64 m (73,25%). €5.11m paid to authors and publishers (70 : 30), whose books had been on loan in a particular sample of public libraries. Every three years there is a special payout (Sonderverteilung Bibliothekstantieme) for authors and publishers who didn't get anything in three years because the sample libraries did not record any lendings. Scientific publishers voluntarily don't claim their share of the payout. The authors' share is distributed individually according to the authors' declarations.

In comparison, the UK income from PLR was in 2003 more than £ 7 Mio (2002: £5.2 Mio). In the UK 19,064 (2003) authors received money from the PLR (2002: 17,581). In 2003, 251 authors received the maximum amount of £6,000. 1,419 authors received more than £1,000. Because of a minimum sum of £5, many authors do not get paid at all. Between 1983 and 2003 about £77 Mio were transferred to the authors.

2. Readers clubs

Contributions from Readers Clubs (Lesezirkel) have been declining since 1995. In 2004, VG Wort abandoned the category. A Readers Club share is now included in both "Presse-Repro" (popular magazines) and "Wissenschaft" (scientific journals).

3. Video rental

Contributions from video rentals (Videovermietung) are supplied by commercial video/DVD rental shops and collected by "Zentralstelle für Videovermietung" (ZVV), an agency run by collecting societies lead by GEMA. VG Wort's share is 23%.

4. Photocopying in schools

Based on yearly estimates of the amount of copying, a lump sum is agreed between VG Wort and the Länders' education ministries. VG Wort collects and transfers the shares of VG Bild-Kunst (visual art) and VG Musikedition (music publishers' neighbouring rights for new editions of scores). For textbooks a particular share is paid directly to the publishers who have declared that they will forward a 50% author's share directly to the authors. Thus textbook authors receive their cheques without even claiming their rights individually with VG Wort.

5. Levy on copying machines "Kopiergeräteabgabe"

Levies on copying machines are VG Wort's biggest single source of income. Claims to this levy can only be made via collecting societies against producers, importers, dealers of copying devices specifically designed for copying.

The legal basis is §54a Abs.1 UrhG. The levy is meant to compensate for private copies allowed in §53. When introduced in 1965 it applied to tape recorders and later was extended to photocopying machines, video recorders, scanners, laser printers, reader printers, CD writers and fax machines.

In 2005 VG Wort succeeded in a case against Fujitsu Siemens Computers GmbH who had argued that a computer as such does not literally "copy" a work of literature without the use of a printer and special software. VG Wort's attempt to establish a €30 levy on computers was rejected. The Munich court (Landgericht München 14.01.2005) fixed the levy at €12.

The latest attempts to amend the federal copyright law have caused disputes between authors and publishers. According to the government's draft bill (Regierungsentwurf »Zweiter Korb« – März 2006 <http://www.urheberrecht.org/topic/Korb-2/bmj/1174.pdf>) there will be a maximum levy limit of 5% of the retail price of any equipment (from all

levy sources). The levy is no longer fixed by law but rather to be negotiated between collecting societies and hardware producers. Authors and publishers can claim levies only for devices used for copying “to a substantial degree” (“in erheblichem Umfang”), i.e. more than 10 %. Collecting societies need to prove that certain devices are used “in erheblichem Umfang” for copying.

6. Copy shop levy

VG Wort runs an agency to collect levies from about 16,000 copy shops.

7. Posting of copies “Kopienversand”

Users from Germany, Austria and Switzerland can order copies of journal articles or parts of books (printouts via mail or electronic copies via email) via the platform *Subito* <http://www.subito-doc.de>. If one of the 35 cooperating research libraries in Germany, Austria and Switzerland keeps a hard copy of the demanded journal the reader gets a copy within days for about € 9 (up to 20 pages) regardless of any online-services which might be provided by the publishers directly.

The levy for this practice has no statutory basis but is derived from a federal court (BGH) decision in 1999: Right holders cannot prevent libraries from doing so. However, since posting copies considerably interferes with normal exploitation, the federal court drew an analogy to other forms of non-exclusive rights.

VG Wort had an agreement with Bund and Länder governments covering photocopies and electronic copies. The contract ended in 2004. Journal publishers are contesting the applicability of the BGH decision to electronic copies in court.

Under the 2006 copyright draft amendment (“Regierungsentwurf” 2. Korb, § 53a). *Subito* would only be entitled to supply an article per e-

mail, if the article was not available electronically elsewhere (e.g. on a publisher's commercial service).

8. Press cuttings (Pressepiegel)

There are about 700 press reviews in Germany, most of them edited for in-house use in companies, authorities and other organisations. § 49 I 1 explicitly allows copying and publishing of press reviews. However, § 49 I 2 entitles the authors to claim a remuneration. Based on individual contracts with VG Wort, editors of press reviews pay VG Wort according to circulation and the amount of copyrighted material used.

VG Wort registers all uses in press review and transfers the money individually to the respective journalists.

9. School books "Schulbuch"

UrhG § 46 I 1 allows the publication of works or part of works without explicit permission of the right owners in collected editions being used in schools, churches and for teaching purposes. However, remuneration is required. In practice, school book publishers are registering in advance all planned editions with VG Wort, before this information is forwarded by VG Wort to the authors. VG Wort transfers the money individually to the respective authors.

10. Private copying and public performance of broadcast works ("Hörfunk / Fernsehen")

There are two so-called secondary rights ("Zweitverwertungsrechte") for right-owners of broadcast works. (1) A levy on video and tape recording machines and blank CDs / DVDs (54 Abs. 1 UrhG), intended to compensate rights-owners for private copying of their broadcast works. (2) A levy on the use of radios in public places (mainly hotels and restaurants) (§§ 21 und 22 UrhG). These rights can only be claimed via collecting societies for legal (§54) or for practical reasons (§§ 21, 22).

VG Wort distributes the income according to four categories: (1) the type of broadcast work, e.g. lyric, sports report, documentation, (2) the length, (3) the time of day and (4) the coverage of the broadcasting. Thus peak times and nationwide broadcastings get a bigger share than late night programmes in regional stations.

11. Broadcasting rights for literary works (“Kleine Senderechte”)

As an exclusive right, the right to broadcast a literary work has to be cleared individually. However, for works or part of works up to 15 minutes (radio) or 10 minutes (television) VG Wort has negotiated a flat rate with public service broadcasters on a trust basis for both authors and publishers. Even authors and publishers who have not entered a contract with VG Wort do receive their share from “Kleine Senderechte” based on the detailed records of public service broadcasters.

12. Cable retransmission national and Cable retransmission international

In 1993 the Council Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission 93/83/EEC was implemented in German law. The directive was meant to establish a secure legal framework for cross-frontier satellite broadcasting. The German legislator, in addition, introduced a right of cable retransmission on a national level. According to §20 b it is a non-exclusive right of the author. After the author has transferred this right to a broadcasting organisation, he still is entitled (§20 b (2) to a fair compensation (“angemessene Vergütung”). A compulsory licence for both broadcast organisations and the companies organising the cable transmission was introduced in §87 UrhG.

According to VG Wort’s distribution scheme, scriptwriters receive 100% for both published and unpublished scripts whereas publishers of the dramas receive a 30% extra.

Arge Kabel, an agency formed by collecting societies GVL (performers' rights), VG Bild-Kunst (visual art) is run by VG Wort and takes a cut of 2% for administering the collecting procedure.

Figure 4.2

