Fair remuneration for audiovisual authors and performers in licensing agreements - National case studies

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1. Introduction

This annex complements the publication on "Fair remuneration for creators in exploitation contracts".

It provides a detailed analysis of the transposition of Chapter 3 of Title IV of the Directive on Copyright in the digital single market (CDSM Directive) and of the regulatory framework in force in a selection of seven member states: Belgium, Germany, Spain, France, Hungary, the Netherlands and Slovenia. [1]

[1] The following analysis does not cover the rights to equitable remuneration granted to authors and performers under the EU copyright acquis or certain national legislations (e.g., rental right, rights to fair compensation for exceptions such as private copying or lending, or cable retransmission and direct injection) which are usually unwaivable, non-transferable and under mandatory collective management.

2. BE – Belgium

The law of 19 June 2022 transposing Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC (hereafter referred to as "the Law") was adopted on 16 June 2022. It amends in particular Book XI of the Code of economic law[2] (*Code de droit économique*) on intellectual property and trade secrets, hereafter "the Code". The Code contains the general provisions applicable to economic matters which fall within the competence of the federal authority and therefore covers all three Belgian Communities (Art. II. 1).

Of particular interest is the fact that the Law introduced new unwaivable and non-transferable remuneration rights for authors and performers for the use of their works or performances by OCSSPs[3] and VOD services.

2.1. Key provisions on assignment and licensing of rights

Under Belgian law, both authors' and performers' economic rights are movable, assignable and transferable,[4] and may in particular be subject to assignment or to a simple or exclusive license (Art. XI. 167 §1). As a general rule, all contracts must be in writing and the contractual provisions relating to the author's and performer's rights and their modes of exploitation are subject to strict interpretation. The assignment of the object incorporating a work or a fixation of the performance does not confer the right to exploit it. For each mode of exploitation, the author's and performer's remuneration and the scope and duration of the assignment or license must be expressly determined (Art. XI.167 §1-2 and Art. XI.205 §3-4).

The assignee or the licensee is obliged to ensure that the work or performance is exploited in accordance with the accepted practices of the profession. The assignment or license of rights for still unknown forms of exploitation is null and void. In addition, the assignment or licensing of economic rights relating to future works or performances is valid only for a limited time and provided that the types of works (or performances) to

[2] Code de droit économique, 28 February 2013, as amended, https://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2013022819&table_name=loi&caller=list&F&fromtab=loi&tri=dd%20AS%20RANK&rech=1&numero=1&sql=%28text%20contains%20%28%27%27%29%29#LNK0013.

[3] Several Internet service providers introduced annulment actions through direct actions against the law before the Constitutional Court, *inter alia* related to OCSSPs' obligation to conclude license agreements with rightsholders. For more details about the case, please refer to Chapter 5 of this publication.

[4] "*mobiliers, cessibles et transmissibles*"

which the assignment or license relates are specified (Art. XI.167 §1-2 and Art. XI.205 §3-4).

As far as audiovisual works are concerned, the law provides for a rebuttable presumption of transfer of the exclusive audiovisual exploitation rights to the producer by the authors of the work and the authors of a creative element lawfully incorporated or used in the audiovisual work (Art. XI 182). The same applies to performers in relation to their performance (Art. XI.206).[5] Authors of musical compositions are not covered by this legal presumption.

In addition to the above, the Belgian Code provides numerous remuneration rights which are explicitly made unwaivable and/or non-transferable, not by contract or license nor as a result of the presumption of transfer.

2.2. Key provisions on remuneration

The principle of fair remuneration contained in Art. 18 of the CDSM Directive has been transposed in Belgian law in different steps. Art. XI.167/1 and Art. XI.205/1 of the Code provide the principle that where an author or performer has assigned or licensed his/her exclusive rights for the exploitation of a work or a performance under an exploitation agreement, he/she retains the right to receive an "appropriate and proportional" remuneration.[6]

Despite discussions on the core concept of "proportionate remuneration" and whether it should be translated as "*proportionnée*" (proportionate) or rather "*proportionnelle*" (proportional)[7]Belgium decided to use the term "proportionelle" for its official French version, as it was considered to be in line with the wording of Recital 73 of the Directive.

The wording of the Belgian text however does differ slightly from the wording of Art. 18 in using the past tense "has transferred" and "retain the right to receive appropriate and proportional remuneration", rather than "when they transfer" and "they are entitled to receive".

This alternative wording was chosen to bring the text more in line with existing remuneration rights in the Belgian Code and to emphasise that the right is not only exercisable at the moment of signing an agreement.

[5] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and of mandatory collective management).

[6] « *rémunération appropriée et proportionnelle*".

[7] Op. cit.

In addition to the transposition of the general principle of Art. 18(1), the Belgian legislator made use of the possibility given by Art. 18.2 and introduced two new remuneration rights built on the mechanism of the right to equitable remuneration for rental as introduced by article 5 of the EU Rental Directive (2006/115/EC), a mechanism that the Belgian Code also applies to cable retransmission and direct injection.

A first additional remuneration right (to be found in Art.XI.228/4) offers authors and performers a right to be remunerated for the use of their work and performances by OCSSPs which are identified by Art. 17 of the CDSM Directive.[8] This remuneration right is unwaivable and non-transferable and subject to mandatory collective management.

A second additional remuneration right (to be found in Art.XI.228/11) offers authors and performers a right to be remunerated for the use of their work and performances by commercial streaming and VOD services (music and audiovisual), which are identified as a specific category of information society service providers by Art.XI.228/10. This remuneration right is unwaivable and non-transferable. It is mandatorily collectively managed if no collective agreements are applicable.

Contract adjustment mechanism procedures may be determined through collective agreements, as provided in Art. XI. 167/5 and XI. 205/5.

2.3. Key provisions on dispute resolution mechanisms and revocation of rights

Alternative dispute resolution mechanisms for both authors and performers may be determined through collective agreements, under Art. XI. 167/5 and Art. XI. 205/5 sub-paragraph 7. Likewise, collective agreements may set the revocation right as provided in sub-paragraph 6 of the same article.

Under a given exploitation agreement, the rightsholder must exploit the rights within an agreed period. This period may not be contrary to the honest practices of the profession unless it offers a higher degree of protection to the author. If the agreement does not set this period, it is set in accordance with honest practices in the profession for the type of work concerned (or by collective agreements). In the event of failure to exploit the rights within the agreed period, and if the rightsholder cannot provide a legitimate excuse, the author or performer may retrieve the rights assigned or granted on an exclusive basis in whole or in part or terminate the exclusivity of the license (Art. XI.167/4

[8] Art. 17 CDSM Directive itself is transposed literally by Art. XI.228/2, XI.228/3 and XI.228/5 to XI.228/9.

and Art. XI.205/4). A number of conditions under which these rules do not apply are identified in sub-paragraph 4 of Art. XI. 167/4 and Art. XI. 205/4.[9]

In any event, any contractual provision derogating from this provision shall be binding only if it results from a collective agreement.

2.4. Key provisions on transparency obligations

Transparency is ensured as long as the rightsholder to whom rights were transferred provides the authors or performers with up-to-date, pertinent and complete information on the exploitation of the work or performance, in particular with regard to the modes of exploitation, the revenue generated and the remuneration due. The provision of such information shall be done, within a reasonable time after the relevant exploitation has taken place, on a regular basis, and at least once a year, taking into account the specificities of each sector (Art. XI. 167/2 and Art. XI. 205/2).

However, in duly justified cases where the administrative burden resulting from the transparency obligation of the assignee or licensee proves to be disproportionate compared to the revenue generated by the exploitation, such an obligation may be limited to the types and level of information that can reasonably be expected in the sector concerned. In any event, this obligation does not apply where the author's or performer's contribution is not significant in relation to the work or performance as a whole, unless he/she proves he/she needs such information in order to exercise his/her right to the contract adjustment mechanism (Art. XI. 167/2 and Art. XI. 205/2).

In case of subsequent exploitation, i.e. where the assignee or the licensee him-/her-self assigned or licensed the rights to a third party and does not possess all the information necessary to satisfy the transparency obligation referred to above, the author/performer or their representative may request additional information concerning the exploitation of the work/performance. Such a request may be addressed to the third party in question, to the person to whom the rights were assigned or to the licensee, who shall forward the request to the third party (Art. XI. 167/2 and Art. XI. 205/2).

The transparency obligation may be further detailed in collective agreements, as provided in Art. XI.167/5 and Art. XI.205/2 sub-paragraphs 4.

[9] Such conditions include for instance situations where the lack of exploitation is mainly due to circumstances which the author can remedy according to any reasonable expectation or if a collective agreement, as referred to in Art. XI.167/5, regulates the right of revocation.

2.5. Key provisions on collective agreements

According to Art. XI.167/5 and Art. XI.205/5, collective agreements may determine the scope and the terms and conditions of the assignment or licensing of rights, as well as the terms relating to remuneration for such assignment or licensing. They may also determine the terms of the transparency obligation (Art. XI.167/2 and Art. XI.205/2) and the arrangements relating to the contract adjustment mechanism (Art. XI.167/3 and XI.205/3), as well as the right of revocation (Art. XI.167/4 and Art. XI.205/4) and alternative dispute resolution methods.

It is also specified that collective agreements must always seek to strike a fair balance between the rights and interests of each of the parties. An executive decision can make collective agreements binding on beneficiaries and users in the same category as those who concluded the agreements concerned. In this case, the executive decision verifies that the parties to the agreement have been jointly represented and that the agreement does not contravene the applicable regulations.

3. DE – Germany

The Act on Copyright and Related Rights (Urheberrechtsgesetz – hereafter referred to as the UrhG),[10] transposing the CDSM Directive in German law was adopted on 20 May 2021 and entered into force on 7 June 2021. The Act covers the remuneration of authors and performers as well as transparency and contract adjustment obligations. It further addresses alternative dispute resolution mechanisms and the right of revocation. These provisions were already included in the version preceding the 2021 update, leading to limited changes in that regard. The German legislation sets out a joint remuneration agreement framework[11] and allows all parties involved to cooperatively determine the appropriateness of remuneration. Besides, the collective management of rights – as provided in the Act on the Management of Copyright and Related Rights by CMOs[12] (*Verwertungsgesellschaftengesetz*; hereafter referred to as the VGG) – also underwent a revision on 31 May 2021 in the context of the transposition of the CDSM Directive.

Germany has been a pioneer in introducing protective measures into its copyright legislation to address issues relating to contractual asymmetry, which means that it did not need to make extensive amendments to its national legislation in order to transpose the CDSM Directive

3.1. Key provisions on assignment and licensing of rights

While the principle is that copyright is not transferrable, unless it is transferred to the joint heirs (Section 29(1) UrhG), the granting of rights of use (or exploitation rights), contractual agreements and arrangements concerning exploitation rights and legal transactions concerning moral rights of authors are nevertheless permitted (Section 29(2) UrhG). In addition, an author may grant rights in respect of unknown types of use. Such granting, however, is subject to a right of revocation and in case the licensee exploits the work in a form which constitutes a use unknown at the time of the granting, the author will be entitled to additional appropriate remuneration (Sections 31a(1), 32c UrhG). A right of use may only be transferred with the author's consent (Section 34(1) UrhG). Likewise, the holder of an exclusive right of use may grant further rights of use only with the author's consent, but the author's consent is not required if the exclusive right of use is granted only to ensure that the author's interests are served (Section 35 UrhG).

In general, if the author grants another person a right of use of the work, the right to authorise the publication or exploitation of an adaptation of the work shall, in case of

[10] https://www.gesetze-im-internet.de/urhg/.
[11] For more details on joint remuneration agreements, see Chapter 4.
[12] https://www.gesetze-im-internet.de/englisch_vgg/index.html.

doubt, remain with the author. Similarly, if the author grants another person a right of use for the reproduction of the work, he/she retains, in case of doubt, the right to transfer the work to visual or audio carriers. However, where the author grants a right of use for the communication to the public of the work, the latter is, in case of doubt, not entitled to make the communication perceivable outside of the event for which it is intended by means of a screen, loudspeaker or similar technical devices (Section 37 UrhG).

In the audiovisual sector in particular, the presumption of transfer of rights to the producer is provided in Sections 88 (1) and 89 (1) UrhG: anyone who agrees to have their preexisting work used for the production of a film or audiovisual work ("*Filmwerk*") or agrees to participate in the production of such a work, in the event that he/she acquires a copyright in the work, in case of doubt grants the film producer the exclusive right to use the work, together with translations and other cinematographic adaptations or transformations of the work. In case a contributor to a film or audiovisual work has granted the right of use in advance to a third party, the author nevertheless always retains the right to grant this right to the producer of the film, either in limited or unlimited form (Section 89 (2) UrhG).[13] This does not apply to authors of underlying rights such as literary property on which a film is based or the screenplay (Section 88 UrhG).

Performers may also transfer their rights and claims conferred under Sections 77 and 78 UrhG (i.e. right of reproduction and communication to the public of the fixation of their performance). They may indeed grant to another person a right to use their performance in a particular manner or in any manner to which they are entitled (Section 79 UrhG).

3.2. Key provisions on remuneration

The principle in Art. 18(1) of the CDSM Directive has not been transposed explicitly by the German legislator. As a general rule, Section 11 UrhG already provided that, in addition to protecting the author's intellectual and personal relationships to the work, copyright also serves to ensure *equitable remuneration*[14] for the use of the work. In particular, Section 32 UrhG addresses this notion and sets the presumption that if the amount of the remuneration has not been determined, equitable remuneration is deemed to have been agreed. Remuneration is deemed to be equitable if it is determined between all parties, in accordance with a joint remuneration agreement (Section 32 and further addressed in Section 36 UrhG), or if at the time the agreement is concluded it corresponds to what is customary and fair in business relations, given the nature and extent of the possibility of

[13] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and administered under mandatory collective management).

[14] "*eine angemessene Vergütung*".

use granted. All circumstances, in particular the duration, frequency, extent and time of use, should be considered. In any event, and unless the remuneration was determined in a collective agreement, if the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is ultimately granted equitable remuneration.

The German legislation does not prohibit flat-rate remuneration. However, it has become slightly more difficult to put in place. Lump-sum payments must still guarantee the author's equitable participation[15] in the expected total proceeds from such use and must be justified in the light of sector-related specificities (Section 32(2) UrhG).

Although Art. 18 of the CDSM Directive was not transposed explicitly, the German legislator was "guided" by its principle when transposing Article 17. The law transposing the Directive sought a solution that guarantees that authors and performers receive part of the remuneration to be paid by OCSSPs directly through their collective management.

Article 3[16] of the transposition law makes a clear statement that the act for which OCSSPs are considered responsible is an act of communication to the public and couples this with the introduction of an additional remuneration right for authors. This remuneration right is drafted on the basis of the model of equitable remuneration for rental and is explicitly unwaivable and subject to mandatory collective management. Art. 21 of the same law makes this provision also applicable to performers.

With regard to contract adjustment mechanisms, the German Copyright Act (UrhG) transposed Art. 20 of the CDSM Directive by means of Art. 32a UrhG. It obliges the other party to consent to an amendment of the agreement granting the author further equitable participation appropriate to the circumstances. The review and amendment of the remuneration initially agreed upon requires proof that it is disproportionately low in relation to the proceeds and benefits derived from the use of the work. According to the Explanatory Memorandum,[17] the 2021 update of the UrhG was intended to lower the threshold for authors' claims for contract adjustment, as the previous version required "conspicuous disproportion" of the remuneration, as opposed to the lighter wording of the Directive: "disproportionately low remuneration". Besides, if the right of use was transferred or further rights granted to a third party, the latter is directly liable to the author in respect of further participation (Section 32a(2) UrhG).

As part of the contract adjustment mechanisms, authors' associations together with associations of users of works or individual users of works can determine "equitable remuneration" and "appropriate participation" through "joint remuneration agreements"

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[15] "Eine pauschale Vergütung muss eine *angemessene Beteiligung* des Urhebers am voraussichtlichen Gesamtertrag der Nutzung gewährleisten […]" (Section 32 (2) UrhG), op. cit.

[16] Artikel 3, Teil 1, §1 (1)) "*Ein Diensteanbieter (§ 2) gibt Werke öffentlich wieder, wenn er der Öffentlichkeit Zugang zu urheberrechtlich geschützten Werken verschafft, die von Nutzern des Dienstes hochgeladen worden sind.*"

[17] https://dip.bundestag.de/drucksache/entwurf-eines-gesetzes-zur-anpassung-des-urheberrechts-an-die-erfordernisse/251322, p. 80

(Art. 36 UrhG). Even though rules contained in collective bargaining agreements take precedence over joint remuneration agreements (Section 36(1) UrhG), the latter still exert a strong impact and quite a few have been entered into until today.[18] These associations shall be representative, independent and authorised to establish common remuneration rules. An association representing a substantial part of the respective authors or users of works shall be deemed to be authorised within the meaning of the law, unless the members of the association adopt a resolution to the contrary (Section 36 (2) UrhG). If parties so agree, proceedings for the establishment of joint remuneration agreements are conducted before an arbitration board (Section 36a UrhG), which is to submit a settlement proposal to all parties that participated or were called to participate. The proposal is deemed accepted if none of the concerned parties object within six weeks after receiving it. Under Section 36b, any person in a contract with an author, who uses a provision deviating from the joint remuneration agreement to the detriment of the author, may be sued for a cease-and-desist order. This may be the case if and insofar as that person has himself/herself established the joint remuneration agreement or is a member of an association of users of works which established the joint remuneration agreement.

Under Section 32c, an author is also entitled to separate equitable remuneration if the other contracting party makes use of a new type of exploitation of the author's work which was agreed but not yet known at the time the contract was concluded. From 7 June 2021, this provision even applies to contracts concluded before that date.

The measures applicable to authors, in particular in respect of equitable remuneration (Section 32 UrhG), further participation (Section 32a UrhG) and joint remuneration agreement, (Section 36 to 36b UrhG) apply to performers under Section 79(2a) and 133(2) UrhG).

3.3. Key provisions on transparency

While transparency obligations were formerly only to be fulfilled upon request, the amendments to the UrhG turned them into an annual obligation (Section 32d UrhG), also made compulsory under Art. 32b UrhG. At least once a year, the contracting party must provide the author with information about the extent of the use of the work and the proceeds and benefits derived therefrom. The provision of names and addresses of its sub-licensees is only to be effected at the author's request.

Such transparency obligations do not however apply if the author has made only a secondary contribution to a work, product or service, unless he/she provides clear indications based on verifiable facts that the information is needed in relation to the amendment of a contract (section 32a (1) and (2) UrhG). A contribution is said to be secondary where it has little influence on the overall impression created by a work or the

[18] For more details on joint remuneration agreements, see Chapter 4.

nature of a product or service, for example because it does not belong to the typical content of a work, product or service. A further exception to the obligation to provide information would apply if the requirement on the contracting party were disproportionate for other reasons, in particular if the effort involved in providing the information were disproportionate to the income generated from the use of the work. Derogations are possible only by an agreement which is based on a joint remuneration agreement or collective bargaining agreement. In such a case, collective bargaining agreements are at least presumed to guarantee the author a degree of transparency comparable to that guaranteed under statutory provisions (Section 32d UrhG).

Section 32e UrhG extends transparency obligations to third parties to whom an exploitation right has been transferred or to whom further exploitation rights have been granted. A cease-and-desist claim following failure to provide information is provided under Section 36d UrhG.

All previous transparency measures have retroactive effect, therefore also apply to contracts concluded before 7 June 2021. However, in the case of contracts concluded before 1 January 2008, information about the use of audiovisual works or moving pictures and the filmic use of the works used in their production, is only to be provided at the author's request (Section 133 (3) UrhG). The same measures apply to performers (Section 79 (2a) and 133 (4) UrhG).

3.4. Key provisions on dispute resolution mechanisms and revocation of rights

In case of disputes relating to rights and claims covered under Sections 32 to 32e UrhG, authors and users of works may institute a mediation procedure or another voluntary out-of-court dispute resolution procedure (Section 32f UrhG). Authors may be represented by authors' associations in accordance with the provisions of the Legal Services Act (*Rechtsdienstleistungsgesetz*) and rules of procedure (Section 32g UrhG). Likewise, cases of contractual negotiations relating to the granting of rights of use or the making available to the public of audiovisual works via VOD services may be subject to a mediation procedure or another voluntary out-of-court dispute resolution procedure (Section 35a UrhG). The same measures apply to performers under Section 79 (2a) UrhG.

With regard to the right of revocation, an author may revoke either the exclusiveness of the right of use alone or the right of use as a whole if the exclusive right is not used or is used insufficiently. Exceptions apply if this is predominantly due to circumstances which the author can be reasonably expected to remedy. This right may however not be exercised before two years have expired following the grant or transfer of the right of use or, if the work is delivered at a later date, since its delivery, and before an appropriate extension to sufficiently exercise the right of use that was granted to the rightsholder. Derogations to these provisions to the detriment of the author are possible only by an agreement which is based on a joint remuneration agreement or collective

agreement (Section 41 UrhG). However, for film rights a revocation shall only be possible until the commencement of photography and the period before a revocation is possible can contractually be extended up to and until five years (Section 90 (1) UrhG). These provisions relating to the right of revocation for non-exercise even apply to contracts concluded before 7 June 2021 (Section 133 (2) UrhG).

In addition, the author also holds an unwaivable revocation right where the work no longer reflects his/her conviction and he/she can therefore no longer be expected to agree to the exploitation of the work (Section 42 UrhG). The author's successor in title may also exercise the right of revocation, but only if he/she can prove that the author would have been entitled to exercise this right prior to his/her death and was prevented from exercising the right or provided for its exercise by testamentary disposition. The author must adequately compensate the holder of the revoked right of use. The same measures apply to performers under Sections 79 (2a) and 133 (2) UrhG).

3.5. Key provisions on collective agreements

As part of the transposition of the CDSM Directive, the VGG (Act on the Management of Copyright and Related Rights by CMOs) also underwent an important revision. In particular the law provides that CMOs are obliged to conclude collective agreements[19] with associations of users at reasonable conditions in respect of the rights they manage, except where a CMO cannot be reasonably expected to conclude such an inclusive agreement ("*Gesamtvertrag*"), in particular because the membership of the association of users is too small (Section 35 VGG). In terms of negotiation, CMOs are obliged to negotiate with users or associations of users in good faith (section 36 VGG). In addition, where no agreement can be reached regarding the amount of the remuneration for the grant of rights of use, the rights are deemed to have been granted if the remuneration has been paid to the CMO in the amount accepted by the user, and has been paid conditionally to the CMO in the amount exceeding the CMO's claim or has been deposited for its benefit (Section 37 VGG).

Where collective agreements have been concluded, the remuneration rates agreed therein shall be deemed to be tariffs[20] (Section 38 VGG). Tariffs are in principle to be calculated on the basis of the pecuniary benefits derived on account of exploitation. In any event, due consideration shall be given to the share of the use of the work in the overall scope of the exploitation process, to the economic value of the services provided by the CMO, and to the religious, cultural and social concerns of the users, including the concerns of youth support programs (Section 39 VGG). Negotiations between the CMO and the users can thus lead to a lower price for the tariffs related to the public communication of works in schools.

[19] « Gesamtvertrag »
[20] For more details on the tariffs, see Chapter 4.

In addition, the update of the VGG in 2021 also addresses extended collective licensing (as provided in Art. 2 of the Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market).[21] When granting an agreement for the use of its repertoire, a CMO may also grant corresponding rights of use in the work of an external rightsholder – who may however file an objection at any time (Section 51 VGG), under certain conditions listed in Section 51a VGG.

In case of a dispute regarding the conclusion or amendment of a collective agreement to which a CMO is party, any party may apply to the Arbitration Board (Section 92 (1) VGG). In such a case, the settlement proposal contains the content of the collective agreement (Section 110 (1) VGG). The higher regional court determines, at its reasonable discretion, the content of the inclusive agreements, in particular the nature and amount of the remuneration (Section 130 VGG).

[21] Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes vom 31.05.2021, https://dejure.org/BGBl/2021/BGBl._I_S._1204.

4. ES – Spain

In Spain, the CDSM Directive was transposed by virtue of Royal Decree Law no. 24/2021 (hereafter referred to as the "RDL") on 2 November 2021,[22] which partially amends the Spanish Copyright Act (Texto Refundido de la Ley de Propiedad Intelectual, "TRLPI").[23]

The Spanish model provides yet another interesting case as most of the principles introduced by the Directive were already included in the TRLPI. The Royal Decree therefore introduces provisions that merely add on the already existing provisions on fair remuneration in exploitation contracts of authors and performers. Notably, since 1996, Spanish copyright law has granted audiovisual authors and performers an unwaivable and inalienable remuneration right connected to the transfer of their exclusive rights and subject to mandatory collective management.

4.1. Key provisions on assignment and licensing of rights

Title V, Chapter I TRLPI provides for general rules with regards to the transfer of rights. According to Art. 43 TRLPI, the exploitation rights to a work may be transferred between living persons, the transfer being limited to the rights transferred, to the forms of exploitation expressly provided for and to the time and territorial scope to be determined (Art. 43 (1) TRLPI). In the absence of a time limit, the transfer shall be limited to five years and the territorial scope to the country in which the transfer is made. If the mode of exploitation of the work is not specifically and concretely expressed, the transfer shall be limited to that which is necessarily deduced from the contract itself and is indispensable for the fulfilment of the purpose of the contract (Art. 43 (2) TRLPI). In addition, the assignment of exploitation rights shall be null and void in respect of all works that may be created by the author in the future (Art. 43 (3) TRLPI). In the same way, provisions whereby the author undertakes not to create any work in the future shall be null and void (Art. 43 (4) TRLPI). Finally, the transfer of exploitation rights shall not extend to methods of use or means of dissemination that do not exist or are unknown at the time of the transfer (Art. 43 (5) TRLPI).

[22] Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en las materias de bonos garantizados, distribución transfronteriza de organismos de inversión colectiva, datos abiertos y reutilización de la información del sector público, ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión, exenciones temporales a determinadas importaciones y suministros, de personas consumidoras y para la promoción de vehículos de transporte por carretera limpios y energéticamente eficientes, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-17910.

[23] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, https://boe.es/buscar/act.php?id=BOE-A-1996-8930.

Under general terms, all assignments must be formalised in writing (Art 45 TRLPI). Rights may be assigned exclusively (Art. 48 TRLPI) or non-exclusively (Art. 50 TRLPI). The exclusive assignment requires the assignee to provide all the means necessary for the effectiveness of the exploitation granted, according to the nature of the work and the uses in force in the professional, industrial or commercial activity in question (Art. 48 TRLPI). The exclusive assignee may further transfer the rights to a third party with the explicit consent of the licensor (Art. 49 TRLPI).

More particularly, in the audiovisual sector, the rights of reproduction, distribution and communication to the public, as well as the rights of dubbing or subtitling of the work, held by authors are presumed to have been assigned exclusively to the producer under the contract for the production of the audiovisual work, subject to certain limitations laid down in the law. However, in the case of cinematographic works, the explicit authorisation of the authors shall always be necessary for their exploitation, by making copies available to the public in any system or format, for domestic use, or by communication to the public by broadcasting (Art. 88 (1) TRLPI). Similar rules apply in the case of transformation of a pre-existing work (Art. 89 (1) TRLPI).

The transfer to the producer of the above-mentioned rights must be accompanied by remuneration for the authors of the work, and, where applicable, the authors of the pre-existing works, determined for each of the modes of exploitation granted (see below, Art. 90 (1) TRLPI).[24] In addition, Spanish law grants audiovisual authors an unwaivable and non-transferable right to remuneration for the communication to the public and making available to the public of their work. This right is paid for by the user and subject to mandatory collective management (see below, Art. 90 (2).

In relation to performers, the rights of reproduction (Art. 107 (3) TRLPI) and distribution (Art. 109 (1) TRLPI) may be transferred, assigned or subject to contractual licensing. With regard to the right of public communication, Art. 108 (2) provides that performers are presumed to have transferred their right to make available to the public – except for the unwaivable right to equitable remuneration – when they individually or collectively conclude with a producer of phonograms or audiovisual recordings contracts relating to the production of phonograms or audiovisual recordings.

4.2. Key provisions on remuneration

The provisions of the CDSM Directive on fair remuneration and transparency obligations towards authors and performers have been transposed into Spanish law by means of Art.

[24] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and administered through mandatory collective management).

74 and 75 of the RDL, while the other provisions of Chapter 3 of Title IV of the CDSM Directive have been transposed by means of amendments to the TRLPI.

As previously mentioned, Spanish law already granted audiovisual authors a specific right to remuneration for the communication to the public and making available to the public of their work (Art. 90 (3) and (4) TRLPI). This right is unwaivable, cannot be transferred to the producer, and is administered through mandatory collective management (Art. 90 (6) and (7) TRLPI). In the same way, under Art. 108 (3) TRLPI, a performer who has transferred or assigned to an audiovisual recording (or phonogram) producer his/her right of making available to the public, in respect of an original or a copy of an audiovisual recording (or phonogram), shall retain the unwaivable right to obtain equitable remuneration[25] from the person making such a work/performance available to the public (Art. 108 (3) TRLPI).

According to the new Art. 74 RDL, when authors and performers have granted authorisations or assigned their exclusive rights for the exploitation of their works or performance, they shall be entitled to receive "adequate and proportionate remuneration".[26] The negotiation of the corresponding authorisations or assignments shall be carried out in accordance with the principles of contractual good faith, due diligence, transparency and respect for free competition, which excludes the exercise of a dominant position. In parallel, the former provision of Art. 46 TRLPI on a "proportionate and flat-rate remuneration"[27] remains unchanged. According to this provision, authors are entitled to a "proportionate share"[28] in the revenues from the exploitation, in the amount agreed with the assignee (Art. 46 (1) TRLPI). However, authors may also, on an exceptional basis, receive a flat-rate remuneration.[29] In any event, the benefits granted to authors and their successors in title shall be unwaivable (Art. 55 TRLPI).

Moreover, the author may request a revision of the contract if there is a manifest disproportion between the remuneration initially agreed by the author and the totality of the subsequent revenues derived from the exploitation of the works obtained. In the absence of an agreement, the author may apply to the judge to fix an adequate and equitable remuneration,[30] taking into account the circumstances of the case (Art. 47 (1) TRLPI). However, this contract adjustment provision may only be exercised within 10 years of the assignment. This is also subject to the condition that there is no express agreement to that effect, collective agreement or sectoral agreement between the representatives of the authors and the assignees providing for a review procedure of the non-equitable remuneration for the assignment of rights (Art. 47 (2) TRLPI). As a result of Art. 110 TRLPI, this applies to performers equally.

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[25] "*una remuneración equitativa*".
[26] "*remuneración adecuada y proporcionada*".
[27] *"remuneración proporcional y a tanto alzado"*.
[28] *"participación proporcional"*.
[29] For instance, when there is serious difficulty in determining the income or when it is impossible to verify it or when the cost is disproportionate to the possible remuneration.
[30] "*remuneración adecuada y equitativa"*.

4.3. Key provisions on transparency

The RDL, in its new Art. 75, establishes a transparency obligation on the assignee of exploitation rights or the holder of an authorisation for the use of a work or other subject matter or of a repertoire administered by a copyright management society. In essence, it requires this assignee to provide authors or performers, at least once a year and by electronic means, with up-to-date information on the exploitation of their works or other subject matter, in particular as regards the modes of exploitation, the total revenue generated and the remuneration therefor. In the case where the authorisation is transferred by the assignee or holder of the authorisation to third parties, authors and performers may request from the transferring holder the identity of the successive assignees and request from them, directly or through the transferring holder, the additional information they need (Art. 75 (1) RDL).

Limits to the transparency obligation apply if the revenue generated by the exploitation of the work proves to be disproportionate. In such a case, the obligation shall be limited to a reasonable, proportionate and effective level of information (Art. 75 (2) LDR). Exceptions may also apply where the contribution of the author or performer is not significant in relation to the work or other subject matter, unless the author or performer needs such information for the exercise of his/her right to adjust the contract because of inequitable remuneration (Art. 47 TRLPI). Furthermore, under Art. 90 (5) TRLPI, the producer shall, at least once a year, provide the author with the necessary documentation at his/her request.

It is worth mentioning that Book III, Title IV, Chapter TRLPI on collective management of rights also provides for a specific transparency obligation towards users of repertoires of works administered by CMOs. Such users shall provide, within 90 days of the use of the right and in an agreed or pre-established format, the detailed and relevant information available to the CMO on the use of the rights represented by the CMO and necessary for the collection of royalties and the distribution and payment of royalties due to rightsholders (Art. 167 (1) TRLPI).

4.4. Key provisions on dispute resolution mechanisms and revocation of rights

Alternative dispute resolution mechanisms are provided in Art. 194 (5) TRLPI on the Intellectual Property Commission, whose functions of mediation, arbitration and tariff determination have been extended by the RDL to include new competences in relation to disputes over transparency obligations and action to review contracts. The Commission operates in two sections, the first of which exercises *inter alia* the functions of mediation and arbitration with regard to issues of transparency, contract adjustment mechanisms, and difficulties in reaching agreements on the granting of authorisations to make audiovisual works available on VOD services.

With regard to the right of revocation, Art. 48bis TRLPI provides for termination in whole or in part of authorisations to use works, assignments of rights, or the exclusivity of the contract if the work is not being exploited. An exception applies where circumstances can reasonably be expected to be remedied by the author or the performer. This right of revocation can only be triggered after five years have elapsed since the authorisation or assignment of the rights and under the condition that the notification sent by the author to the rightsholder set a period of at least one year after the expiry of which they may decide to terminate the authorisation, assignment or exclusivity of the contract. Besides, no express, collective or sectoral agreement must regulate this right. Despite the presence of the right of revocation in the legislation, this is unusable for authors and performers of audiovisual works, since these are works of joint authorship which are explicitly excluded from the right of revocation. Art. 48bis §2 explicitly excludes the application of this right to works of joint authorship, collective works, and computer programs, while according to Art. 87 TRLPI, authors of audiovisual works are authors in the meaning of Art. 7 TRLPI which sets the definition of "works of joint authorship".

4.5. Key provisions on collective agreements

The collective management of rights recognised under the TRLPI is addressed in Book III, Title IV of the law.

As regards the licensing of works to users by CMOs within the framework of their mandate and the establishment of tariffs, it is worth mentioning that under Art. 164 TRLPI, CMOs are required to establish simple and clear general tariffs that determine the remuneration required for the use of their repertoire.[31] These general tariffs shall be accompanied by an economic report, the content of which shall be determined by regulation, which shall provide a detailed explanation by tariff modality for each category of user. The amount of the general tariffs shall be set on reasonable terms, taking into account the economic value of the use of the rights in the protected work or other subject-matter in the user's activity, and seeking a fair balance between both parties, taking into account at least the following criteria:

- The degree of effective use of the repertoire in the user's activity as a whole.
- The intensity and relevance of the use of the repertoire in the user's activity as a whole.
- The breadth of the CMO's repertoire. For these purposes, repertoire shall mean the works and subject matter whose rights are managed by a CMO.
- The economic income obtained by the user from the commercial exploitation of the repertoire.
- The economic value of the service provided by the management entity to enforce the application of tariffs.

[31] For more details on the tariffs, see Chapter 4.

- The tariffs established by the management entity with other users for the same mode of use.
- The tariffs established by homologous CMOs in other member states of the European Union for the same type of use, provided that there is a homogeneous basis for comparison.

5. FR – France

France transposed Chapter 3 of Title IV of the CDSM Directive through an Ordinance dated 12 May 2021, transposing in particular Art. 2(6) and Art 17 to 23 of the Directive, which entered into force shortly after, on 7 June 2021.[32] Transposition was further completed with a second Ordinance from 24 November 2021.[33] The two ordinances have modified the French Code on Intellectual Property (CPI).[34]

While the French transposition remains quite literal, the provisions related to the remuneration of authors underwent careful scrutiny by the *Comité pluridisciplinaire des artistes-auteurs et des artistes-autrices* (CAAP) and the *Ligue des auteurs professionnels*. Together, they lodged a complaint on grounds of *ultra vires* in June 2021, seeking to have the text annulled. The issue related in particular to the notion of "appropriate" remuneration, a key benchmark within the Directive, which did not however appear in the revision of the French CPI regarding authors, while it was explicitly provisioned for performers in Art. L212-3, II of the French CPI. The Ordinance from June 2021 was subsequently partially annulled by the *Conseil d'Etat*,[35] specifically Art. 4, in that it did not stipulate that remuneration must be "appropriate" from the outset. It is therefore foreseeable that Art. 131-4 CPI will be amended.[36]

5.1. Key provisions on transfer of rights

Book 1, Title III, Chapter I CPI (Art. L131-1 to L131-9) provides for the general rules applicable to exploitation contracts. As a general rule, the global assignment of future works is null and void (Art. L131-1 CPI). In addition, contracts transferring copyright (including audiovisual production contracts) must be in writing (Art. L131-2 CPI). In any event, the transfer of the author's rights is subject to the condition that each of the rights transferred is mentioned separately in the contract and that the modes of exploitation of the rights transferred is delimited as to extent and purpose on one side, and as to the

[32] Ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'Art. 2 et des Art. 17 à 23 de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043496429.

[33] Ordonnance n° 2021-1518 du 24 novembre 2021 complétant la transposition de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE – https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044362034.

[34] https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006114031/.

[35] Conseil d'État 454477, lecture du 15 novembre 2022, ECLI:FR:CECHR:2022:454477.20221115 Decision n° 454477, https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-11-15/454477.

[36] This decision is further examined in Chapter 5 of this publication.

place and duration on the other (Art. L131-3 CPI). The scope of the transfer of such rights is therefore limited to the modes of exploitation provided for in the contract. Specific rules apply to the transfer of audiovisual adaptation rights that must be the subject of a written contract on a separate document from the contract relating to the actual edition of the printed work (Art. L131-3 CPI).

The assignee undertakes by the contract to seek to exploit the rights assigned in accordance with the practices of the profession and to remunerate the author, in the event of adaptation, in proportion to the revenue received (Art. L131-3 par. 3 and 4 CPI).[37] Likewise, the transfer by the author of his/her rights over his/her work may be total or partial and shall include the author's proportionate share of the revenue from sales or exploitation (Art. L131-4 CPI). This provision is mandatory (Art. L131-5-3). Moreover, the right to future forms of exploitation is regulated for both authors (Art. L131-6 CPI) and performers (Art. L212-11 CPI). For both, the right to exploit the work in a form that could not be foreseen or was not foreseen at the date of the contract must figure in a clause of the contract, which must be explicit and stipulate a correlative share in the profits of exploitation.[38] For performers this is however limited to performers of a musical work.

In addition, specific rules apply to the contract of audiovisual production under Art. L132-23 to L132-30 CPI. In particular, the contract between the producer and the author(s) of an audiovisual work - except for the author of a musical composition - entails, unless otherwise stipulated and without prejudice to the rights granted to the author by other provisions of the law, the transfer to the producer of the exclusive rights to exploit the audiovisual work (Art. L132-24 CPI).[39] Remuneration of the authors is due for each mode of exploitation (Art. L132-25 CPI).

In addition, subject to the general provisions on remuneration (see next section), audiovisual authors are granted a right to remuneration, when the public pays a price to receive communication of a specific and individualisable audiovisual work, which is proportionate to this price and paid to the authors by the producer (Art. L132-25 CPI). The author guarantees the producer the peaceful exercise of the rights assigned (Art. L132-26 CPI), and the producer is required to seek the continued exploitation of the audiovisual work in accordance with the practices of the profession (Art. L132-27 CPI).

Concerning performers, as a general rule, their written authorisation is required for the fixation of their performance, its reproduction and communication to the public, as well as any separate use of the sound and image of the performance when it has been fixed for both sound and image. A performer may transfer all or part of his/her rights to his/her performance. It must include appropriate and proportional remuneration for the performer in proportion to the actual or potential economic value of the rights

[37] « […] *rémunération proportionnelle aux recettes perçues* ».
[38] See details on remuneration in the next section.
[39] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and administered through mandatory collective management).

transferred, taking into account the performer's contribution to the work as a whole and taking into account all other circumstances of the case, such as market practices or the actual exploitation of the performance (Art. L212-3 CPI).[40]

As regards the audiovisual sector more specifically, the signing of a contract between a performer and a producer for the production of an audiovisual work constitutes authorisation to fix, reproduce and communicate to the public the performer's performance. The contract must determine separate remuneration for each mode of exploitation of the work (Art. L212-4 CPI).

5.2. Key provisions on remuneration

As previously mentioned, the transfer of rights by the author must entail, under Art. L131-4 CPI, a proportionate share of the revenue[41] from the sale or the exploitation of the work for the author. An exception to this principle applies in six particular cases mentioned under this Article, allowing authors to receive a flat-rate remuneration, as follows:

- The basis for calculating the proportionate share cannot be practically determined;
- The means of controlling the application of the contribution are lacking;
- The costs of calculation and control operations would be out of proportion to the results to be achieved;
- The nature or conditions of exploitation make it impossible to apply the rule of proportionate remuneration, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work, or because the use of the work is only incidental to the object exploited;
- In the case of assignment of software rights;
  In the other cases provided for in the CPI.

Contracting parties may also, at the author's request, convert the rights arising from current contracts into lump-sum annual payments for periods determined between the parties. Furthermore, a clause in an assignment that grants the right to exploit the work in a form that could not be foreseen or was not foreseen at the date of the contract must be explicit and stipulate a correlative share in the exploitation revenues (Art. L131-6).

According to the new Art. L132-25-2 CPI introduced by the Ordinance of 12 May 2021, the procedures, in particular for determining and paying proportionate remuneration for each mode of exploitation, are to be fixed by one or more agreements concluded between professional authors' organisations, CMOs, professional organisations representing producers and, where applicable, organisations representing other sectors of activity. This includes as well, where applicable, the conditions under which authors may

[40] See details on remuneration in the next section.
[41] « *la participation proportionnelle aux recettes* »

benefit from additional remuneration after amortisation of the cost of the work, as well as the methods of calculating this amortisation and the definition of the net receipts contributing to it.

Performers are, for their part, entitled to appropriate remuneration proportional to the actual or potential economic value of the rights assigned, taking into account the performer's contribution to the work as a whole and all other circumstances of the case, such as market practices or the actual exploitation of the performance (Art. L212-3 CPI).[42] As is the case for authors, five particular cases also allow for remuneration to be paid in a lump-sum. Performers may also require, as authors, the conversion of rights arising from current contracts into lump-sum annual payments. Besides, collective agreements may determine the conditions for implementing the provisions of this Article.

However, where neither the contract nor a collective agreement specifies remuneration for one or more modes of operation, the level of remuneration is set by reference to scales established by specific agreements concluded, in each sector of activity, between the employees' and employers' organisations representing the profession (Art. L212-5 CPI).[43]

Besides, contract adjustment mechanisms are also provided in French law. Art. L131-5 CPI provides for the possibility to revise the terms of the contract if the author suffered a loss of more than seven twelfths due to imbalance or inadequate estimation of the proceeds from the work.[44] This request may only be made where the work has been assigned for a lump-sum remuneration. The imbalance is assessed in the light of all the exploitation by the assignee of the works of the author who claims to have been wronged. In addition, the author is in any event entitled to additional remuneration if the proportionate remuneration initially provided for in the exploitation contract proves to be unreasonably low in relation to the total income subsequently derived from the exploitation by the assignee. These measures are applicable in the absence of any specific provision providing for a comparable mechanism in the exploitation contract or in a professional agreement. The request for readjustment of the contract is to be made by the author or any person specially authorised by him/her for this purpose. These provisions are of public order and cannot be derogated by contract. Art. L212-3-2 CPI contains a similar public order measure applicable to performers.

To conclude, as mentioned in the introductory part of this section, France's transposition of Art. 18 of the CDSM Directive on fair remuneration of authors and performers has been at the heart of important debates, leading to legal proceedings and

[42] « une rémunération appropriée et proportionnelle à la valeur économique réelle ou potentielle des droits cédés, compte tenu de la contribution de l'artiste-interprète à l'ensemble de l'œuvre et compte tenu de toutes les autres circonstances de l'espèce, telles que les pratiques de marché ou l'exploitation réelle de la prestation. »

[43] For more details on tariffs, see Chapter 4.

[44] « dû à une lésion ou à une prévision insuffisante des produits de l'œuvre »

ultimately to the annulment of the Ordinance of 12 May 2021 with regard to the provisions relating to the remuneration of authors.[45]

5.3. Key provisions on transparency

Under Art. L131-5-1 CPI, when authors transfer all or part of their exploitation rights, the assignees must send them or make available by electronic communication, at least once a year, explicit and transparent information on all the income generated by the exploitation of the work, distinguishing between the different modes of exploitation and the remuneration due for each mode of exploitation.

France did not transpose in the law the possibility allowed for by Art. 19 (4) of the CDSM Directive to limit this obligation for authors or performers whose contribution to the work was not significant. However, the law provides that professional agreements may lay down specific conditions for the submission of accounts for authors whose contribution is not significant (Art. L131-5-1 CPI). If such information is held by a sub-licensee (third party) and the assignee did not provide it in full to the author, it is to be communicated by the sub-licensee. A professional agreement concluded between professional authors' organisations or CMOs, and organisations representing the assignees in the sector concerned determines in particular whether the author applies directly to the sub-licensee or via the assignee to obtain the missing information (Art. L131-5-2 CPI).

Similar rules apply for performers under Art. L212-3-1 CPI. This new Article further provides for the obligation to present accounts. The conditions under which they are presented, in particular the frequency and the deadline for sending them electronically, may be specified by a professional agreement concluded between authors' professional bodies or collective management bodies and organisations representing the assignees in the sector concerned. In the absence of an applicable professional agreement, the contract specifies the procedures and date for the presentation of accounts. Any of the above-mentioned agreements may be extended to all interested parties by order of the Minister of Culture (Art. L131-5-3 CPI). Similar rules apply for performers under Art. L212-3-1 CPI.

In addition, the transmission of information to an author related to a work communicated to the public via a VOD service (i.e. the number of times the work is downloaded, consulted or viewed) is provided in the contract allowing communication of the work to the public. The transmission of such information must be done at a frequency appropriate to the distribution of the work and at least once a year (Art. L. 132-28-1 CPI). Further conditions relating to the transfer of such information can also be provided in a professional agreement (Art. L131-5-1 CPI). Art. L. 132-18 CPI was amended to specify the

[45] See Chapter 5 of this publication.

scope of the transparency obligation in the context of general representation contracts concluded with VOD audiovisual media services.

5.4. Key provisions on dispute resolution mechanisms and revocation of rights

In relation to the alternative dispute resolution mechanisms, it appears that the Ordinance of 12 May 2021 does not contain any new specific provision transposing Art. 21 of the CDSM Directive "since the ordinary law on conciliation and mediation, set out in Title VI of Book I of the Code of Civil Procedure, allows for this transposition". According to a report drafted for the President of the Republic, "these procedures are available not only to authors and performers but also to the organisations representing them, as provided for in the Directive".[46] Art. L326-2 CPI introduced by Ordinance n°2016-1823 of 22 December 2016[47] further states that CMOs must in particular publish updated information on the procedures for handling disputes and litigation on their website.

In addition, the Ordinance of 12 May 2021 introduced new provisions relating to the revocation of rights, as provided by Art. 22 of the CDSM Directive. This right allows both authors and performers to automatically terminate the transfer of all or part of the exclusive rights transferred, in the absence of exploitation of the work (Art. L. 131-5-2. CPI and Art. L. 212-3-3 CPI). However, those provisions are neither applicable to authors of software or of audiovisual works, nor to performers who have contributed to an audiovisual work (Art. L. 131-5-2 (V) CPI and Art. L. 212-3-3 (V) CPI).

5.5. Key provisions on collective agreements

The transposition of the CDSM Directive was accompanied by the addition of several provisions relating to collective agreements, and in particular to their mandatory nature.

Art. L. 132-25-1, introduced by the Ordinance of 12 May 2021, provides for the possible extension to all interested parties, by order of the Minister for Culture, of agreements on contractual practices or professional usages between authors and producers, concluded between professional authors' organisations or CMOs mentioned in

[46] Rapport au Président de la République relatif à l'ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'Art. 2 et des Art 17 à 23 de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE, https://www.legifrance.gouv.fr/eli/rapport/2021/5/13/MICB2106674P/jo/texte.

[47] https://www.legifrance.gouv.fr/loda/id/LEGIARTI000033676087/2016-12-24/.

Title II of Book III of Part 1, professional organisations representing producers and, where applicable, organisations representing other sectors of activity.

The amount of the remuneration fixed by CMOs for the exploitation of rights they represent must be reasonable and ensure that the rightsholders they represent receive appropriate remuneration[48] for such exploitation. The amount of the remuneration must take into account, in particular, the economic value of the rights exploited, whether they are exclusive rights or rights to remuneration, the nature and extent of the use of the works and other subject matter to which those rights relate, and the economic value of the service provided by the collecting organisation (Art. L324-6 CPI). According to Art. L. 132-25-2 CPI, one or more agreements relating to the remuneration of authors concluded between professional authors' organisations, CMOs, professional organisations representing producers and, where applicable, the organisations representing other sectors of activity, set the terms for determining and paying the proportionate remuneration per mode of exploitation as well as, where applicable, the conditions under which authors may benefit from additional remuneration after depreciation of the cost of the work, as well as the terms for calculating this depreciation and the definition of the net revenue contributing to it.

Agreements can also be concluded in relation to the transparency obligation for both authors (Art. L. 131-5-1 CPI) and performers (Art. L. 212-3-1 CPI), and regarding the exercise of the right of revocation (Art. L. 131-5-2 CPI for authors and L. 212-3-3 CPI for performers). Such agreements are concluded between, on the one hand, the professional organisations or the CMOs mentioned in Title II of Book III and, on the other hand, the organisations representing the licensees in the sector concerned (Art. L. 131-5-2 CPI for authors and L. 212-3-3 CPI for performers).

In addition, France provides for extended collective licensing, as introduced by the Ordinance of 24 November 2021.[49] Agreements dealing with contractual practices or professional customs between authors and producers may indeed be extended to all interested parties by order of the Minister responsible for culture under Art. L132-25-1 CPI. This principle is also provided in Art. L324-8-1 CPI, according to which a contract authorising the exploitation of protected works or objects concluded by a CMO may, with regard to use on national territory, be extended to rightsholders who are not members of this organisation by order of the Minister responsible for culture. However, any rightsholder may object to the granting of licenses on their behalf by a CMO of which they are not a member. This objection can be notified to the approved CMO at any time. When it is notified after a contract has been extended, the stipulations of that contract cease to have effect with regard to that rightsholder as soon as possible and at the latest within three months of notification (Art. L324-8-2 CPI).

[48] *"une remuneration appropriée"*
[49] https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044362034

6. HU – Hungary

Hungary was one of the few countries together with Germany and the Netherlands to transpose the CDSM Directive by the deadline set at 7 June 2021. The Hungarian Parliament adopted, on 26 April 2021, Act LXXVI of 1999 on Copyright[50] (hereafter referred to as "the Copyright Act"). The law amending the Copyright Act was later published in the Hungarian Official Gazette on 6 May 2021.

This country case provides an example of a relatively literal transposition of Chapter 3 of Title IV of the CDSM Directive.

6.1. Key provisions on assignment and licensing of rights

The Hungarian Copyright Act prohibits the full transfer of authors' economic rights (Art. 9(3) Copyright Act). Such transfer is only permitted in specific cases determined by law (Art. 9(5) Copyright Act). These restrictions do not apply to performers, whose economic rights are freely transferable.

Authorisation for use may be obtained by means of a license agreement (Art. 16(1) Copyright Act). Such license agreements are also regulated under Chapter 5 of the Copyright Act. On the basis of a license agreement, the author grants permission to use his/her work, and the user is obliged to pay a remuneration in return. The content of the contract of use is freely determined by the parties but if the content of the contract of use cannot be clearly established, an interpretation more favourable to the author should be adopted (Art. 42 Copyright Act). In any event, rights are exclusively granted only if they are expressly stipulated in the contract. The authorisation for use may be limited to a certain area, duration, type of use and a certain extent of use (Art. 43 Copyright Act). Furthermore, license agreements on the use of an indefinite number of future works are prohibited, meaning that any such clause in a contract will be null and void (Art. 44 Copyright Act). A contract of use must in principle be in writing (Art. 45 Copyright Act). A license can also be transferred to third parties, or the latter can be granted a further license to use the work only if the author has expressly authorised this (Art. 46). The provisions relating to license agreements also apply to the licensing of performers' performances (Art. 55(1) Copyright Act).

Specific rules apply to the contract for the creation of an audiovisual work ("filming contract").[51] In such contracts, the law provides for a rebuttable presumption of transfer of the rights of the author to the producer of the work – except for the rights of the composer of a musical work with or without text (Art. 66 (1) Copyright Act).

[50] 1999. évi LXXVI. törvény a szerzői jogról, https://njt.hu/jogszabaly/1999-76-00-00.
[51] "megfilmesítési szerződés".

Furthermore, the author shall be entitled to remuneration separately for each type of use (Art. 66 (3) Copyright Act).[52] The producer may exercise his/her rights under the contract jointly with another natural or legal person, whether national or foreign (Art. 66 (4) Copyright Act). If the contract is concluded for a work to be created in the future for the purpose of a film, the producer must notify the author in writing within six months of receipt of the work whether he/she accepts it or requires its modification (Art. 66 (7) Copyright Act). In addition, within 10 years of the completion of the production, the author may not conclude a new filming contract for the same work or characteristic figure in the cartoon or puppet film, or another work on the same subject, without the consent of the producer (Art. 66 (8) Copyright Act).

Similarly, there is a rebuttable legal presumption of transfer of the performer's economic rights to the film producer, where the performer has consented to the fixation of his/her performance in the audiovisual work (Art. 73(3) Copyright Act). This is without prejudice to the rights to remuneration granted to performers by other provisions of the law (see below).

6.2. Key provisions on remuneration

As a general rule, authors are entitled to remuneration in return for the license to use a work (Art. 16 Copyright Act). The said remuneration must be in proportion to the income from the use,[53] and can only be waived by the rightsholder by means of an explicit declaration (Art. 16 (4) Copyright Act).[54] The law specifies that where an exception is provided in the law and is accompanied by a right to equitable remuneration, even in the absence of a provision preventing this remuneration from being waived, the author may only waive it by explicit declaration (Art. 16 (5) Copyright Act). The principle under which remuneration is to be in proportion to the income from the use of the work (Art. 16 (4) Copyright Act) also applies to performers (Art. 55(1) Copyright Act).

According to the general rules of civil law, the court may modify an exploitation contract and adjust the author's remuneration if the author has suffered a disproportionate loss as a result of a significant increase in the use of the work after the

[52] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and administered through mandatory collective management).

[53] « *a felhasználáshoz kapcsolódó bevétellel kell arányban állnia* »

[54] This is without prejudice to other unwaivable and non-transferable rights to equitable remuneration under the EU copyright acquis, such as for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending, which are usually administered through mandatory collective management.

contract was concluded. (Art. 48) This provision shall also apply to performers, as specified under Art. 55(1) of the Copyright Act.

6.3. Key provisions on transparency

Art. 50/A of the Copyright Act provides for transparency obligations. In particular, the licensees that are party to a license agreement must provide the author with detailed information, at least once a year, on the use of their work, the manner and extent of use, the revenues derived from the use of the work for each type of use separately, and the remuneration payable to the author. In a contract of exploitation of a cinematographic or audiovisual work, the parties may stipulate that such an obligation to provide information shall apply only if the author requests the information from the licensee in writing or by electronic means (Art. 50/A (3) Copyright Act).

Besides, in the case of transfer of rights to third parties, the person to whom the right of use has been transferred or the primary user's successor in title, must, at the explicit request of the author, provide the information if the primary user does not have it (Art. 50/A (4) Copyright Act). The author may request the information through his/her contracting party (Art. 50/A (5) Copyright Act).

However, if the obligation to provide information is not provided for in the contract of exploitation and represents an administrative burden for the user which is disproportionate to the revenue from the exploitation, this obligation shall only be fulfilled to the extent that it is normally required in the given circumstance (Art. 50/A (6) Copyright Act). Similarly, an exception to this obligation applies where the author's contribution to the entire work is not significant, unless the author demonstrates that the information requested is necessary to assert the claim provided for in Art. 48(1) (contract readjustment clause) (Art. 50/A (8) Copyright Act).

Collective exploitation agreements on the general conditions for authorising the use of the works of the authors may lay down rules on the provision of information, provided that their provisions comply with certain conditions set out in paragraphs 1 to 8 of Art. 50/A. Such agreements are concluded between authors and representative organisations authorised by a statutory instrument to conclude an exploitation agreement (Art. 50/A (9) Copyright Act). As specified under Art. 55(1), these provisions shall also apply to performers.

6.4. Key provisions on dispute resolution mechanisms and revocation of rights

As a general rule, authors may always terminate a contract containing an exclusive license if the user does not commence exploitation of the work within the period

specified in the contract or, failing this, within the period which can normally be expected in the circumstances; or if the user exercises the rights acquired under the contract in a manner manifestly unsuitable or improper for achieving the purpose of the contract. If the contract of exploitation was concluded for an indefinite period or for a period exceeding five years, the author may exercise his/her right of termination only after the expiry of two years after the conclusion of the contract. In any event, the right of termination may be exercised by the author only after an appropriate period has been set by the user and has elapsed without result. The right of termination may not be waived in advance by the author; its exercise may be excluded by contract only for a period of not more than five years after the conclusion of the contract or, if later, after the delivery of the work. In lieu of termination, the author may also terminate the exclusivity of the authorisation, subject to a proportionate reduction of the royalty payable for the exploitation (Art. 51 Copyright Act).

Art. 52 of the Copyright Act further provides that if a contract of exploitation is concluded for works to be created in the future in such a way that they are designated only according to their type or nature, either party may terminate the contract after five years from the conclusion of the contract and after a further period of five years thereafter, by giving six months' notice. This right may not be waived in advance by the author.

Furthermore, concerning filming contracts more specifically, if the producer does not begin the filming of the work within four years of the acceptance of the work, or begins the filming but does not complete it within a reasonable period, the author may terminate the contract and claim payment of a proportionate fee. In such a case, the author shall be entitled to the advance payment received and shall be free to dispose of the work (Art. 66 (6) Copyright Act). Art. 66 of the Copyright Act on filming contracts does not apply to performers.

It is also worth mentioning that alternative dispute resolution mechanisms are provided primarily in the Copyright Act. Art. 102 establishes an arbitration (conciliatory) board for disputes between users and rightsholders or between users or their representative organisations and that of rightsholders, and also, in connection to disputes about collective rights management between CMOs, members of CMOs, rightsholders or users. These measures are complemented by Art. 47 of the Act of 2016 on Collective Management of Copyright and Related Rights.[55]

[55] 2016. évi XCIII. törvény a szerzői jogok és a szerzői joghoz kapcsolódó jogok közös kezeléséről, https://njt.hu/jogszabaly/2016-93-00-00.

6.5. Key provisions on collective agreements

Art. 50/A (9) of the Copyright Act provides that collective agreements on the general conditions for authorising the use of works may lay down rules on the provision of information (transparency obligation), provided that the provisions comply with the requirements set out in paragraphs 1 to 8 of Art. 50/A.[56] Such agreements are concluded between authors on one hand, and representative organisations authorised by their own statutes to conclude agreement on the other.

In the audiovisual sector in particular, collective management of rights is mandatory in several cases specified in the Copyright Act (e.g., private copying, rental and lending right, public communication and cable retransmission). In all these cases, CMOs conclude agreements with users for the authorisation of the broadcasting of works already published and the amount of remuneration payable (Art. 27(1) Copyright Act). In all such cases, remuneration is to be fixed by the CMOs. Likewise, the remuneration for private copying is to be fixed by CMOs (Art. 20(2) Copyright Act).

CMOs can also conclude agreements for the licensing of other uses vie extended collective licenses (Art. 27(3 Copyright Act). In these cases, authors can make a statement of objection (opting out) pursuant to Art. 18(1) Collective Management Rights Act.

The provisions on extended collective licensing apply *mutatis mutandis* to performers and their CMOs in respect of the remuneration for the fixation of a performance for broadcasting or communication to the public [Art. 26(6)] and the exercise of the right to making available provided for in Art. 73(1)(e).

[56] For more details as to the requirements, see section 3.2.5.3. on key provisions on transparency

7. NL – Netherlands

The Netherlands was the first EU member state to transpose the CDSM Directive on 16 December 2020, by introducing amendments[57] to the Dutch Copyright Act (*Auteurswet*)[58] and the Neighbouring Rights Act (*Wet op de naburige rechten*).[59] The amended Act entered into force on 7 June 2021. The Act on Supervision and Dispute Resolution, Collective Management Organisations, Copyright and Neighbouring Rights (*Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten*)[60] contains further relevant provisions within the framework of collective management of rights.[61]

The Netherlands is an interesting example of a country that has adopted safeguards to address issues of contractual asymmetry.

7.1. Key provisions on assignment and licensing of rights

The Copyright Act establishes that copyright passes on inheritance and is subject to full or partial transfer. The author, or his/her assignee, may grant a license to a third party for all or part of the copyright. The Act also provides that whole or partial transfer, as well as the grant of an exclusive license, may only be effective by means of a deed executed for that purpose. The assignment or the grant of an exclusive license comprises only the rights that are stated in the deed or that necessarily derive from the nature and purpose of the title or the granting of the license (Art. 2 Copyright Act). In addition, a clause stipulating rights to the exploitation of future works of the author for an unreasonably long or insufficiently determinate period is voidable (Art. 25f Copyright Act).

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[57] Act of 16 December 2020 amending the Copyright Act, the Neighbouring Rights Act, the Databases Act and the Act on Supervision and Dispute Resolution of Collective Management Organisations for Copyright and Neighbouring Rights in connection with the implementation of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC (Copyright in the Digital Single Market Directive Implementation Act), https://zoek.officielebekendmakingen.nl/stb-2020-558.html.

[58] Copyright Act, https://wetten.overheid.nl/BWBR0001886/2022-10-01#HoofdstukIVa.
An English translation is available at:
https://www.bing.com/ck/a?!&&p=6f73fdd36e64ec7fJmltdHM9MTcwMTA0MzIwMCZpZ3VpZD0yYzliN2MyMS1jMDZmLTY4YTctMGIxMS02ZWUzYzE2ZTY5OGQmaW5zaWQ9NTE5Ng&ptn=3&ver=2&hsh=3&fclid=2c9b7c21-c06f-68a7-0b11-6ee3c16e698d&psq=hendricks+james+translation+copyright+act&u=a1aHR0cHM6Ly93d3cuaGVuZHJpa3MtamFtZXMubmwvYXNzZXRzL3BkZi9Db3B5cmlnaHRfQWN0XzIwMjEucGRm&ntb=1.

[59] Neighbouring Rights Act, https://wetten.overheid.nl/BWBR0005921/2021-06-07.

[60] Act on Supervision and Dispute Resolution Collective Management Organisations Copyright and Neighbouring Rights, https://wetten.overheid.nl/jci1.3:c:BWBR0014779&z=2022-10-01&g=2022-10-01.

[61] It is worth mentioning that most of the framework laid out in Chapter 3 of Title IV of the CDSM Directive was already in place as of 1 July 2015, with the exception of the transparency obligation.

With regard to the transfer of cinematographic works in particular, unless the authors and the producer have agreed otherwise in writing, the authors shall be deemed to have transferred to the producer their exploitation rights, from the moment the work is completed (Art. 45d(1) Copyright Act), that is at the time it is ready for screening (Art. 45c Copyright Act). The exploitation rights transferred include the right to rent out and otherwise make public a cinematographic work, the right to reproduce it, to attach subtitles to it and to synchronise its lyrics. The presumption of transfer does not apply to the person who created the music for the film work and the person who created the lyrics accompanying the music and to the works not specifically created for the cinematographic works. Regardless of the method of transfer, the producer shall owe the creators fair compensation for the transfer of rights and the exploitation of the film work. The right to fair compensation cannot be waived (Art. 45d(1) Copyright Act). [62]

The transfer of performers' exploitation rights may be done in whole or in part (Art. 9(1) Neighbouring Rights Act). In the audiovisual sector in particular, the exploitation rights may be licensed in all or in part (Art. 9(1) Neighbouring Rights Act). As for authors, whole or partial transfer, as well as the granting of an exclusive license, may only be effective by means of a deed executed for that purpose (Art. 9(2) Neighbouring Rights Act). Art. 25f Copyright Act on the exploitation of future works applies *mutatis mutandis* to performers (Art. 2b Neighbouring Rights Act).

7.2. Key provisions on remuneration

The Dutch Copyright Act provides for a general rule entitling authors to contractually stipulated fair compensation for granting a right of exploitation (Art. 25c(1)). If the author granted exploitation rights for a work in a manner unknown at the time the agreement was concluded and the other party proceeds to do so, he/she owes the author additional fair compensation. In case the authorisation to exploit the work is transferred by the user to a third party who proceeds to the said exploitation, the author may claim the additional fair compensation from that third party (Art. 25c(6) Copyright Act).

Art. 25h of the Copyright Act specifies that creators cannot waive the provisions of Chapter 1 of the Copyright Act. Besides, regardless of the law governing the contract, these provisions apply if, in the absence of a choice of law, the contract would be governed by Dutch law, or if the operating activities take place or should take place entirely or predominantly in the Netherlands.

The Dutch Copyright Act provides in Article 45d(1) specifically for authors and performers contributing to cinematographic works fair compensation for transferring their

[62] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and administered through mandatory collective management).

rights of exploitation to the producer, whether by contract or via art. 45d(1) Copyright Act. The right to this fair compensation – which was introduced in Article 45d Aw even prior to 1 July 2015 – cannot be waived (Art 45d(1) Copyright Act). In addition Article 45d(2) of the Copyright Act imposes on cable operators and retransmission service operators for linear cable retransmissions, retransmissions via other means than cable and for direct injection the obligation to pay a proportional fair compensation to the CMOs of the authors who have transferred their rights of exploitation to the producer. Article 45d(2) of the Copyright Act applies *mutatis mutandis* to performing artists.

With regard to lump-sum payments, the Copyright Act does not contain specific provisions. However from the legislative history from Article 45d of the Copyright Act prior to 1 July 2015, it has become clear that a lump sum as such is allowed, provided however that the lump sum can be regarded as fair compensation. If the lump sum cannot be regarded as fair, as of 1 July 2015, the authors and performers can invoke Article 25d of the Copyright Act.

Regarding performers, since Chapter 1a of the Copyright Act applies *mutatis mutandis* (Art. 2b Neighbouring Rights Act), Art. 25c of the Copyright Act establishing a fair compensation therefore also applies to performers.

Where, having regard to the performance delivered by both parties, the agreed compensation is disproportionate to the proceeds from the exploitation of the work, the author may claim additional fair compensation in court from the other party to the contract. If the disproportion between the author's compensation and the proceeds from the work's exploitation arises after the other party to the contract with the author has assigned or licensed the copyright to a third party, the author may issue the claim against that third party, insofar as the latter is entitled to the proceeds from the exploitation of the work (Art. 25d Copyright Act).

7.3. Key provisions on transparency

Under Art. 25ca of the Copyright Act, which is applicable as of 7 June 2022, the party to whom the author has granted exploitation rights is obliged to provide information to the author or his/her successor in title at least once a year and, taking into account the specificities of each sector, about the exploitation of the work, in particular with regard to the modes of exploitation, the revenues generated by it and the compensation due. The information should be up to date, relevant and comprehensive.

If the other party to the contract or his/her successor in title has granted a license to a third party for the purposes of exploitation and the other party or his/her successor in title does not hold all the information with respect to the exploitation covered by the license, the licensee must provide the author and the other party to the contract or his/her successor in title with the missing information at the request of either of them. Upon request, the author will receive information regarding the identity of the licensee from the other party or his/her successor in title.

The obligation to provide information does not apply when the contribution of the author is not significant having regard to the overall work, unless the author demonstrates that he/she requires the information to invoke Art. 25d of the Copyright Act on the contract adjustment mechanism. In addition, if the administrative burden resulting from the provision of information becomes demonstrably disproportionate in the light of the revenues generated by the exploitation of the work, the obligation is limited to the information that can reasonably be expected in such cases.

Art. 25ca Copyright Act applies *mutatis mutandis* to performers (Art. 2b Neighbouring Rights Act).

7.4. Key provisions on dispute resolution mechanisms and revocation of rights

The Minister of Security and Justice may appoint a dispute resolution committee for the resolution of disputes between an author and the other party to the contract or a third party concerning the application of provisions related to fair compensation, transparency, the contract adjustment mechanism, the revocation of rights or future works. If the dispute is not brought before the court within three months after a copy of the decision of the disputes committee was sent to the parties, what was established in the judgment is deemed to be agreed between the parties. Proceedings may also be brought on behalf of authors by a foundation or an association with full legal capacity to the extent that it represents the interests of authors (Art. 25g Copyright Act). Art. 25g Copyright Act applies *mutatis mutandis* to performers (Art. 2b Neighbouring Rights Act).

In addition, if the parties cannot reach an agreement on making a film available to the public on a VOD service, they may rely on one or more mediators. The mediators assist the parties in negotiating and concluding agreements. Where appropriate, the mediators can submit proposals to the parties to that end (Art. 45ga Copyright Act).[63]

In relation to the revocation of rights, Art. 25e Copyright Act provides that an exploitation contract may be dissolved in whole or in part if the other party to the contract does not sufficiently exploit the copyright to the work within a reasonable period after concluding the contract, or does not sufficiently exploit the copyright after having initially performed acts of exploitation. However, this rule does not apply if the failure to sufficiently exploit the copyright within this period is attributable to the author. If the copyright vests in several authors and the contributions of all authors are not distinct from each other, the author may only dissolve the contract with the consent of the others.

[63] This newly added Article 45ga in the Dutch Copyright Act is the result of implementation of Article 13 of the CDSM Directive, which is not part of Chapter 3 of Title IV of the Directive. It has been transposed to the Dutch Copyright Act quite literally.

If an author withholds his/her consent and the other authors are disproportionately disadvantaged as a result, the contract may only be dissolved in court.

In any event, the right to dissolve the contract only arises after the author has granted the other party, in writing, a reasonable period to sufficiently exploit the work and no exploitation is performed within this period. In accordance with Art. 6:267 of the Civil Code, the contract is dissolved by a written statement by the author to the other party to the contract. Upon application by the author, the contract may also be dissolved by a judicial decision.

If the other party to the contract has assigned the copyright to a third party, the author may also exercise the rights arising from the dissolution against it after having notification of the dissolution, in writing and as soon as possible. If the other party to the contract or the third party does not assign the copyright back within a stipulated reasonable period, a court may determine an amount that is reasonable in the circumstances which the other party or the third party must pay the author, in addition to any compensation due. Art. 25e Copyright Act *applies mutatis mutandis* to performers (Art. 2b Neighbouring Rights Act).

7.5. Key provisions on collective agreements

The procedure for approval of a remuneration arrangement for specific sectors is regulated under Art. 25c(2) of the Copyright Act. The Minister of Education, Culture and Science may, after hearing an advisory body to be designated by order in council, on the recommendation of the aforementioned Minister, determine the amount of a fair compensation for a specific branch and for a specific period after consultation with the Minister of Security and Justice. This must be made taking into account the importance of preserving cultural diversity, the accessibility of culture, a social policy objective and the importance of the consumer. The Minister of Education, Culture and Science however only makes such a determination at the joint request of an association of authors from the relevant industry and an operator or an association of operators. The request must contain a jointly supported recommendation on fair compensation as well as a clear indication of the industry covered by the request (Art. 25c(2)(3) Copyright Act).

Art. 45d(3) Copyright Act provides that the right to the compensation referred to in the second subsection is exercised by a CMO.

The collective management of rights is further addressed in the Act on Supervision and Dispute Resolution Collective Management Organisations Copyright and Neighbouring Rights. In particular, the Act stipulates that CMOs and users must conduct negotiations on rights licensing in good faith. Rates for exclusive rights and rights to remuneration shall be fair in relation to, *inter alia*, the economic value of the use of the rights in commerce, given the nature and scope of the use of material protected under the Copyright Act and the Neighbouring Rights Act, and in relation to the economic value of

the service provided by the CMO. CMOs must inform the user concerned of the criteria used to determine those tariffs (Art. 2l).

8. SI – Slovenia

After a lengthy public consultation process involving industry stakeholders from the fields of research, education, preservation of cultural heritage and other areas, and multiple drafts, the transposition of the CDSM Directive in Slovenia was finally passed in an urgent legislative procedure on 29 September 2022. The changes to the Slovenian legal framework entered into force on 26 October 2022. They were incorporated in two acts, the "Copyright and related rights act"[64] (*Zakon o avtorski in sorodnih pravicah (ZASP*) and the "Act regulating collective management of copyright and related rights"[65] (*Zakon o kolektivnem upravljanju avtorske in sorodnih pravic (ZKUASP*).

Slovenia is another example of a country that has introduced new rights for the online exploitation of works as part of the transposition of the CDSM Directive. The "Copyright and related rights Act" (ZASP) introduced a new remuneration right for authors for the online exploitation of their works by OCSSPs (Art. 76 (6)) and video-on-demand (VOD) services (Art. 107 (4) 5.).

8.1. Key provisions on assignment and licensing of rights

The use of a copyright work is permitted only if the author has transferred the appropriate economic right in accordance with the ZASP and under the conditions determined by the author (Art. 21 (2) ZASP). Economic and other rights may be transferred by contract or by another legal transaction (Art. 72(1) ZASP) and may be limited in terms of content, territory, or time (Art. 73 ZASP). In any event, transfer of economic rights with respect to the author's future works or to yet unknown means of use of works is prohibited (Art. 79(3)(4) ZASP).

Concerning audiovisual works, there is a presumption that, by concluding a film production contract, co-authors have transferred to the film producer, exclusively and without limitations, all their economic rights and other rights of the author in connection with this work, unless otherwise provided by contract (Art. 107(2) ZASP).[66] The same

[64] Zakon o avtorski in sorodnih pravicah (ZASP), 30 March 1995, http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO403. Unofficial English consolidated version available at: https://www.gov.si/assets/organi-v-sestavi/URSIL/Dokumenti/Avtorska-in-sorodne-pravice/Copyright-and-related-rights-act-unofficial-consolidated-version.docx

[65] Zakon o kolektivnem upravljanju avtorske in sorodnih pravic (ZKUASP), 22 September 2019, http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7317. Unofficial English consolidated version available at: https://www.gov.si/assets/organi-v-sestavi/URSIL/Dokumenti/Avtorska-in-sorodne-pravice/Act-regulating-collective-management-of-copyright-and-related-rights-unofficial-consolidated-version.docx.

[66] This is without prejudice to the rights to equitable remuneration granted to authors and performers by other provisions of the law under the EU copyright acquis (e.g., for rental, cable retransmission, direct

applies to performers in relation to their performance (Art. 124 (1) ZASP). In relation to the above changes, some additional rights have been recognised for producers.

8.2. Key provisions on remuneration

Art. 81 of the ZASP transposes Art. 18 of the CDSM Directive on the principle of appropriate and proportionate remuneration. More specifically, according to Art. 81(1) of the ZASP, authors are entitled to equitable and proportionate royalties or remuneration[67] where they transfer their economic rights or other rights. Co-authors of an audiovisual work are entitled to royalties separately for each transferred economic right or other right of the author (Art. 108(1) ZASP). Where royalties or remuneration have not been determined, they are calculated by taking into account the usual fee for a particular category of works, the scope and duration of use, and other circumstances of the case (Art. 81(2) ZASP).

In addition, co-authors shall have the right to equitable remuneration from online content-sharing service providers (OCSSPs) for each communication to the public of the audiovisual work (Art. 107(4) §5 ZASP). Furthermore, they have the right to equitable remuneration for each communication to the public, including making available, of the audiovisual work by VOD services (Art. 107(4) §6 and §7 ZASP). These rights are unwaivable by law (Art. 107(5) ZASP).

As far as performers are concerned, the ZASP provides that for each economic right which was transferred, they shall have the right to demand equitable remuneration from the film producer (Art. 124 ZASP). Performers also hold the right to demand equitable remuneration[68] from film producers for the transfer of any of their exclusive economic rights (Art. 124 (2) ZASP). In addition, the Slovenian Copyright Act introduces new remuneration rights for the communication to the public, including making available, of works by OCSSPs (Art. 107(4) §5 ZASP) and VOD services (Art. 107(4) §6 ZASP).

Furthermore, where royalties or remuneration agreed in the contract subsequently appear manifestly disproportionately low compared to subsequent revenues derived from the use of the copyright work, the author or his/her representative may request the other party or his/her successors in title to modify the contract in such a way as to provide for additional, appropriate and fair remuneration[69] (Art. 81(3) ZASP). In doing so, account must be taken of all the circumstances of the case. This does not however apply to joint

injection, or rights to fair compensation for exceptions such as private copying or lending), which are usually unwaivable, non-transferable and administered through mandatory collective management).

[67] "*primernega in sorazmernega avtorskega honorarja ali nadomestil*".

[68] "*primernega nadomestila*".

[69] "*dodatno, primerno in pravično plačilo*".

agreements and contracts concluded by a CMO or an independent management entity in accordance with the Collective Management Act (Art. 81 (4) ZASP).[70]

Art. 4 and Art. 162b (3) ZASP make the above *mutatis mutandis* applicable to performers' neighbouring rights.

As far as producers are concerned, the ZASP provides additional remuneration rights directly to the film producers for all forms of communication to the public (Art. 134a ZASP). This includes their own cable retransmission right and secondary uses in public spaces. For these uses, collective management has been made mandatory (Art. 9 ZKUASP). With these additional remuneration rights, producers retain their economic interest even when the transfer of these (economic) rights of authors and performers has been effectively cancelled.

8.3. Key provisions on transparency

Transparency obligations are provided in Art. 82 ZASP. According to this provision, where the royalties or remuneration have been agreed upon or determined in proportion to the revenue derived from the use of a work, the user of the work shall keep appropriate books or other records on the basis of which the amount of such revenues can be determined. The user of the work shall provide the author access to those books or records.

In addition, Art. 82(2) to (9) ZASP provides for the different types of reporting obligations applicable to the user of the work. These include the obligation for the user to keep appropriate books or other records and to keep the contact details of the persons who have acquired rights to use the work by means of further transfers of rights (Art. 82(2) ZASP); the sending by the user, at least once a year, to the author, on request, of an up-to-date, relevant and comprehensive report which shall include in particular all uses of the work; all revenues derived from the use of the work; and the royalties or remuneration due to the author (Art. 82 (3) ZASP). Such information can also be requested by the author to the user of the work who has acquired the rights by virtue of further transfer. In such a case, the first contracting party shall send the author the user's contact details (Art. 82 (4) ZASP). Derogations to these provisions are set forth in case of joint agreements and contracts concluded by a CMO (Art. 82(8) ZASP). Contractual stipulations that are contrary to these provisions to the detriment of the author shall be null and void (Art. 82(9) ZASP). Information and reporting obligations of users on the use of works are also provided in Art. 48 ZKUASP.

[70] Authors' collective agreements are expressly mentioned in Art. 84 of the Copyright Act, which provides that organisations of individual categories of copyright works and the users of such works or their associations may lay down general rules for the use of copyright works; and conclude tariff agreements.

In the case of audiovisual works specifically, the film producer shall report to the co-authors of the work separately for each authorised form of use of the work (Art. 108(2) ZASP).

Nevertheless, if the reporting obligation is not proportionate to the revenue derived from the use of the work, it shall be limited to the types and level of information that can reasonably be expected (Art. 82 (7) ZASP). Full exceptions to the obligation provided under Art. 19 CDSM apply when the contribution of the author is not significant having regard to the overall work or has a minor impact on it, unless the author proves that he/she needs the information to modify the contract (Art. 82 (6) ZASP).

Art. 4 ZASP makes the above *mutatis mutandis* applicable to performers' neighbouring rights.

8.4. Key provisions on dispute resolution mechanisms and revocation of rights

Should a dispute arise with regard to the transfer of an economic or other right of the author, appropriate/proportionate remuneration or the transparency obligation, mediation or any other form of alternative dispute resolution may be used to resolve it (Art. 82.a ZASP). Proceedings may be initiated by organisations of authors of particular categories of copyright works on the proposal of the author.

Revocation of the transferred economic rights in whole or in part may be a last solution where rights have been insufficiently exploited, or not at all, leading to the legitimate interests of the author being considerably affected (Art. 83 ZASP). A period of two years must have elapsed since the transfer of the economic right and the rightsholder must have been given by the author adequate additional time to comply with the demand for sufficient exploitation. After the expiry of that period, the author may revoke the exclusivity of the transfer of rights instead of revoking the economic right. If equity so requires, the author shall pay appropriate compensation to the rightsholder.

Art. 4 ZASP makes the above *mutatis mutandis* applicable to performers' neighbouring rights.

8.5. Key provisions on collective agreements

The Slovenian legal framework provides for a system of collective management of copyright and related rights. In essence, collective rights management is voluntary and remains the rightsholder's choice (Art. 7 ZKUASP). It is however mandatory in certain cases mentioned under Art. 9 of the Act on Collective management of copyright and related rights (ZKUASP) (e.g., private copying, rental and lending, cable retransmission, as

well as the new remuneration rights on communication to the public and making available of audiovisual works).

Within the scope of their activities, CMOs can negotiate tariffs with representative associations of users and conclude common agreements (Art. 16 ZKUASP). A common agreement between a CMO and a representative association of users of copyright works in the repertoire of the CMO shall be concluded in writing. Representative associations of users shall mean those associations that represent the majority of users from a particular field of activity with regard to their number and associations recognised as representative by law. A common agreement may also be concluded between a CMO and an individual user of copyright works from its repertoire when, due to the nature of the activity, this individual is the only one carrying it out (Art. 44 ZKUASP). The common agreement shall include at least the tariff; the terms of use of copyright works with regard to context of use; the contexts of use that shall give rise to an increase or decrease in the payment of rights revenue or compensation under the tariff or to exemption from such payment; a remuneration adjustment mechanism, on the basis of which authors may request additional remuneration if the conditions under Art. 81(3) of the ZASP are fulfilled (the remuneration is manifestly disproportionately low compared to subsequent revenues derived from the use of the work); the deadline for payment of rights revenue or compensation; the method of payment of rights revenue and possible back payment with regard to the provisional tariffs; representatives of the CMO and representative association of users who shall monitor the implementation of the common agreement. CMOs and users shall negotiate in good faith and exchange any information necessary to conclude the common agreement. The CMO shall publish the common agreement in the Official Gazette of the Republic of Slovenia, and it shall start to apply to any user of the same category of works in the repertoire of the CMO, regardless of their participation in negotiations or in the conclusion of such an agreement. The common agreement shall be binding on courts (Art. 44 ZKUASP).

In addition, Art. 45 of the ZKUASP provides for the rules related to the establishment of tariffs by CMOs for the use of the works, including the amount and method of calculating the rights revenue payable by individual users to the CMO for the use of the works in the repertoire, and the requirement that tariffs shall reflect the economic value of the rights, the nature and scope of the use of the works and the economic value of the service provided by the CMO (Art. 45 ZKUASP).

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