



# Fair remuneration for audiovisual authors and performers in licensing agreements

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See also as annex to this publication: Fair remuneration for audiovisual authors and performers in licensing agreements - National case studies, available at: <https://go.coe.int/26aV9>.

# Fair remuneration for audiovisual authors and performers in licensing agreements

**Amélie Lacourt, Justine Radel-Cormann, Sophie Valais**





# Foreword

In May 2023, a massive strike in Hollywood by screenwriters and performers brought crucial issues concerning remuneration and working conditions of creators into the spotlight. This collective action led to negotiations and to a tentative agreement, ratified by the Writers Guild of America (WGA) and the Alliance of Motion Picture and Television Producers in September 2023. This was followed, six weeks later, by the approval of another agreement to the benefit of actors by the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) negotiators. Despite the "work for hire" model underpinning the US copyright system, which designates the creators' employer as the author, this development emphasised global concern about fair remuneration of creators, a concern that has long been central to discussions in Europe too.

The transformation of the audiovisual sector over the last decade, linked to digital technologies, the growth of video-on-demand (VOD) services, and the evolution of business models, has multiplied the opportunities for access to creative content and therefore the possibilities of generating income for creators. However, it has also raised new challenges for the latter, notably linked to the lack of transparency associated with new online exploitation models and to an imbalance of bargaining power in contractual negotiations relating to the exploitation of rights. Ensuring fair remuneration for authors and performers is essential for a well-functioning copyright marketplace, supporting cultural development, job creation and, above all, enabling them to make a living from their work and continue to create.

In the European Union, the Directive on Copyright and Related Rights in the Digital Single Market (CDSM Directive) (2019/790),<sup>1</sup> adopted in April 2019, aims to formulate a response to these challenges. Recognising the vulnerability of creators in online exploitation contexts, the European legislator has marked a significant shift by introducing elements of harmonisation into contractual matters relating to copyright. Chapter 3 of Title IV (Art. 18-23) of the CDSM Directive aims to strengthen the position of authors and performers when transferring or licensing their exclusive rights for the use of their works or performances. In particular, it establishes an obligation for member states to ensure "appropriate and proportionate remuneration" for creators, and provides for a set of measures to put an end to asymmetry in contractual negotiations. These include new transparency obligations, the introduction of contract adjustment mechanisms when initial remunerations agreed upon prove disproportionately low compared to subsequent revenues from exploitation, alternative dispute resolution procedures, and a right of revocation in the event of non-used work or performances.

Although the transposition of the CDSM Directive, due in June 2021, has been significantly delayed in many member states, prompting the European Commission, in February 2023, to refer six of them to the Court of Justice of the European Union, the

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<sup>1</sup> 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, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

process has now been completed in all but one member state. While the Directive offers a degree of flexibility in achieving its goals, a variety of solutions have emerged at national level. These range from collective bargaining approaches to the creation of new remuneration rights for creators, often facilitated through mandatory collective management. Some member states have transposed the CDSM Directive literally, creating mechanisms for future implementation, while in others the protection of creators in contractual arrangements had already been partially addressed prior to the implementation of the Directive.

In order to cover this complex topic as comprehensively as possible, this publication will first set the scene with an introduction to the audiovisual value chain and the rights-licensing process, a focus on the economic rights of audiovisual authors and performers, and an overview of exploitation contracts and remuneration issues. Chapter 2 provides a deeper insight into the EU legal framework, focusing on the policy objectives for a well-functioning copyright marketplace and an analysis of the main provisions of Chapter 3 of Title IV of the CDSM Directive. Seven country cases (Belgium, France, Germany, Hungary, the Netherlands, Slovenia and Spain) are presented in detail in Chapter 3 and its annex, accompanied by a comparative analysis. Chapter 4 provides the reader with flagship examples of collective agreements in the industry and Chapter 5 provides international and national case law on key concepts related to remuneration rights.

As the implementation of national measures to ensure fair remuneration for authors and performers is still in its early stages, the full impact of these measures on the contractual situation of authors and performers has not yet been revealed. It will be interesting to see over the next few years how these various national approaches shape industry practices and whether the situation for creators in Europe will continue to mirror that of their counterparts across the Atlantic.

I would like to thank the members of the Advisory Committee of the European Audiovisual Observatory for having provided valuable feedback during the drafting process and ensured a reality check of provisions that are charged with nuances according to the respective national legislative traditions.

Enjoy the read!

Strasbourg, December 2023

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

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# 1. Setting the scene

This chapter aims to describe the general context from a market, legal, and contractual perspective. It first presents the value chain in the audiovisual sector and the rights-licensing process. It then provides an overview of the market trends in online distribution models, before delving into key legal concepts and rights involved, as well as usual contractual practices in the sector.<sup>2</sup>

## 1.1. Audiovisual value chain and rights-licensing process

### 1.1.1. Value chain and exploitation channels

A film or audiovisual work (hereinafter, “audiovisual work”) is probably one of the most complex artistic works in terms of copyright and related rights, as production usually involves several authors, performers, and producers, as well as multiple rightsholders. In addition, the broad range of exploitation channels for the final work offers a wide variety of licensing options, which the producer explores on behalf of all the rightsholders of the collective work by virtue of the principle of unification of rights in the producer, through statutory provisions or by contract. Moreover, film and audiovisual works may be based on pre-existing copyright (a literary text, a musical composition, images, etc.). It is therefore not surprising that the licensing of rights is essential when it comes to financing production (in the form of pre-sale of future distribution rights), producing and exploiting an audiovisual work.

The notion of value chain in the audiovisual sector generally refers to the production model of an audiovisual work, step by step, from its conception to its exploitation. The various revenue streams generated by the money paid by the end consumer through each exploitation channel constitute what could be called the recoupment chain, through which the economic contributors along the value chain (producers, financiers, public authorities, and distribution partners such as exhibitors,

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<sup>2</sup> Although Chapter 3 of Title IV of the CDSM Directive (“Measures to achieve a well-functioning marketplace for copyright”) takes a holistic approach and concerns the entire value chain of theatrical, offline/online home entertainment (TVOD, SVOD, AVOD, FAST) and the various forms of broadcasting, this publication focuses primarily on online distribution models.



distributors, physical and online video publishers, broadcasters) recover their investment. In this context, the term "release window" refers to the different forms of exploitation channels of an audiovisual work, which include theatrical exhibition, broadcasting (pay TV, free TV), online home entertainment (such as TVOD, SVOD, AVOD, FAST), live streaming, physical retail and rental.<sup>3</sup>

## 1.1.2. Production stages and rights licensing

The value chain of an audiovisual work can be broken down into three main stages: pre-production, production and commercialisation. During these stages, the producer will usually play a crucial role, both commercially and creatively, taking on financial and legal risks associated with the production and often intervening in creative decisions.

The first stage of **pre-production** involves the development and financing of the work; it is during this stage that the different contracts with the authors (the authors of the pre-existing work on which the screenplay is based – if applicable – and the authors of the screenplay, the director, the composer, etc.),<sup>4</sup> cast and crew are signed with the producer, with the relevant financial modalities attached (fee while working on the production, terms and conditions for transfer of relevant rights vested in the author, performer,<sup>5</sup> etc.). Depending on the country, some of them retain copyrights (director, screenwriter, composer, etc.) or related rights (actors, performers, etc.) to the final work.

The financing plan may include equity investment from different co-producers or co-financiers, public support, pre-sales and advances (this is not always the case, but local distributors, international distributors and broadcasters may contribute to the financing of the audiovisual work at this stage in exchange for certain exclusive exhibition rights for one or more territories and/or several distribution channels – so-called all-rights deals) or gap financing to be recouped from the revenues.<sup>6</sup> Moreover, it is also at this stage that the

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<sup>3</sup> See also Cabrera Blázquez F.J., Cappello M., Grece Ch., Simone P., Talavera Milla J., Valais S., "Territoriality and release windows in the European audiovisual sector", IRIS Plus, European Audiovisual Observatory, Strasbourg, June 2023, <https://rm.coe.int/iris-plus-2023-02en/1680abd676>.

<sup>4</sup> In certain instances, directors and writers may also take on some financial risk by deferring their fees during the development / pre-production phases as a way to ensure that the financing plan comes together. They may also be involved in the promotion of the work as part of their contribution towards the overall exploitation and success of the work.

<sup>5</sup> Unlike authors (whose rights are granted under copyright law before they enter into contractual negotiations with producers), performers' rights are granted under copyright law once their performances are fixed in audiovisual formats/works, i.e. during actual shooting.

<sup>6</sup> For more information on financing, see Kanzler M., "Fiction film financing in Europe: A sample analysis of films released in 2020", European Audiovisual Observatory, Strasbourg, 2023, <https://rm.coe.int/fiction-film-financing-in-europe-2022-edition-m-kanzler/1680aa189b>.



licensing of pre-existing works starts (e.g. usually through an option agreement) as well as other pre-existing works used in the work.<sup>7</sup>

The next stage of the value chain is the **production** stage, which comprises the actual shooting of the film or other audiovisual work and its post-production.

The last stage concerns the actual **commercialisation** of the work, including its marketing, distribution and exploitation. This final stage includes the physical or digital distribution of the work to the end-consumer through a variety of distribution channels operating under diverse business models, as well as related marketing and promotion activities. The film exploitation process involves multiple stages and licensing scenarios, whether before or after the work's completion, typically involving exclusive rights for specific territories and timeframes across various exploitation channels. This process generates revenue for different players in the value chain, including exhibitors, distributors, physical and online video publishers, broadcasters, and sales agents, ultimately benefiting the producers and their financing partners, in some instances public funding authorities, and authors, performers and creators of pre-existing works, depending on their contractual agreements – whether collective or bilateral arrangements – or local laws. In the event of bilateral contractual agreements, these individuals may assign their rights on a royalty basis or through lump-sum buy-out contracts. In such case, they will not receive additional revenue. In essence, the revenue stream follows the value chain, benefiting authors, performers, creators, producers who made the initial investment, and consumers, along the recoupment chain.

### 1.1.3. Distribution models in constant evolution

#### 1.1.3.1. Main players in the rights-licensing process

As mentioned above, the **producer** plays a central role in the film / audiovisual production process. It is also the producer who negotiates the licensing of most of the economic rights (usually previously acquired from the various rightsholders)<sup>8</sup> to the completed film / audiovisual production, as it is the producer's responsibility to maximise the work's revenue through favourable distribution and exploitation agreements.

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<sup>7</sup> For more information on the value chain, see Cabrera Blázquez F.J., Cappello M., Fontaine G., Talavera Milla J., Valais S., "Copyright licensing rules in the EU", IRIS Plus, European Audiovisual Observatory, Strasbourg, July 2020 <https://rm.coe.int/iris-plus-2020en1/16809f124b>.

<sup>8</sup> It is worth noting that, as regards the main cast, agreements between producers and main cast performers are often reached early in the development phase and contribute to ensuring that the financing plan is achieved and completed. For other actors, the neighbouring rights of actors are often only acquired after the financing is completed. As a result, many producers have already agreed on providing third-party licensees with rights they do not own yet, resulting in additional pressure on actors to transfer their rights (or not take on the role).



The **distributor** is the legal person who is entitled through a license contract to generate revenue from the completed audiovisual work by releasing it to the public or by licensing it to sub-distributors who are responsible for other areas of distribution (in terms of territory, language or medium). In order for the distributor to engage in the above activities, he/she will need to have the authorisation of the rightsholders (i.e. the producers). The combination of rights to be obtained depends on the intended use. Distributors are also responsible for marketing the audiovisual work and often contribute to financing the project (e.g. through pre-acquisition of future distribution rights). They may be established as part of a vertically integrated company or as an independent film distributor. **International sales agents** also play an important role in the film / audiovisual production's distribution process as they are responsible for representing works to local and international buyers, negotiating deals with distributors, providing necessary material for release and managing promotional activities. These may also acquire rights or agree minimum guarantees at the pre-production stage of a project, thus contributing to the financing of the work.

The **aggregators** serve a similar function to traditional distributors but only focus on the online retail market. They act as distribution outlet and maintain a network of VOD platforms, through which films / audiovisual productions are converted and distributed to the online service providers. They also collect the revenue generated from the providers and distribute it to the producer or through the licensee who concluded the agreement.

The **broadcasters, the VOD platforms (TVOD, SVOD and AVOD) and the live streaming services** ("FAST": Free Ad-supported Streaming TV) distribute audiovisual productions to their audience via terrestrial radio signals, through cable or satellite, as well as IPTV or the Internet, either free-to-view or on a subscription basis. They are required to obtain the rights to broadcast or stream the audiovisual production from the rightsholders. This can be done via a number of parties, including the producers, distributors, original broadcaster or the collective management organisation (CMO) of the rightsholders. Broadcasters and VOD platforms can also undertake in-house production of TV programmes,<sup>9</sup> while FAST services can also be set up by production companies or any of their licensees.

**Collective management organisations** (CMOs) collect remuneration on behalf of rightsholders. Rights in secondary exploitation, in particular, are often administered by CMOs, though their involvement varies across member states.<sup>10</sup>

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<sup>9</sup> European Commission, Impact Assessment, op. cit.; Study: "New French and European film markets – Digital: a new growth driver for intra-community circulation and export?", Ernst & Young and uniFrance films, March 2015, [https://medias.unifrance.org/medias/21/44/142357/piece\\_jointe/unifrance-films-devoile-un-rapport-sur-les-marches-numeriques-pour-les-films-francais-et-europeens.pdf](https://medias.unifrance.org/medias/21/44/142357/piece_jointe/unifrance-films-devoile-un-rapport-sur-les-marches-numeriques-pour-les-films-francais-et-europeens.pdf).

<sup>10</sup> Cable retransmission rights, private copying levies, rental and lending rights, educational uses. Some primary exploitation rights are covered by CMOs in Europe as well, although this does not concern a majority of member states.

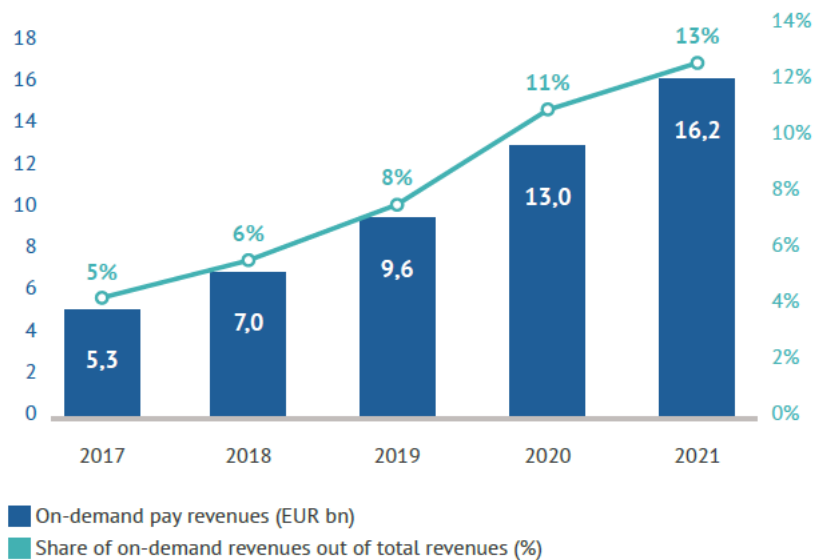
### 1.1.3.2. The growth of VOD services

Revenues generated by VOD services in Europe (only) represented 13% of total revenues in 2021, showing that offline exploitation, including theatrical exploitation, broadcasting services, offline video publishing, remains a huge generator of revenues that is pivotal for the economic operators of the region, both in terms of recoupment of investment but also as a means to finance the development, production, marketing and distribution of new works.

However, it should be noted that in contrast to more “traditional” market segments, on-demand services, and mainly SVOD, kept on growing in Europe during and after the 2020/COVID-19 crisis. Revenues increased by close to 70% between 2019 and 2021, and over a longer time period (2017-2021), pay on-demand revenues grew by EUR 11 billion and traditional segments decreased by EUR 5 billion.<sup>11</sup> More recently, advertising has become a growing source of revenues and is covered by SVOD, AVOD and FAST services.

**Figure 1. The growth of the on-demand market in Europe**

**The on-demand market in Europe: total revenues (EUR bn) and share of total revenues (%)**



Source: European Audiovisual Observatory

<sup>11</sup> Yearbook 2022/2023 Key Trends, European Audiovisual Observatory, p. 36, <https://rm.coe.int/yearbook-key-trends-2022-2023-en/1680aa9f02>.



### 1.1.3.3. Main business models for digital platforms

While authors and performers continue to negotiate their remuneration for the transfer or licensing of their economic rights upstream of the value chain, when they sign the contract with the licensee (i.e., usually the producer or the broadcaster or platform in their capacity as producer), business models have changed dramatically in the audiovisual sector. In particular, in recent years new hybrid and sometimes overlapping concepts linking on-demand and streaming platforms have emerged, as for example with the emergence of FAST free (linear) streaming television services, funded by advertising and created from existing catalogues.

Overall, it can be said that in the case of online/on-demand platforms, revenues are collected when consumers pay for a subscription to the online catalogue (SVOD) or pay per viewing for each film/TV programme (TVOD). In addition, advertising is increasingly being used as a new source of revenue for both subscription and free on-demand services.

Three main business models now exist:

- **Indirect sales through a distributor:** this is the most common model. The distributor acquires the VOD and SVOD rights as part of a bundle of exploitation rights (in most cases, all of them) from the producer. These rights are included in the minimum guarantee paid by the distributor.
- **Sales through an aggregator:** The aggregator acts as an intermediary between the producer and the platforms, facilitating the access of the latter to the VOD platforms for the “making available” of the audiovisual content. The aggregator negotiates with local platforms and manages the aggregation of content and marketing materials for the producer.
- **Direct sales to platforms:** Direct sales imply a ‘direct’ negotiation between the producer and the platform. This practice, which was relatively rare a decade ago and mainly used by major studios directly selling ‘big’ films, which did not need a marketing intermediary to sell them, has now become more prevalent among producers. Indeed, an increasing number of producers are now granting licenses directly to VOD platforms once production is completed. These licenses can involve one or more territories, either on an exclusive basis or on a non-exclusive one. This approach is very similar to ‘direct-to-video’ content in the physical world. It can work for big titles, but also for titles that cannot be expected to perform well in theatrical release, or for catalogues of titles.



## 1.2. Economic rights of audiovisual authors and performers

### 1.2.1. Ownership of rights and categories of rightsholders

As previously seen, an audiovisual work is the result of the collaboration and creative and financial contribution of a number of individuals/entities. Based on the originality of their work, some of these individuals are recognised under national legislation as being authors and are granted intellectual property rights (copyright or authors' rights) to either the completed work or their contribution to it. In the European Union, the principal director of an audiovisual work is considered as the author or one of the authors of the work. Other co-authors may also be designated under EU law<sup>12</sup> (e.g. the author of the screenplay or the dialogue, the composer of the music, the director of photography, the stage designer, the costume designer, the sound engineer, etc.). Copyright protection is limited in time. In the EU, the duration of protection for an audiovisual work is set at 70 years after the death of the last survivor among the following: the principal director; the author of the screenplay; the author of the dialogue; and the composer of music specifically created for use in the audiovisual work.<sup>13</sup>

Other intellectual property rights are also granted to certain categories of beneficiaries that play an important role in the creation, production, and dissemination of an audiovisual work. Most often, these rights are "related" to copyright in that they are dependent on the existence of a work protected by copyright. These are referred to as "related" or "neighbouring" rights. Thus, performers are granted related rights to their performance in the work. Phonogram producers, producers of audiovisual works and broadcasting organisations are also granted related rights as a way to protect their investment in the creation and the creative and organisational resources they have put together in relation to the work.<sup>14</sup> The term of protection of related rights in audiovisual works is 50 years, calculated on a case-by-case basis from the date of the performance or the communication of its fixation.<sup>15</sup>

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<sup>12</sup> Article 2.2. of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0115> (Rental and Lending Directive); Article 2 of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (codified by Directive 2006/116/EC of the European Parliament and of the Council on 12 December 2006), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116> (the "Term Directive").

<sup>13</sup> Art. 2.2 of the Term Directive, op. cit.

<sup>14</sup> The rights of phonogram producers, film producers and broadcasting organisations are excluded from the scope of this publication, as are moral rights.

<sup>15</sup> This is different from the related rights in phonograms, which are protected for a period of 70 years.





## 1.2.2. Nature of copyright and related rights

### 1.2.2.1. Economic and moral rights

Copyright and related rights encompass both moral rights and economic rights. **Moral rights** enable rightsholders to take certain actions to preserve and protect their link with the work and other subject matter. Moral rights are only held by natural persons, authors and performers, and not by producers or broadcasters. They are not harmonised at EU level and are usually non-transferable.

**Economic rights**, on the other hand, enable rightsholders to authorise or prohibit the use of their work and other protected material and to be remunerated for that use. The introduction of copyright and related rights was primarily motivated by economic and cultural factors. Financial rewards give authors and other co-creators the opportunity to make a living from their work and provide them with an incentive to produce new works. This helps support cultural development and stimulate new employment opportunities.<sup>16</sup> Economic rights and their terms of protection are, to a large extent, harmonised at EU level.

### 1.2.2.2. Exclusive rights, remuneration rights and fair compensation

According to international treaties and the EU copyright acquis, economic rights may take the form of “exclusive” rights that allow their owners to authorise or prohibit particular uses with respect to the works or other subject matter to which they pertain. Exclusive rights can usually be transferred, assigned, licensed or otherwise alienated in favour of a third party. Exclusive rights concern the fixation, reproduction, distribution, rental, broadcasting and communication to the public, and making available to the public (on demand) of the work, performance or subject matter.

In some cases, the law confers on authors and performers a right to receive remuneration for the use of works or other subject matter by a third party. In such cases, the use can take place without the prior authorisation of the author or performer, provided that remuneration for the use is paid. This so-called “remuneration right” may be granted instead of an exclusive right in certain cases, for example in the field of music, with a right to equitable remuneration for broadcasting and communication to the public of phonograms.<sup>17</sup> Sometimes a remuneration right may be granted in addition to an exclusive right. In this case, the exclusive right remains intact (the user needs to obtain prior authorisation from the rightsholder), but the author or performer who transfers the

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<sup>16</sup> See for example, Recital 5 of Directive 2006/115/EC codified version or Recitals 4 and 10 of Directive 2001/29/EC.

<sup>17</sup> The Rome Convention introduced the concept of a guarantee of such remuneration without granting performers and producers an exclusive right of communication to the public (Art. 12, Rome Convention) / (Art. 15(1), WIPO Performances and Phonograms Treaty (WPPT)).



exclusive right to the producer retains the right to receive remuneration for the specific use covered by the exclusive right. The best-known example of such a right is the remuneration right introduced in 1992 by the Rental and Lending Right Directive,<sup>18</sup> which ensures that an author or performer who has transferred or assigned his/her rental right concerning, a.o. an original copy of a film to a film producer retains the right to obtain equitable remuneration for that rental. This model has been applied to other rights in some countries.<sup>19</sup> These remuneration rights are usually not transferable or assignable, and they cannot be waived (subject to the wording of the law). This means that, regardless of any contractual agreements, authors and performers always have the right to receive the remuneration to which they are entitled. In many cases, these rights are subject to mandatory collective management.<sup>20</sup>

Remuneration rights must be distinguished from the right to obtain "fair compensation." Indeed, all copyright systems provide for exceptions and limitations to copyright and related rights for specific purposes, such as facilitating the use of protected works or performances in certain circumstances or achieving public policy objectives (e.g., teaching, research, parody, access to disabled persons). These exceptions grant legal authorisation to certain beneficiaries to use copyrighted material without seeking permission from rightsholders. Yet, certain exceptions, like those concerning reprography or private copying, must be accompanied by a right to fair compensation in favour of rightsholders. The right to fair compensation was designed by the legislator to adequately compensate<sup>21</sup> rightsholders for the prejudice incurred due to an exception to or limitation of their exclusive rights,<sup>22</sup> whereas remuneration rights are granted instead of an exclusive right or result from the transfer of it. Member states have leeway in defining the precise form of this compensation, in line with their legal traditions.

The rights to fair compensation are typically managed by a third party, a collective management organisation (CMO), which collects revenue for the rights and distributes the revenues to rightsholders.

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<sup>18</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0115>.

<sup>19</sup> For example, Belgium applied it in 2014 to the exclusive right to authorise cable-distribution. In 2006, Spain applied it to the general right of communication to the public.

<sup>20</sup> For further details, "Performers' Rights", Study Update 2022, AEPO ARTIS, [https://www.aepo-artis.org/wp-content/uploads/2022/11/AEPO-ARTIS\\_Performers\\_Rights\\_Study\\_2022\\_digital.pdf](https://www.aepo-artis.org/wp-content/uploads/2022/11/AEPO-ARTIS_Performers_Rights_Study_2022_digital.pdf).

<sup>21</sup> "to compensate them adequately", Recital 35 InfoSoc Directive. According to Recital 35 of the InfoSoc Directive, the payment of any compensation should take into account: (i) the "possible harm to the rightsholders"; (ii) whether rightsholders "have already received payment"; and (iii) that no obligation for payment arises where there is minimal harm to rightsholders.

<sup>22</sup> In order to determine when unauthorised use is lawful, the Berne Convention (Article 9(2)) instituted the so-called "three-step test", which sets out three conditions that govern exceptions and limitations to copyright and related rights until today under international and EU law, namely that they be limited: (1) in special case, provided that the act; (2) does not conflict with a normal exploitation of the work, and (3) does not unreasonably prejudice the legitimate interests of the rightsholder.



### 1.2.2.3. Exclusive rights of audiovisual authors and performers

Each EU member state has its own copyright law and policy at national level. Nevertheless, at EU level, the main exclusive rights granted to authors and performers were harmonised to a large extent by a set of EU directives and regulations (the “EU copyright acquis”).<sup>23</sup> They were designed by the EU legislator to: reduce national discrepancies; ensure the level of protection required to foster creativity and investment in creativity; promote cultural diversity; and ensure better access for consumers and businesses to digital content and services across Europe.

Most of the EU copyright acquis reflects the member states' obligations under the Berne and Rome conventions,<sup>24</sup> as well as the obligations of the EU and its member states under the WTO TRIPS Agreement.<sup>25</sup> In addition, in 2001, the Directive 2001/29/EC (the “**InfoSoc Directive**”)<sup>26</sup> updated copyright rules in respect of the digital context and to implement the two 1996 WIPO Internet Treaties – the WIPO Copyright Treaty<sup>27</sup> and the WIPO Performances and Phonograms Treaty.<sup>28</sup> This directive harmonised several exclusive rights that are essential to the online dissemination of works and other protected subject matter, such as the right of reproduction and the right of making available. More recently, the EU signed the Beijing Treaty on Audiovisual Performances.<sup>29</sup> Moreover, free trade agreements, which the European Union concluded with a large number of third countries, also reflect some provisions of EU law. In 2019, the EU adopted a set of modernised copyright rules to facilitate access and use of content in the online environment and to support European culture and creativity, through the Directive on Copyright in the Digital Single Market (**CDSM Directive**).<sup>30</sup>

The European Commission monitors the timely and correct implementation of the EU copyright acquis in the member states. In addition, the Court of Justice of the European Union (CJEU) has significantly contributed to the consistent application of copyright rules across the EU by developing a substantive body of case law interpreting the provisions of the directives. Based on this set of rules, EU member states have provided for at least the following exclusive (and transferable) rights, the exercise of

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<sup>23</sup> For a description of the EU copyright acquis, see at:

<https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation>.

<sup>24</sup> Berne Convention for the Protection of Literary and Artistic Works, <https://www.wipo.int/treaties/en/ip/berne/index.html>. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, <https://www.wipo.int/treaties/en/ip/rome/index.html>.

<sup>25</sup> TRIPS Agreement, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm).

<sup>26</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029>.

<sup>27</sup> <http://www.wipo.int/treaties/en/ip/wct/>.

<sup>28</sup> <http://www.wipo.int/treaties/en/ip/wppt/>.

<sup>29</sup> Beijing Treaty on Audiovisual Performances (2012), <https://www.wipo.int/treaties/en/ip/beijing/>.

<sup>30</sup> 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, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.



which is also regulated by the above-mentioned directives. The exclusive rights of authors and performers involved in the licensing of an audiovisual work can be described in Table 1, as follows:



**Table 1. Exclusive rights of audiovisual authors and performers under the EU copyright acquis**

Exclusive right	Description	Audiovisual authors	Audiovisual performers
Fixation	Right to authorise or prohibit the fixation	No	Yes, regarding the fixation of the performances (Art. 7(1) Rental and Lending)
Reproduction	Right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of the original and copies of the work/fixation	Yes, regarding the reproduction of the work (Art. 2a Infosoc)	Yes, regarding the reproduction of the fixation of the performance (Art. 2b Infosoc)
Communication to the public (CTTP), incl. making available to the public	Right to authorise or prohibit the communication to the public of the work/subject matter by wire or wireless means. Includes the making available to the public of the work (i.e. the right to authorise or prohibit the making available to the public of the work/subject matter, “in such a way that members of the public may access them from a place and at a time individually chosen by them”). This right is pivotal for online licensing as it <b>encompasses all forms of interactive Internet distribution, VOD, webcasting, streaming, etc.</b> , as confirmed by extensive CJEU case-law.	Yes (Art. 3.1 Infosoc)	No, the EU acquis currently does not provide for a general exclusive right of CTPP for audiovisual performers. Protection is limited to: <ul style="list-style-type: none"> <li>- the right to authorise or prohibit the broadcasting and communication to the public regarding unfixed (live) performances) (Art. 8 Rental and Lending);</li> <li>- the right to authorise or prohibit the making available regarding the fixation of the performance (Art. 3(2)a Infosoc).<sup>31</sup></li> </ul> <p>EU law does not grant audiovisual performers (and producers) an exclusive right to authorise or prohibit any other form of CTPP other than making available that which concerns audiovisual recordings (fixations).</p>

<sup>31</sup> Contrary to the case with authors, for whom the right of making available to the public was introduced as included in their right of communication to the public, for performers (as for producers and broadcasters), the right of making available to the public was introduced by the InfoSoc Directive as a stand-alone right, which may impact negotiations on remuneration for online exploitation.



Distribution	Right to authorise or prohibit any form of distribution to the public by sale or otherwise of the original of the work/performance or of copies thereof.	Yes (Art. 4.1 InfoSoc)	Yes (Art. 9(1)a Rental and Lending)
Cable retransmission	Right to authorise a cable operator for a cable retransmission through mandatory collective management	No (Art. 9(1) SatCab)  The cable retransmission right is not provided as such under EU law as it is considered to be a form of CTPP. EU law only introduces mandatory collective management.	No (Art. 9(1) SatCab)  Article 9 does not grant performers (nor producers) with a right to prohibit or authorise cable retransmission. Given the fact that EU law itself does not provide performers (nor producers) with an exclusive right on CTPP of fixed performances, this article (imposing mandatory collective management) only applies in those countries where national legislation offers performers (and producers) an exclusive right on CTPP.
Retransmission	Right to authorise retransmission (i.e. any simultaneous, unaltered and unabridged retransmission, other than cable retransmission, by wire or over the air, including by satellite (but not by online transmission) through mandatory collective management). Member states may provide that mandatory collective management applies to domestic retransmissions too.	Yes (Art. 4(1) SatCab II) <sup>32</sup>	Yes (Art. 4(1) SatCab II) <sup>33</sup>
Rental and Lending	Right to authorise or prohibit the rental and lending of the original and copies of the works / fixation of the performance.  Rebuttable presumption of transfer of rental right to producer	Yes (Art. 3.1a Rental and Lending)  Optional for member states  Yes (if transferred or	Yes (Art. 3.1b Rental and Lending)  Yes (Art. 3(4) Rental and Lending)  Yes (Art. 5(1) Rental and

<sup>32</sup> Directive (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (SatCab II Directive), <https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:31993L0083>.

<sup>33</sup> As for cable retransmission, Article 4 provides that “Acts of retransmission of programmes have to be authorised by the holders of the exclusive right of communication to the public.” Under EU law performers (and producers) are not ‘holders’ of such rights (as regards recordings), only authors are.



	Unwaivable right of remuneration in case of transfer of the rental right to the producer	assigned to producer, Art. 5.1 Rental and Lending)	Lending)
	Right to authorise or prohibit the public lending or remuneration right	Yes (Art. 6(2) Rental and Lending) /Public Lending	Right of remuneration for public lending is optional (Art. 6(2) Rental and Lending)
	Rebuttable presumption of transfer of rental right to producer	Optional for member states (Art. 3(5) Rental and Lending)	Yes (Art. 3(4) Rental and Lending)
	Unwaivable right of remuneration in case of transfer of the rental right to the producer	_ Yes (if transferred or assigned to producer, Art. 5.1 Rental and Lending)	Yes (Art. 5(1) Rental and Lending)
	Right to authorise or prohibit the public lending or remuneration right	Yes (Art. 6(2) Rental and Lending) / Public Lending	Right of remuneration for public lending is optional (Art. 6(2) Rental and Lending)

### 1.2.3. Transfer of rights to the producer

In the context of the film and audiovisual industry, producers play a central role by serving as the primary licensors of most, if not all, of the economic rights associated with the completed audiovisual work. This consolidation of rights in the producer's hands is essential for efficient management of the work's exploitation, securing funding, and ensuring legal and business certainty. To achieve this, producers typically acquire from the various rightsholders, through production contracts, all the exclusive rights necessary to enable them to authorise or prohibit the exploitation of the work. In practice, the transfer and exercise of rights can involve a certain degree of complexity, linked to the fragmentation of rights and the fact that each right in the bundle may be shared by co-authors and may be contractually divided by territory, language, means of distribution, etc. In addition, the actual uses by which copyright is exploited do not always correspond strictly to a particular right within the bundle of rights. This means that a particular single use of the work may technically require the authorisation of the rightsholder in relation to more than one right, leaving an open margin of interpretation. Also, depending on the interpretation of the member states, a particular use may fall under different categories of rights or cover more than one right in different member states.<sup>34</sup>

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<sup>34</sup> Guibault, L., Salamanca, O., van Gompel, S, "Remuneration of authors and performers for the use of their works and the fixation of their performances", Europe Economics, IVIR, study prepared for the European Commission (2015), [https://www.ivir.nl/publicaties/download/remuneration\\_of\\_authors\\_final\\_report.pdf](https://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf).



Although the exclusive rights of authors and performers may in principle be assigned, licensed or otherwise transferred by law to another party (remuneration rights may be unwaivable or non-transferable), the general rules of contract law in most countries do not regulate the scope of the transfer of rights to the producer. In the EU, copyright regimes for film and audiovisual production vary across countries regarding such transfers.<sup>35</sup> Some countries have general copyright contract regulations with specific provisions for film and audiovisual production. Others provide for a legal presumption of transfer of a broad range of rights to the producer and have specific provisions for copyright licences and assignments. Some countries have more detailed regulations for the main types of copyright contracts, sometimes including film and audiovisual production contracts.<sup>36</sup> The extent of the transfer is usually determined by the parties, but in some countries the law already provided for restrictions before the CDSM Directive was transposed, for example by limiting the transfer to certain rights, or by requiring that the contract should set out explicitly, for each mode of exploitation, the author's remuneration, the geographical scope and the duration of the assignment. Some countries have expressly regulated the transfer of rights relating to forms of exploitation that are unknown or unforeseeable at the time the copyright contract was concluded, either by strictly prohibiting such transfers or by allowing them to take place while providing the possibility of renegotiation. As regards the transfer of rights in future works, many national copyright laws had not addressed this issue.

Under the copyright legislation of most EU member states, the courts generally offer a restrictive interpretation of clauses in copyright contracts that provide for the transfer of rights from an author or performer to a contractual counterpart (i.e. operators). This restrictive interpretation can arise either due to specific provisions within the national copyright law or from the general principles of interpretation applied in civil law cases.

### 1.3. Exploitation contracts and remuneration issues

Prior to the adoption of the CDSM Directive in 2019, the content of exploitation contracts and the level of remuneration of authors and performers had not been the subject of any comprehensive regulation at European level, resulting in a diverse landscape among EU member states: some countries rely mostly on the principle of freedom to contract and leave it to the contracting parties to negotiate the content of their agreement and the level of remuneration of authors and performers. Others had already in place in their laws some codified measures for authors and performers with regard to the transfer of rights or the formation, execution and interpretation of contracts concluded with producers, broadcasters, and publishers. Moreover, in a number of EU member states, authors and

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<sup>35</sup> See Kamina P., *Film Copyright in the European Union*, Second Edition, Cambridge University Press, 2016, page 453 (e-book version).

<sup>36</sup> See more details in Chapter 3 of this publication.





performers have regrouped in professional organisations/associations/guilds representing individuals and trade unions, or count on CMOs to provide representation in negotiating contracts or industrial collective agreements dealing with individual contract modalities, including remuneration modalities.<sup>37</sup> This section looks into the application of contractual freedom to exploitation contracts, with a particular emphasis on the choice of applicable law, before digging into typical contractual provisions on remuneration in the audiovisual sector.

## 1.3.1. Contractual freedom and choice of applicable law

### 1.3.1.1. Freedom to conduct business

Contract laws are generally established by individual EU member states, although the EU has harmonised certain aspects. In EU law, contractual freedom is a fundamental principle recognised by the EU Charter on Fundamental Rights<sup>38</sup> through the “freedom to conduct business”. Under this principle, parties are free to negotiate and shape their agreements. This principle is the cornerstone of commercial relationships, allowing contractual parties to define the terms and conditions of their collaborations.

In the film and audiovisual sector, this freedom also applies and offers *in principle* creators and operators the flexibility to draw up agreements that meet their specific needs. Contractual freedom encompasses the possibility for creators to negotiate the scope and duration of their contributions. They may decide to assign exclusive rights or retain certain rights, such as moral rights. In principle, contractual freedom should also extend to determining the form of remuneration for authors and performers in relation to the work (lump-sum payments, royalties, or profit-sharing arrangements). In the same way, contractual freedom allows producers to negotiate distribution rights, territories, and platforms or to set conditions for international co-productions. In the context of the rise of digital platforms and streaming services and of new exploitation models, contractual freedom can also guide the negotiation of contracts, which can be tailored to accommodate these new distribution channels.

However, in order for this contractual freedom to be fully exercised and not to remain an empty principle, it needs to be exercised between parties with the same bargaining power or be accompanied by mechanisms to ensure a balance and avoid the imposition of abusive clauses on the weaker parties. The adoption of Chapter 3 of Title IV of the CDSM Directive in 2019 served to ensure this balance between authors, performers and producers.

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<sup>37</sup> See more details on collective agreements in Chapter 4 of this publication.

<sup>38</sup> Charter of Fundamental Rights of the European Union,  
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.



### 1.3.1.2. Choice of law applicable to exploitation contracts

The principle of contractual freedom also includes the freedom for the parties to a contract to choose the law applicable in the case of a possible dispute arising amongst them. This question is all the more important in the context of online exploitation of content protected by copyright which entails cross-border aspects.

Under EU law, the contracting parties are free to determine the law applicable to their contractual relationships, through a choice of law clause (Art. 3(1) Rome I Regulation).<sup>39</sup> This clause must be expressly or clearly deducible from the contract's terms or circumstances, in order to reduce legal uncertainties arising from the disparities between national legal frameworks. While these clauses have the advantage of giving great flexibility to contracts between companies, they can have the effect of placing individual authors or performers under foreign laws that may not be favourable to their interests. In addition, parties in a strong negotiating position often have the necessary influence to dictate the law of the jurisdiction according to their preferences, such as for example the choice of law clauses favouring common law jurisdictions that may have an impact on the level of protection afforded to creators.

The law of the country selected in a choice of law clause (known as *lex contractus*) governs matters relating to the interpretation, performance, and consequences of termination of contracts (Art. 12 Rome I Regulation). In contrast, certain aspects of the contract are not affected by this clause. The Rome I Regulation only applies to contractual obligations and does not address matters related to ownership. Consequently, issues relating to the initial ownership or legal transfer or licensing of rights held by the initial owners are governed by the law of the country where copyright protection is claimed (known as *lex loci protectionis*) (Art. 5(2) Berne Convention).<sup>40</sup> As a result, limitations on the transferability of rights that are not included in the *lex contractus* may still apply to specific disputes where protection is sought in a jurisdiction that recognises those limitations.<sup>41</sup>

Choice-of-law clauses are subject to restrictions due to specific EU law provisions. If the chosen law is not related to the context of the dispute at the time of the choice, the mandatory laws (i.e. those that cannot be derogated by agreement) of a country more closely related to the case remain applicable alongside the chosen law (Article 3(3) of the Rome I Regulation). However, this provision only applies when a contract essentially concerns a single country, which limits its relevance in the context of online content exploitation, characterised by its inherent cross-border nature.

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<sup>39</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>.

<sup>40</sup> Berne Convention for the Protection of Literary and Artistic Works, <https://www.wipo.int/treaties/en/ip/berne/>.

<sup>41</sup> Vanherpe, J., "Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 1)", 17 October 2022, Kluwer Copyright Blog, <https://copyrightblog.kluweriplaw.com/2022/10/17/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-1/>.



A similar rule applies to mandatory provisions of EU law, including those implemented in the laws of member states. If parties have chosen the law of a non-member state (e.g., the United States), but the contractual relationship has links with one or more member state when the choice of law is made, mandatory EU law applies (Article 3(4) Rome I Regulation). The factors taken into account are, for example, the domicile of the parties, the place of creation of the content and the intended place of exploitation – if known at the time of the choice of law. Mandatory EU provisions encompass the provisions of the CDSM Directive concerning active transparency obligations, the contract adjustment mechanism and the potential recourse to alternative dispute resolution (Art. 19, 20 and 21 in conjunction with 23(1) CDSM Directive).

Moreover, once the applicable law has been determined, certain legal provisions may be excluded if they are manifestly incompatible with the public policy (*ordre public*) of the forum (Art. 21 Rome I Regulation). This concept translates into the inapplicability of specific rules rather than the imposition of positive obligations as terms of exploitation or remuneration of content. It is therefore unlikely to have a substantial impact on creators' rights, except in extreme scenarios where a chosen law would significantly disregard moral rights or creative freedom.<sup>42</sup>

In essence, while the contracting parties are free to choose the law applicable to their copyright exploitation agreements, this freedom is subject to various legal provisions of EU law and to the nature of the contractual relationship. These restrictions aim to strike a balance between contractual autonomy and safeguarding fundamental principles and protections.<sup>43</sup> However, as seen, these restrictions may have a limited effect in the context of online content exploitation contracts.

As far as individual employment contracts are concerned, e.g. in the case of employed artists, they may rely on an advantageous regime under EU private international law: they can invoke preferential provisions of mandatory law of the country where they habitually carry out their work (Art. 8 Rome I Regulation). Where the habitual place of work cannot be determined, reference is made to the place of business of the employer (to be determined in accordance with Article 19 Rome I Regulation, i.e. habitual residence of the company). If the circumstances of the case show a closer connection with another country, the mandatory law of that other country applies. This framework is designed to ensure that employees and artists enjoy the protection of laws most closely related to their work activities, even when contractual elements like choice of law are in play.

Additionally, in disputes heard by EU national courts, the principle of “overriding mandatory provisions” requires the application of national legal provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its

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<sup>42</sup> See Vanherpe, J., Part I, op.cit.

<sup>43</sup> See also, Vanherpe, J., “Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2)”, 19 October 2022, Kluwer Copyright Blog, <https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/>.



political, social or economic organisation (Art. 9(1)-(2) of the Rome I Regulation). Courts may also choose to enforce such provisions in the law of the country where contract obligations are performed, even if it differs from the forum's jurisdiction, as long as these provisions render contract performance illegal (Article 9(3) of the Rome I Regulation).

Looking at issues related to fair remuneration and transparency, some parallels with the concept of overriding mandatory provisions may be found in certain national laws transposing the CDSM Directive. For instance, according to Article L 132-24 paragraph 2 of the French Intellectual Property Code which aims to counteract buyout practices in the audiovisual sector, music composers may invoke the right to proportionate remuneration, the contract adjustment mechanism, and transparency obligations specific to audiovisual production contracts for the exploitation of their works, regardless of any choice of law. In the same way, German law mandates the application of its provisions concerning fair remuneration, the contract adjustment mechanism, the transparency obligations and alternative dispute resolution if the contract would be governed by German law in the absence of choice of law and/or covers significant acts of exploitation in Germany (Art. 32b German Copyright Act). Dutch law extends further, declaring all copyright contract law provisions from the Dutch Copyright Act applicable when the contract would be subject to Dutch law in the absence of a choice of law, or when the acts of exploitation predominantly occur in the Netherlands (Art. 25h(2) of the Dutch Copyright Act).<sup>44</sup>

### 1.3.1.3. Continental versus Anglo-American approaches to audiovisual contracts

The issue of contractual freedom has become increasingly critical in the current audiovisual landscape, particularly with the proliferation of global platforms, mainly of US origin. These platforms operate within a US-federal harmonised copyright framework that relies heavily on the “**work-for-hire**” model, which allows the consolidation of rights with the producer, as is the case in the EU and in the other regions of the world. This approach however contrasts sharply with the European model, which is built around the notion of authorship – creatives do not enjoy a specific legal status like the authorship status in the EU – and the creative independence of creators and embraces both cultural and legal diversity.

Key differences between both systems focus on aspects like copyright regulations and work-for-hire arrangements. In the United States, the doctrine of “work-for-hire” is deeply embedded in the local film and audiovisual industry's DNA. The work-for-hire doctrine is a legal mechanism by which the employer of creatives – eg. the production company – is deemed the author of that work.<sup>45</sup> While historically such employer

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<sup>44</sup> See Vanherpe, J., Part 2, op. cit. For further details on national transposition, see also Chapter 3 of this publication.

<sup>45</sup> 17 U.S.C. § 201 (2006) (“In the case of a work made for hire, the employer... is considered the author.”). See also id. § 101 (delineating requirements of works for hire), <https://uscode.house.gov/view.xhtml?path=/prelim@title17/chapter2&edition=prelim>.



relationship schemes were not recognised by courts, today the work-for-hire doctrine is a firmly embedded part of US copyright law. In particular, work-for-hire has developed into an essential tool of the US audiovisual industry.<sup>46</sup>

In practice, a work-for-hire agreement is a contractual arrangement in which the employer, often a film production company, is considered the legal author and owner of a work. In legal terms, the work-for-hire doctrine applies when: (1) the creator is an employee who created the work within the scope of his/her employment, or (2) he/she is an independent contractor and the “client” specifically commissioned his/her work for a project.<sup>47</sup> Once a work is considered one made for hire, the authorship and copyright ownership belong to the employer or the person or entity who commissioned the work of an independent contractor.

This fundamental difference compared to European copyright traditions, which place a strong emphasis on authorship and the creative independence of filmmakers and artists, raises important challenges in the digital environment. In fact, although US studios have a longstanding tradition of production and investment in Europe, the increase in the production of original audiovisual works by US on-demand services on the European market in recent years has raised concerns among some about the potential erosion of the continental authorship model, through the importation of work-for-hire contractual clauses and the submission of contracts to non-European jurisdictions.<sup>48</sup>

## 1.3.2. Contractual provisions on remuneration

### 1.3.2.1. Forms of remuneration

Depending on the contractual agreement between the producer and the authors and performers, the production contract includes **upfront payment** in the form of a fee (for work on the project, set, location, etc.) and remuneration for the rights transfer, such as royalties or lump sum payments, or both, depending on the industry practice in the country, the individual contract and the type of creative contribution. These arrangements specific to the authorship / rightsholders status will be complemented by a labour

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<sup>46</sup> See the history of the scriptwriter “employee-writer” and the “employer-producer” in Schwab, J. L., “Audiovisual Works and the Work for Hire Doctrine in the Internet Age”, Columbia Law School, 2012, <https://academiccommons.columbia.edu/doi/10.7916/D83F508X>.

<sup>47</sup> If the creator is an independent contractor, the work created must be commissioned for the exclusive use of the client for the works-for-hire doctrine to apply. The works-for-hire doctrine will apply where an independent contractor’s work was commissioned by a client for use as a contribution to a.o. a contribution to a collective work or a part of a film or other audiovisual work.

<sup>48</sup> See, for example, regarding audiovisual composers, ECSA’s vision on how Europe can prevent buy-out contracts, an insight into buyouts affecting audiovisual composers and actual solutions to prevent them, May 2021, <https://composeralliance.org/media/250-ecsas-vision-on-how-europe-can-prevent-buyout-contracts.pdf>.



contract for the work deployed in pre-production (eg. rehearsal, etc.), on set and for the entire post-production and promotion process, when applicable.

In addition to receiving advance payments for the actual work accomplished during the production time, arrangements for the payment of a **proportionate remuneration** or royalties related to the exploitation of the audiovisual work vary considerably depending on the legislation and systems in place, in relation to both the determination of the level of remuneration and the administration of the payment of such remuneration (either through the producer or through a CMO).<sup>49</sup>

### 1.3.2.2. Contractual negotiations and remuneration practices

The form of remuneration (i.e. lump-sum payment, royalties, or a combination of both) is normally negotiated by the contracting parties. However, contractual practices differ significantly between countries, when it comes to remuneration of authors and performers, which prompted the European legislator to intervene in 2019.<sup>50</sup> In particular, a 2014 study conducted by IViR on behalf of the European Commission on the remuneration of authors and performers<sup>51</sup> found that, based on a survey in 10 member states, the broader provisions of contract law had only a limited effect in supporting authors and performers in negotiations of exploitation agreements and in determining remuneration levels. While general law could impact contract interpretation and execution, it typically did not influence the outcome of the negotiations on the transfer of rights or remuneration.

However, prior to the implementation of the CDSM Directive, recognising authors and performers as the typically weaker party in contractual negotiations, some member states had already integrated mandatory rules into their copyright legislation to address contract formation, execution, and interpretation issues.<sup>52</sup> Additionally, authors and performers have long organised themselves into unions or guilds, with many of these groups negotiating model exploitation contracts with industry representatives. However, the existence and extent of such collective actions vary by country, as regards both the unions' and guilds' role in the negotiation and enforcement of contracts.<sup>53</sup> Collective rights management organisations (CMOs) also play a role in determining authors and

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<sup>49</sup> For example, in nearly all EU member states, audiovisual authors and performers receive remuneration from CMOs in respect of private copying and retransmission.

<sup>50</sup> The CDSM Directive adopted in 2019, implementation of which, in the EU/EEA member states, is almost completed, provides for provisions to balance the contractual relations between authors and performers on the one hand and producers on the other. See chapters 2 and 3 of this publication for further details.

<sup>51</sup> Guibault, L., Salamanca, O., van Gompel, S, "Remuneration of authors and performers for the use of their works and the fixation of their performances", Europe Economics, IVIR, study prepared for the European Commission (2015), [https://www.ivir.nl/publicaties/download/remuneration\\_of\\_authors\\_final\\_report.pdf](https://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf).

<sup>52</sup> For more details on national legislation, see Chapter 3 of this publication.

<sup>53</sup> For more details on collective agreements, see Chapter 4 of this publication.



performers rights remuneration, though their influence varies too, based on local legislations and on factors like the type of rightsholder, sector and member state.<sup>54</sup>

The same IVIR/EC study identified several key legal factors with a notable influence on contractual negotiations regarding the remuneration of authors and performers. These included the legal framework regulating rights (including ownership and the type of rights, whether exclusive or remuneration rights), statutory provisions aimed at protecting authors and performers as the weaker party in contracts, and the use of collective bargaining and the participation of trade unions and associations.

### 1.3.2.3. Buy-out contracts and lump-sum payments

As we have seen, in the rapidly and constantly evolving audiovisual sector, contracts are the bond that holds together the complex array of creative and financial elements. Among these contracts, two terms are often mentioned: "buy-out contracts" and "lump sum payments". These concepts play an important role in the way authors and performers are remunerated for their contribution to the audiovisual work.

A **buy-out contract**, as the name suggests, involves a one-time payment made to authors or performers in exchange for the transfer of their exclusive rights to the audiovisual work. Buy-out contracts have been a subject of debate within the audiovisual sector as they can be a double-edged sword. While they provide certainty for producers (e.g., in order to put together the financing and recoupment plan), this may come at the cost of potential future royalties and residual rights, which could substantially outweigh the initial lump-sum payment if the work becomes a success.<sup>55</sup>

**Lump-sum payments**, on the other hand, provide authors and performers with a single, upfront payment, but unlike buy-out contracts, they don't involve the complete transfer of rights. Instead, creators retain some ownership and may continue to receive income from their work, such as royalties, residual rights, or additional remunerations based on the exploitation revenues. These payments, although more limited at the outset, can offer substantial benefits in the long term. Creators retain a vested interest in their work, and in the event of commercial success, they can continue to receive a share of the financial rewards. As explained in Chapter 2 of this publication, while lump-sum payments are authorised under the CDSM Directive, they are subject to scrutiny, and safeguards must be in place to protect the interests of creators, notably to ensure that they ensure an appropriate and proportionate remuneration for authors and performers.

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<sup>54</sup> Ibid.

<sup>55</sup> For further descriptions of buyout contracts, see Carre, S., Le Cam, S, Macrez, F., "Buyout contracts imposed by platforms in the cultural and creative sector", Study requested by the JURI Committee, European Parliament, November 2023, [https://www.europarl.europa.eu/thinktank/fr/document/IPOL\\_STU\(2023\)754184](https://www.europarl.europa.eu/thinktank/fr/document/IPOL_STU(2023)754184).



#### 1.3.2.4. Case study on levels and structure of incomes of audiovisual authors

A comprehensive Europe-wide survey on the remuneration of audiovisual authors, conducted in March 2019 (i.e. before the adoption of the CDSM Directive)<sup>56</sup> on behalf of various authors' organisations,<sup>57</sup> revealed that audiovisual authors are pre-eminently self-employed, with only 18% of directors and other audiovisual authors working as employees. The study found that the median total annual net income for audiovisual authors in 2016 was EUR 25 000 after taxes, which was lower than the income of a median person in the same country with a similar education level. Income variations were observed based on subsectors (cinema documentary, TV fiction, documentaries...), genres, recognition level, gender and age.

The study identified several potential sources of income for audiovisual authors, including: **upfront payments** (received at contract signature, encompassing wages / fees for work, payment for the transfer of rights to contractual counterpart, advance payment or lump sum for share of future exploitation revenues); **secondary payments** (repeated exploitation revenues and compensation for copyright exceptions, i.e. private copying levy), coming from the contractual counterpart or, in the case of private copying, a CMO;<sup>58</sup> grants or advance payments for project development; income from other paid work (e.g. commissioned work not generating authors' rights); and unemployment benefits, pension or other social allowances.

For emerging authors, 56% of income originates from their work as audiovisual author, increasing to 75% for established authors. The study also showed that the share of income from upfront and secondary payments coming from activities as audiovisual author increase as an author becomes more established. Additionally, the survey indicated that secondary payments play an essential part in income growth over an author's career, given that they are generated all the way along the exploitation cycle of works, and authors with more works in exploitation are likely to receive secondary payments.

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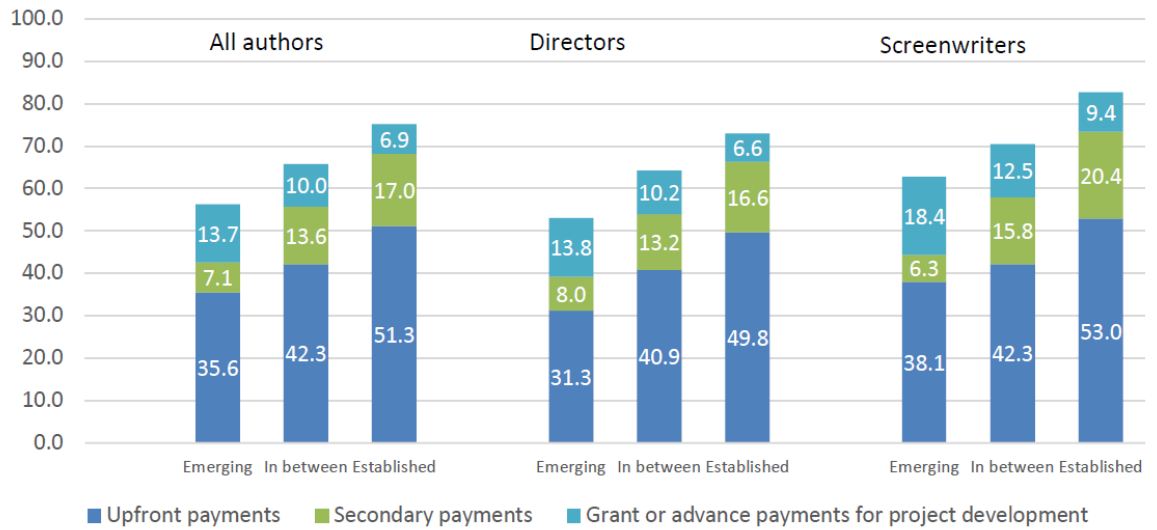
<sup>56</sup> Willekens, M., Siongers, J., Pissens, L., Lievens, J., "Behind the screens, European survey on the remuneration of audiovisual authors", <https://screendirectors.eu/new-report-first-ever-eu-wide-study-finds-audiovisual-authors-struggling-to-make-ends-meet-and-to-maintain-sustainable-careers/>

<sup>57</sup> The research was commissioned by BVR Services GmbH from CuDOS at the University of Ghent on behalf of FERA (the Federation of European Film Directors) and FSE (the Federation of Screenwriters in Europe), with the financial support of AIPA, ALCS, VG Bild Kunst, LIRA, Norsk Filmforbund, SAA, SACD, SGAE.

<sup>58</sup> The two major rights that are collectively managed and result in payment for audiovisual authors in Europe are cable retransmission (Directive 93/83/EEC) and private copying in the countries where levies exist. On a country-by-country basis, other secondary rights are administered collectively and result in additional payment; they are rather important for TV broadcasting in particular (on-demand use, video sales, rental and public lending, educational use, etc.). The use of collective rights management for audiovisual authors varies throughout the EU.



**Figure 2. Share of income from work as audiovisual author: upfront payment, secondary payments and grants, according to profession and status**



Source: *Behind the screens, European survey on the remuneration of audiovisual authors (2019)*, p. 56



## 2. The EU legal framework

This section provides an overview of objectives pursued through legislative intervention. It then considers in more detail the provisions of Chapter 3 of Title IV and the corresponding recitals of the Directive on Copyright in the Digital Single Market (2019/790/EU) (“CDSM” Directive).

### 2.1. Policy objective towards a well-functioning marketplace for copyright

One of the three key policy objectives identified in the European Commission (EC) Impact Assessment of 14 September 2016, accompanying the CDSM Directive, was to achieve a well-functioning marketplace for copyright, which enables rightsholders to set fair licensing terms and negotiate on a fair basis with content licensees, especially in the context of new forms of content distribution.<sup>59</sup> The assessment concentrated on addressing issues related to the distribution of value within the online copyright value chain, aligning with the objective outlined in the EC’s Communication of 9 December 2015 entitled “Towards a modern, more European copyright framework”.<sup>60</sup> This Impact Assessment aimed to address challenges faced “upstream” by rightsholders when licensing their content to online service providers (use of protected content by online service providers storing and giving access to user-uploaded content and rights in publication), or enforcing their rights on online content-sharing services, as is in general the case for the audiovisual sector; and those faced “downstream” by creators when negotiating contracts for the exploitation of their works, particularly concerning fair remuneration. This publication focuses exclusively on the latter aspect.

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<sup>59</sup> Impact Assessment on the modernisation of EU copyright rules, SWD (2016) 301 final, Part 1/3, Commission Staff Working Document, p. 9, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0301>.

<sup>60</sup> See Section 4 “Achieving a well-functioning market place for copyright”, Communication from the Commission, “Towards a modern, more European copyright framework”, COM/2015/0626 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A626%3AFIN>.



### 2.1.1. Addressing the lack of transparency in contractual relationships

The Commission emphasises that creators should be able to license or transfer their rights “in return for payment of appropriate remuneration”, which is a cornerstone of a sustainable content marketplace. This principle aligns with the EU copyright acquis<sup>61</sup> and CJEU case-law.<sup>62</sup> However, determining what constitutes appropriate remuneration depends on factors such as the nature and extent of the use of works. The EC Impact Assessment highlights the lack of transparency in the contractual relationship between creators (authors/performers) and their counterparts (producers/broadcasters), resulting in uncertainty about the use of works and determination of remuneration. According to the Commission, creators often lack information about exploitation of their works, including commercial outcomes and remuneration owed.<sup>63</sup> Moreover, the Impact Assessment notes creators’ complaints about inadequate reporting by producers regarding the use of the transferred rights.<sup>64</sup> This opacity arises from the complexity of modern exploitation models and unclear reporting.<sup>65</sup> The Commission emphasises that in today’s intricate online content landscape, transparency is crucial. Therefore, it suggests EU legislative action to promote a more transparent and equitable system.<sup>66</sup>

### 2.1.2. Addressing unbalanced bargaining power in contractual relationships

The Commission identifies as a core issue an imbalance of bargaining power in contractual relationships, driven by information asymmetry that favours creators’ counterparts. This difference in bargaining power can also create, according to the

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<sup>61</sup> InfoSoc Directive, Rec. 10: “[...] If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work.”

<sup>62</sup> See Chapter 5 of this publication.

<sup>63</sup> For example, the 2015 study on the “Remuneration of authors and performers for the use of their works and the fixations of their performances” concerning the audiovisual and music sectors (hereafter: “AV/M Study”), Institute for Information Law of the University of Amsterdam, together with Europe Economics, PLS, and the 2016 study on the “Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works” (hereafter: “Print Study”), from the same authors, [https://www.ivir.nl/publicaties/download/remuneration\\_of\\_authors\\_final\\_report.pdf](https://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf). See also *infra* the study of the European Parliament.

<sup>64</sup> The Impact Assessment refers to the “Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators” by the Authors’ Group, an umbrella organisation of the ECSA, EFJ, EWC, FERA and FSE; the Paying Artist Campaign launched in the UK by visual artists, or the “Fair terms for creators” campaign coordinated by the Creators Rights Alliance., <https://www.fairtermsforcreators.org/>.

<sup>65</sup> See Annex 14B for examples of the contents of reporting statements. See “Contractual arrangements applicable to creators: law and practice of selected Member States” (2014), a study commissioned by the European Parliament, S. Dusollier, C. Ker, M. Iglesias and Y.Smits, p.76, 164.

<sup>66</sup> For further details, see EC Impact Assessment, p. 174 et seq., *op. cit.*



Commission, a "take-it-or-leave-it" situation for creators, leading to "full buy-outs using catch-all language that covers any mode of exploitation without any obligation to report to the creator".<sup>67</sup> The EC Impact Assessment reveals that this unequal bargaining power discourages creators from seeking additional information or asserting their rights, even when reporting obligations exist. Regulatory factors exacerbate the issue, with varying transparency obligations across member states. This lack of clarity hampers creators' ability to assess the use of their work, commercial success, and economic value, subsequently hindering their capacity to negotiate equitable remuneration or enforce claims, according to the Commission.<sup>68</sup> The Commission believes this situation is not likely to improve and technological advancements alone may not suffice. Without EU intervention, creators' limited bargaining power would persist. While some member states may enact transparency measures, these will vary and may deepen market fragmentation and jurisdiction-shopping. Pre-emptive EU interventions on copyright contract law, such as prohibiting specific contract clauses, face challenges in terms of proportionality and contractual freedom, and due to the diversity of approaches among member states and creative sectors. Therefore, the Impact Assessment prioritises post-contractual transparency issues and imbalanced bargaining dynamics.

## 2.2. CDSM Directive's provisions on fair remuneration in exploitation contracts

On 17 April 2019, the EU Directive on copyright and related rights in the Digital Single Market (CDSM Directive)<sup>69</sup> was adopted following intense negotiations in the Council and the European Parliament. The CDSM Directive, whose aim is to modernise EU copyright rules and make them fit for the digital age, regulates a number of areas where digital technologies have radically changed the way creative content is produced, distributed and accessed. In particular, the CDSM Directive introduces new innovative rules applicable to copyright and related rights remuneration and contracts. The CDSM Directive had to be transposed in the legislation of the member states by 7 June 2021 and the European Commission is to carry out a review of the Directive no sooner than June 2026. As of the date of publication, 26 member states had completed the transposition of the CDSM Directive into national law.<sup>70</sup>

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<sup>67</sup> See EC Impact Assessment, Part I, p. 175, op. cit.

<sup>68</sup> For further information, see: IVIR study on the "Remuneration of authors and performers for the use of their works and the fixations of their performances" (2015), op. cit. See also studies conducted in the UK and France, for example: "What are words worth now," a survey conducted in the UK by ALCS (2014) <http://www.alcs.co.uk/Resources/Research>

<sup>69</sup> 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, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

<sup>70</sup> As of the date of publication, only Poland has not completed transposition.



## 2.2.1. General observations on Article 18-23 CDSM

Chapter 3 of Title IV of the CDSM Directive (“Measures to achieve a well-functioning marketplace for copyright”) is intended to provide harmonised protection for authors and performers where they have transferred or licensed their rights to a contractual counterpart. Historically, and with a few exceptions,<sup>71</sup> the EU copyright acquis did not extensively cover copyright contractual matters, due to the belief that these had limited impact on the functioning of the internal market. Additionally, member states differed in their approach to regulating contracts, with some relying heavily on contractual freedom to ensure fair remuneration for authors and performers.<sup>72</sup> The CDSM Directive introduces five provisions (Article 18-22)<sup>73</sup> that mark a significant shift by introducing elements of harmonisation into contractual issues relating to copyright. Its primary goal is to ensure authors and performers receive fair remuneration for the exploitation of their works and performances. This aims to contribute to the development of a healthy creative ecosystem. In particular, Recital 72 of the Directive provides:

*Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need (...) protection (...) to be able to fully benefit from the rights harmonised under Union law (...) (Recital 72 CDSM Directive).*

With the exception of Article 18 on remuneration, which provides for an **ex ante** measure, in that it is the initial contract that must first provide for appropriate and proportionate remuneration, all the other articles in Chapter 3 of Title IV of the CDSM Directive offer **ex post** protection. In other words, these provisions regulate contracts that have already been concluded, focusing on: transparency obligations (Art. 19); a contract adjustment mechanism (Art. 20); a voluntary dispute resolution mechanism as an alternative to judicial proceedings (Art. 21); and a right of revocation (Art. 22).

According to Article 23(1) of the CDSM Directive, Articles 19, 20 and 21 are binding ([...] “member states shall ensure that any contractual provision that prevents compliance with [these articles] shall be unenforceable in relation to authors and performers”). This also means that the contracting parties cannot choose a different applicable law to bypass these mandatory provisions. To this end, Recital 81 refers to the

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<sup>71</sup> For example, in the audiovisual sector, the unwaivable and equitable remuneration right retained by authors and performers after transfer of their rental right to producers (Article 5 of the Rental and Lending Right Directive).

<sup>72</sup> Xalabader, R., “The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive”, <https://indret.com/wp-content/uploads/2020/10/1591.pdf>.

<sup>73</sup> Article 23 of Chapter 3 of Title IV CDSM concerns the exclusion of authors of computer programs from its scope.



application of Article 3(4) of Rome I Regulation No 593/2008 on the law applicable to contractual obligations,<sup>74</sup> as follows:

*[...] where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States, the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures [...].*

In the case of a contract transferring or licensing copyright or performers' rights, such relevant elements are commonly the place of exploitation of the work or performance, the place of establishment of the author or performers, the place where the creation has taken place.<sup>75</sup>

The principle of appropriate and proportionate remuneration (Art. 18 CDSM) and the right of revocation (Art. 22 CDSM) are not listed among the binding provisions referred to in Article 23(1) of the Directive. However, as far as the principle of appropriate and proportionate remuneration is concerned, it is set out in Article 18 as a principle which member states must guarantee in exploitation contracts with authors and performers, although a certain margin of flexibility is left to the states as to its application. As to the right of revocation, Article 22 recognises the possibility that member states may limit its scope under certain circumstances.

It is important to underline that Articles 18-22 of the CDSM Directive provide for a minimal harmonisation. As a result, member states can maintain or enhance existing contractual protections for authors and performers. Common national provisions include: requirements such as written agreements; a principle of strict interpretation in favour of authors; specifying contract terms (e.g. scope of transferred rights, duration, remuneration mode...); and prohibiting transfers of rights for future works or unknown exploitation modes. These national rules should remain unaltered by the harmonised protection mandated by Articles 18 to 22 of the CDSM Directive.

It is also noteworthy that the CDSM Directive does not target specific contract categories, like publishing or audiovisual production contracts, but allows national

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<sup>74</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>.

<sup>75</sup> European Copyright Society, Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, June 2020, [https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs\\_comment\\_art\\_18-22\\_contracts\\_20200611.pdf](https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf).



legislation to consider sector-specific complexities in the implementation of its provisions.<sup>76</sup>

## 2.2.2. Principle of an appropriate and proportionate remuneration (Art. 18 CDSM)

Article 18 of the CDSM Directive introduces an obligation on member states to secure “appropriate and proportionate” remuneration for authors and performers who license or transfer their exclusive rights for the exploitation of their works or subject matter, as follows:

### *Article 18 Principle of appropriate and proportionate remuneration*

- 1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.*
- 2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.*

### 2.2.2.1. Scope of application

Based on the general principle of contract law, parties to a contract are free to negotiate the price of a good or service. However, Article 18 CDSM limits this contractual freedom considering the structural imbalance in bargaining power between authors/performers and producers. According to this provision, all transfers of exclusive rights (i.e. individual copyright contracts, collectively bargained agreements or legal presumptions of transfer) shall, as a general rule, result in appropriate and proportionate remuneration for rights assignments or licences. As mentioned above, Article 18 is unique in Chapter 3 of Title IV CDSM, as it sets an *ex ante* requirement. Initial contracts must establish this appropriate and proportionate remuneration, and one may assume it should therefore guide contract negotiations, drafting, and interpretation.<sup>77</sup> It is also worth mentioning that, as explained in Chapter 1 of this publication, the purpose of remuneration is not to compensate authors and performers for any prejudice, as for example in the case of the limitation of an exclusive right (e.g., private copying), but to remunerate them for the use of their work

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<sup>76</sup> Dussolier, S., Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, 8 June 2020, European Copyright Society, [https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs\\_comment\\_art\\_18-22\\_contracts\\_20200611.pdf](https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf).

<sup>77</sup> Lucas-Schloetter, A., “A European Copyright Contract Law: A Plea for Harmonization”, 48 IIC pp.897–899 (2017). <https://doi.org/10.1007/s40319-017-0646-2>.



or performance. Regarding its scope, member states must secure appropriate and proportionate remuneration concerning the “rights harmonised under Union law”, in accordance with Recital 72 CDSM. However, it is assumed that they can also extend this principle to non-EU-harmonised rights in their national legislation, respecting subsidiarity and internal market rules.

#### 2.2.2.2. Appropriate and proportionate remuneration

The CDSM Directive requires “appropriate and proportionate” remuneration, though these terms are not clearly defined in the Directive. Recital 73 provides guidance, linking them to the “actual or potential economic value” of the rights, the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.<sup>78</sup> It is worth noting that assessment of the contribution of authors or performers may be carried out differently among sectors or countries, and may involve considering both qualitative (e.g., lead or supporting role in the work or performance) and quantitative aspects (e.g. volume of material contributed or duration of a part in relation to the work or performance as a whole).<sup>79</sup>

Legal discussions have been analysing the meaning and scope of the concept of “appropriate and proportionate remuneration” for many years, often in the context of related concepts such as “fair” or “equitable” remuneration. The concept of “appropriate remuneration” is also mentioned in Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market<sup>80</sup> (“CRM Directive”).<sup>81</sup> According to Article 16(2) of this

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<sup>78</sup> Beyond the question of the interpretation of what “proportionate remuneration” should be, there are, in some cases, also issues related to the translation of the term “proportionate” in the different language versions of the CDSM Directive. Thus, in the French version of the Directive, “proportionate” has been translated as “proportionnelle”, whereas, according to some stakeholders, the term “proportionnée” would have been more appropriate and consistent with the spirit and the letter of the Directive as decided by the EU legislators. According to the various definitions found in dictionaries, “proportionnel” would be more determined in relation to a precise notion of magnitude, while “proportionné” would refer more to an idea of general harmony. These differences may seem subtle but can end up being of significant importance in the negotiations between rightsholders and producers.

<sup>79</sup> Dussolier (2020), op. cit., p. 15.

<sup>80</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32014L0026>.

<sup>81</sup> See for example Reinbothe / Von Lewinski (2015), “The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP, OUP”, [https://books.google.fr/books/about/The\\_WIPO\\_Treaties\\_on\\_Copyright.html?id=i8HmCwAAOBAJ&redir\\_esc=y](https://books.google.fr/books/about/The_WIPO_Treaties_on_Copyright.html?id=i8HmCwAAOBAJ&redir_esc=y). See also Lucas-Schloetter (2017), op. cit. p. 898.





Directive, the following criteria must be taken into account when setting “appropriate remuneration” for rightsholders:<sup>82</sup>

*... Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.*

Yet, Recital 73 CDSM acknowledges lump-sum payments as proportionate in certain circumstances. Indeed, although the Commission has on several occasions considered the practice of “buy-outs”<sup>83</sup> as a practice imposed on authors and performers by stronger contractual parties, the Directive does not rule out lump-sum payments in certain circumstances, such as for commissioned works or for minor contributions. However, the Directive emphasizes that lump-sum payments “should not be the rule” (Rec. 73). Member states are free to define sector-specific situations where lump-sum payments align with Article 18 taking into account the specificities of each sector (Rec. 73 CDSM).<sup>84</sup>

### 2.2.2.3. License or transfer

The provisions of Chapter 3 of Title IV of the CDSM Directive apply to any license or transfer of exploitation rights negotiated by authors or performers as natural persons as long as this is “for the purposes of exploitation in return for remuneration”. In other words, these provisions do not apply when authors or performers have licensed or transferred their rights for free, without remuneration, such as through a Creative Commons license.<sup>85</sup> In addition, Recital 72 CDSM extends this principle of remuneration to exploitation contracts conducted by authors and performers “through their own companies”. Many creators do indeed use separate legal entities for their professional activities (e.g. for social and/or tax reasons), and member states should thus ensure that these provisions equally apply to such arrangements.<sup>86</sup>

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<sup>82</sup> According to the CRM Directive, these criteria are binding for member states and apply to any remunerations negotiated by collective management organisations for all categories of works and rights.

<sup>83</sup> A buy-out is a contractual transfer or assignment of all exploitation rights in exchange for a lump-sum remuneration. This is a practice often imposed on authors and performers by stronger contractual parties and repeatedly considered by the Commission’s Impact Assessment as a “take it or leave it” situation for creators. See Impact Assessment, Part I, p. 175, op. cit.

<sup>84</sup> Rec. 73 CDSM: “(...) Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector”.

<sup>85</sup> See Xalabader (2020), op. cit. p. 17.

<sup>86</sup> Xalabader (2020), op. cit., p. 17.



#### 2.2.2.4. Mechanisms to implement the principle of appropriate and proportionate remuneration

The CDSM Directive grants member states the flexibility to implement the principle of appropriate and proportionate remuneration through various mechanisms and insists on “contractual freedom and a fair balance of rights and interests” (Art. 18(2) CDSM). Recital 73 clarifies that member states can use “different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms”, as long as they comply with EU law. Based on this provision, member states can establish general laws or sector-specific rules to ensure authors and performers receive appropriate and proportionate remuneration. They can also specify situations where lump-sum payments are authorised. Alternatively, they can leave the determination of remuneration standards to sectorial collective bargaining. Member states may require different remuneration fees for each right and modes of exploitation transferred, provided that these provisions preserve contractual freedom and consider the interests of all parties involved, as outlined in Article 18(2) of the CDSM Directive. The Directive does not give details on other mechanisms foreseen, but these could for example refer to statutory remuneration rights granted to authors and performers with mandatory collective rights management, as they already exist in some countries.<sup>87</sup>

#### 2.2.3. Transparency obligation (Art. 19 CDSM)

Article 19 (1) of the CDSM Directive ensures authors and performers receive fair remuneration by providing them access with “up-to-date, relevant and comprehensive information” about the use of their works and performances. Recitals 74 and 75 stresses that authors and performers need information to assess the economic value of their rights. This obligation is especially relevant “where natural persons grant a license or a transfer of rights for the purposes of exploitation in return for remuneration” (Rec. 74). However, according to this same Recital, it does not apply when the exploitation has ceased, or where the author or performer has granted a licence to the general public without remuneration.

This transparency obligation addresses the perceived power imbalance between creators and their contractual counterparts. It aims to enable authors and performers “(...) to assess the continued economic value of their rights compared to the remuneration received (...)”, and to promote fairness and balance in remuneration (Rec. 75 CDSM). The duty to provide information falls upon those to whom authors and performers have licensed or transferred their rights, or their successors in title (Art. 19(1) CDSM). It must be supplied “on a regular basis, at least once a year, and taking into account the specificities of each sector”, and cover, in particular “the modes of exploitation, all revenues generated and remuneration due.” Recital 75 specifies that the information should be

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<sup>87</sup> Xalabader(2020), op. cit. p. 22.



“comprehensive” in a way that ensures that it covers “all sources of revenues relevant to the case, including where applicable, merchandising revenues”. This obligation also covers information on “all modes of exploitation” and “all relevant revenue worldwide”, which is available to the contractual counterparts of authors and performers. The information should be provided “as long as exploitation is ongoing”, “with a regularity that is appropriate in the relevant sector, but at least annually”. In addition, the information should be provided “in a manner that is comprehensive to the author or performer and it should allow the effective assessment of the economic value of the rights in question” (Rec. 75 CDSM).

The subsequent paragraphs of Article 19 of the CDSM Directive give more details about the practical implementation of this obligation and envisage the different types of licences that may be granted. Article 19(2) (and Recital 76) foresees the case whereby the rights have been sub-licensed to other parties who exploit them. In this case, authors and performers do not have an automatic right to transparency but are entitled to request additional relevant information from the sub-licensee “in the event that their first contractual counterpart does not hold all the information that would be necessary [...]”. It is worth mentioning that such an extension of the transparency obligation towards sub-licensees could be particularly useful in order to obtain information on the sales, distribution and streams of works and performances by online platforms and on the revenue generated on these platforms for example. Where that additional information is requested, the first contractual counterpart of authors and performers shall provide information on the identity of those sub-licensees (Art. 19(2) CDSM). In addition, member states may provide that any request to sub-licensees in this context is made directly or indirectly through the contractual counterpart of the author or the performer. Recital 76 specifies that member states have the option to provide for further measures to ensure transparency for authors and performers. It is worth noting that the Directive does not specify to what extent third parties or representatives of authors and performers (e.g. agents, collective management organisations, unions) are entitled to exercise this right on transparency. However, Recital 77 does mention “relevant stakeholders” which could include representative professional organisations (“Collective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency. Such agreements should ensure that authors and performers have the same level of transparency as or a higher level of transparency than the minimum requirements provided for in this Directive.”).

However, this obligation of transparency is attenuated for the sake of proportionality and efficiency. Thus, Article 19(3) provides that “in duly justified cases” member states may limit it “to the types and level of information that can reasonably be expected”, where “the administrative burden resulting from the obligation would become disproportionate in relation to the revenue generated by the exploitation of the work or performance”. Furthermore, according to Article 19(4), member states may decide that contractual counterparts cease providing information “when the contribution of the author or performer is not significant” in relation to the overall work or performance, “unless the author or performer demonstrates that he or she requires the information” within the context of the contract adjustment mechanism (Art. 20 CDSM). The CDSM



Directive leaves it to the member states to define what is an insignificant contribution and to determine who will be responsible, in practice, for assessing it.

Member states should consider the specificities of different content sectors and involve all relevant stakeholders when implementing the transparency obligation. They may allow that these obligations be negotiated collectively, provided the same level of transparency or a higher level than the minimum requirements laid out in the Directive is ensured (Art. 19(5) and Rec. 77<sup>88</sup> CDSM). Collective management organisations are exempted from Article 19 due to existing regulations (Directive 2014/26/EU on collective management of copyright and related rights) (Art. 19(6) CDSM). These transparency obligations apply to existing and future agreements and the obligation to provide the relevant information became effective as of 7 June 2022, according to Article 27 of the Directive.

## 2.2.4. Contract adjustment mechanisms (Art. 20 CDSM)

Article 20 of the CDSM Directive requires member states to ensure that authors and performers or their representatives are entitled to claim “additional, appropriate and fair remuneration” from their contractual counterpart or their successors in title, “when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances. This obligation applies in the absence of an applicable collective bargaining agreement providing for a comparable contract adjustment mechanism in the member state, and it cannot be waived by contract (Art. 23(1) CDSM).

This contract adjustment mechanism is seen as beneficial by the European legislator in order to improve the effectiveness of reporting obligations and to enhance transparency, facilitating contract renegotiations, especially in extraordinary circumstances such as unexpected commercial success or additional formats of work usage, and addressing unfair lump-sum or buy-out deals.<sup>89</sup> While renegotiation costs may be incurred, these are deemed justifiable given creators’ weaker bargaining positions, the longevity of contracts, and the unpredictability of success. The impact on contractual counterparts is expected to be limited, as it will primarily affect contracts with significant disproportionality between agreed remuneration and actual revenues.

The scope of the contract adjustment mechanism is thus broader than a ‘best-seller clause’ or ‘success clause’ in the event of unforeseen commercial success, to which it is often assimilated; it extends to situations where creators underestimated the economic importance of specific modes of exploitation and to pre-digital contracts that

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<sup>88</sup> Recital 77, “[...] collective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency. Such agreements should ensure that authors and performers have the same level of transparency as or a higher level of transparency than the minimum requirements provided for in this Directive.”

<sup>89</sup> For further details, see EC Impact Assessment Part I, op. cit., p. 187, et seq.



did not all take into account new forms of exploitation such as streaming. It may also apply to long-term exploitation contracts which offer creators limited possibilities for renegotiation, in particular where the economic value of the rights turns out to be “significantly higher” than initially estimated (Rec. 78 CDSM). In particular, Recital 78 specifies that these are “cases where the remuneration originally agreed under a licence or transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer”.

To assess if remuneration is “disproportionally low”, creators should consider “all revenues relevant to the case in question”, “including where applicable merchandising revenues” and examining the “specific circumstances of each case (Rec. 78 CDSM). This assessment should encompass the creator’s contribution, industry-specific practices, and the presence of a collective bargaining agreement. Duly mandated representatives of authors and performers (i.e. CMOs) are encouraged to assist creators in seeking contract adjustments, while protecting their identities as much as possible. In cases of disagreements over remuneration adjustments, authors or performers can bring their claim before a court or relevant authority.

This mechanism does not apply to contracts concluded by CMOs or “independent management entities”, as these fall under national rules implementing Directive 2014/26/EU on collective management of copyright and related rights (Rec. 78 CDSM).

Beyond the delimitation of the scope of the contract adjustment mechanism provided for in Article 20 and Recital 78, the member states have some room for manoeuvre in the implementation of this mechanism. For example, the Directive does not provide guidance on the procedure for lodging a claim, nor does it specify whether a claim can also be lodged against sub-licensees where the “disproportion” is linked to the income they receive on their end.

## 2.2.5. Alternative Dispute Resolution (Art. 21 CDSM)

Article 21 of the CDSM Directive stipulates that member states shall ensure that disputes concerning the transparency obligation (Art. 19 CDSM) and the contract adjustment mechanism (Art. 20 CDSM) may be submitted to a voluntary, alternative dispute resolution procedure. Representative organisations of authors and performers can initiate these procedures upon the request of one or more authors or performers. This provision aims to help authors and performers in enforcing their rights without the cost and complexity of legal proceedings, as explained in Recital 79. The EC Impact Assessment indicates varying costs for member states in implementing dispute resolution mechanisms, with reasonable expenses expected in countries already having such mechanisms for CMOs and commercial users. Alternative dispute resolution mechanisms are generally cost-effective



compared to court proceedings, potentially reducing overall legal costs, according to the Commission.<sup>90</sup>

Member states can establish a new body or mechanism, or rely on an existing one, whether industry-led or public, including when as part of the national judiciary system (Rec. 79). In addition, they should determine how dispute resolution costs are to be allocated. Such alternative dispute resolution procedures should be without prejudice to the right of parties to bring an action before a court and there is a monitoring obligation on the European Commission to ensure that this is done.

The Commission believes that this dispute resolution mechanism will empower creators to enforce transparency obligations and contract adjustment provisions more efficiently, encouraging fairer contractual relationships. This is expected to benefit the entire creative value chain, including consumers, by fostering collaboration and creating a better environment for creativity. The dispute resolution mechanism also balances the potential negative impact on the right to conduct business, by providing a non-binding means for parties to reach an agreement on creator remuneration, according to the Commission.<sup>91</sup> The success or otherwise of this provision will depend upon the willingness of the relevant parties to use this (voluntary) dispute resolution procedure.

## 2.2.6. Right of revocation (Art. 22 CDSM)

Article 22 of the CDSM Directive grants authors and performers the right to revoke exclusive licensing or transfer agreements, in whole or in part, if their work or performance remains unexploited (Art. 22(1) CDSM). However, this right of revocation is accompanied by appropriate safeguards to protect the interests of all parties to the contract and to make it an effective and fair tool to be used as a last recourse. Firstly, specific provisions may be adopted for specific sectors, different types of works and performances, and for works composed of multiple contributions. With regard to the latter, member states may decide to exclude the possibility of exercising the right of revocation if such works or other subject matter usually contain contributions by a plurality of authors and performers (Art. 22(2) CDSM). Secondly, member states can set time limits for revocation, justified by sector-specific factors. Finally, authors and performers may be offered the option to terminate the exclusivity of the contract instead of revoking it completely.

Member states must establish a reasonable period after the conclusion of the contract and procedures for revocation, including prior notification and deadlines to undertake or resume the exploitation (Art. 22(3) CDSM). The right of revocation does not apply if the lack of exploitation is predominantly due to circumstances that the author or performer “can reasonably be expected to remedy” (Art. 22(4) CDSM). Unlike transparency

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<sup>90</sup> EC Impact Assessment, Part I, op. cit., p. 63

<sup>91</sup> See EC Impact Assessment, Part I, op. cit., p. 188 et seq.



and contract adjustment provisions, the right of revocation can be excluded by contract, but member states can make this exclusion contingent on the existence of a collective bargaining agreement (Art. 22(5) CDSM).

### 2.2.7. Common provisions (Art. 23 CDSMD)

The provisions regarding transparency, contract adjustment and alternative dispute resolution procedures laid down in the CDSM Directive are of a mandatory nature, and parties should not be able to derogate from them, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements (Art. 23 CDSM and Rec. 81). In addition, the parties' choice of applicable law other than that of a member state does not prejudice the application of these provisions.<sup>92</sup>

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<sup>92</sup> Article 3.4 of the Rome II Regulation concerns freedom of choice in contracts and provides as follows: *"Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."* Consolidated text: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008R0593-20080724>.



## 3. Implementation of Chapter 3 of Title IV of the CDSM Directive

Chapter 3 of Title IV of the CDSM Directive introduced provisions on the process surrounding the remuneration of authors and performers. Although the CDSM Directive was due to be transposed into national law by 7 June 2021, many member states failed to do so, prompting the European Commission to send reasoned opinions<sup>93</sup> to 13 member states on 19 May 2022 for failure to notify transposition, and later, on 15 February 2023, to refer six of them (Bulgaria, Denmark, Finland, Latvia, Poland and Portugal) to the Court of Justice of the European Union (CJEU).<sup>94</sup> At the time of writing, Poland has still not fully transposed the Directive.

This Chapter provides a brief comparative approach of the measures implemented in a selection of seven member states (Belgium, Germany, France, Hungary, the Netherlands, Slovenia, Spain). A detailed analysis of the regulatory framework in force in each of these member states is provided in the annex to this publication.<sup>95</sup>

### 3.1. Comparative approach

This section aims to provide an overview of the different approaches taken by selected member states in transposing Chapter 3 of Title IV of the CDSM Directive, namely Art. 18 to 22. While several countries have opted for a relatively literal transposition, some stand out for having implemented more detailed provisions for the protection of authors and performers. This has sometimes led to debate among industry players and, in some cases, legal action.

In order to illustrate the diversity of approaches taken at national level, the following sections zoom in on seven member states for analysis: Belgium, France, Germany, Hungary, the Netherlands, Slovenia and Spain. These member states include examples of literal transposition (e.g., Hungary), introduction of new statutory rights (e.g., Belgium, Slovenia) and cases where the protection of authors and performers had already

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<sup>93</sup> [https://ec.europa.eu/commission/presscorner/detail/EN/IP\\_22\\_2692](https://ec.europa.eu/commission/presscorner/detail/EN/IP_22_2692)

<sup>94</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_704](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_704)

<sup>95</sup> <https://rm.coe.int/iris-plus-2023-03en-national-case-studies/1680adce35>





been largely addressed before the enforcement of the CDSM Directive (e.g., France, Germany, the Netherlands, Spain).<sup>96</sup>

This comparative analysis provides an overall picture of ongoing trends in relation to the protection of authors and performers in the seven countries under review.

### 3.1.1. Transfer of exclusive rights

In most EU member states, exploitation rights are presumed to have been transferred from the author/performer to the producer by the contracts concluded for the creation/production of an audiovisual work. This presumption is usually rebuttable. However, some of the countries under review explicitly exclude authors or performers of musical works from this presumption (Belgium, France, Hungary, the Netherlands).

The transfer of rights for future forms of exploitation is not systematic. While some member states out of the seven selected prohibit it completely, as is the case in Belgium, Spain, Hungary and Slovenia, which consider such provisions null and void, in others, this is possible (France<sup>97</sup>, Germany and the Netherlands).

The transfer of rights in respect of future works is also variously addressed.<sup>98</sup> Among the countries examined, Spain, France and Slovenia prohibit a global transfer, while it is accepted under the Hungarian legal framework. Belgium, the Netherlands and Germany also allow such a transfer, but only under certain conditions. For Belgium, the transfer is possible for a limited period of time and provided that the types of works (or performances) to which the assignment or licence relate are specified. The Netherlands provides that a clause to this effect may be voidable if it is set for an unreasonably long or insufficiently definite period. Germany requires a written form and provides for a right to terminate after five years if the future works are not specified in detail.

Revocation of the rights assigned, granted or licensed is provided for in five of the analysed countries. In France, these provisions are explicitly not applicable to authors of audiovisual works and performers who have contributed to an audiovisual work. In Spain it is indirectly not applicable. The Spanish legislation explicitly excludes works of joint authorship from this right and by law audiovisual works always belong to this category. The five countries which have transposed this right have set a period to be observed before the right of revocation can be exercised. The grounds for revocation generally

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<sup>96</sup> 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.

<sup>97</sup> In France the transfer of rights on future forms of exploitation is made possible. However, section L.212-11 of the French Intellectual Property Code provides for specific requirements as concerns performers on phonograms whereas for the performers in an audiovisual work no specific requirements exist.

<sup>98</sup> It needs to be noted that the national rules on the transfer of rights in respect of future works often differ as concerns the rights of authors and performers.

include the absence or insufficient exploitation of the rights during a certain period of time, or a period of exploitation that can normally be expected by the industry or a “reasonable” term after concluding the contract (the Netherlands<sup>99</sup>). In Hungary, the grounds for revocation also include the exercise of rights in a manner that is manifestly unsuitable or improper for achieving the purpose of the contract; in Germany they also cover works that no longer reflect the author’s convictions.

In addition, all seven countries provide alternative dispute resolution mechanisms, some of which already existed prior to the transposition of the Directive. Thus, in the Netherlands, the Minister of Security and Justice appointed on 1 November 2016 a dispute resolution committee by ministerial decree. In Spain, mediation and arbitration is performed by the Intellectual Property Commission, whose functions of mediation, arbitration and tariff determination were extended by the Royal decree law transposing the Directive. In France, the Code of Civil Procedure allows for conciliation and mediation.

**Table 2. Transfer of exclusive rights**

TRANSFER					
	Future forms of exploitation	Future works	Revocation of rights		Alternative dispute resolution mechanisms
			Period before termination	Reasons	
<b>BE</b>	No	Yes Under certain conditions	No	Exploitation not carried out within agreed period and formal notice remains ineffective	Yes
<b>ES</b>	No	No	<b>‘Indirectly’ not applicable since ‘works of joint authorship’ (audiovisual works) are explicitly excluded</b>		Yes (Mediation and arbitration by Intellectual Property Commission)
<b>FR</b>	Yes	Yes Under certain conditions	Provisions not applicable to authors of audiovisual works, nor to performers who have contributed to an audiovisual work		Yes (Under ordinary law)
<b>HU</b>	No	Yes	Yes	Exploitation not carried out within period in contract or normally expected period or Exercise of rights in a manner manifestly unsuitable or improper for achieving the	Yes

<sup>99</sup> This was provided in the Dutch Copyright Act prior to the implementation of the CDSM Directive. However the implementation of the directive led to the deletion of the stipulation that revocation is not possible “if the other party [= licensee or assignee - hk] has such a compelling interest in maintaining the agreement that the interest of the author must yield to this according to standards of reasonableness and fairness”.



				purpose of the contract or Filming contracts: filming not started within 4 years of acceptance of the work/not completed within reasonable period	
<b>NL</b>	<b>Yes</b> (Additional fair compensation for authors)	<b>Yes</b> Under certain conditions	<b>Yes</b>	Right not sufficiently exploited within a reasonable period after conclusion of the contract or not sufficiently exploited after performance of initial acts of exploitation	<b>Yes</b> (A dispute resolution committee has been appointed)
<b>SI</b>	<b>No</b>	<b>No</b>	<b>Yes</b>	Rights insufficiently exploited, or not at all, leading to the legitimate interests of the author being considerably affected	<b>Yes</b> (Mediation or any other form of alternative dispute resolution)
<b>DE</b>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>	Exclusive right not used sufficiently or Work does not reflect the author's conviction anymore	<b>Yes</b> (Mediation or other out-of-court mechanism)

Source: European Audiovisual Observatory

### 3.1.2. Remuneration for the exploitation of works (Art. 18 CDSMD)

In all seven countries, appropriate and proportionate remuneration of authors and performers is due for each mode of exploitation transferred. In France, the article of the Intellectual Property Code transposing Art. 18 of the CDSM Directive for authors did not include the principle of appropriate remuneration for authors and was subsequently annulled by the *Conseil d'Etat*, while all other provisions of the text were validated.

It is worth mentioning that several member states now protect authors and co-authors with remuneration rights relating to the online exploitation of their works, such as, among the seven member states under consideration, Slovenia, Spain, Belgium and, for certain modes of online exploitation, Germany. In Slovenia and Belgium, audiovisual authors and performers have a right to equitable remuneration for each communication to the public, which covers the exploitation by VOD services and online content sharing service providers (OCSSPs). In Spain, the law already granted audiovisual authors and performers a specific right to remuneration for communication to the public including the making available by VOD services. This remuneration right now extends to cases of online exploitation by OCSSPs.

In addition, remuneration in the form of a lump-sum payment is explicitly accepted in France, Germany and Spain. Germany does not prohibit such types of remuneration but made them slightly more difficult to put in place as they have to guarantee the author's equitable participation in the expected total proceeds from such



use and need to be justified. France and Spain introduced lump-sum payments as exceptions.<sup>100</sup> The conditions under which such payments may be made include where there are serious difficulties in establishing the income, or where it is impossible to verify it, or where the cost is disproportionate to the possible remuneration.

Contract adjustment mechanisms are provided in all seven member states. In particular, Germany introduced joint remuneration agreements, a specific mechanism by which authors' associations together with associations of users of works, or individual users of works, can determine "equitable remuneration" and "appropriate participation". In Spain, adjustment of the contract may only be exercised within 10 years of the assignment and provided there is no explicit agreement, collective agreement or sectoral agreement between the representatives of the authors and the assignees providing to that effect. In Hungary and Slovenia, contract adjustment does not apply to contracts concluded by a CMO.

**Table 3. Remuneration for the exploitation of works**

REMUNERATION				
	Provisions on lump sum payments	Online exploitation	Contract adjustment mechanisms	Transposition of Art. 18 CDSMD: appropriate and proportionate remuneration
<b>BE</b>	<b>No</b>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>ES</b>	<b>Yes</b> (Exception)	<b>Yes</b>	<b>Yes</b> (Limited in time)	<b>Yes</b>
<b>FR</b>	<b>Yes</b> (Exception)	<b>No</b>	<b>Yes</b>	Annulled by <i>Conseil d'Etat</i>
<b>HU</b>	<b>No</b>	<b>No</b>	<b>Yes</b> (Excluding contracts concluded by CMOs)	<b>Yes</b>
<b>NL</b>	<b>No</b>	<b>No</b>	<b>Yes</b>	<b>Yes</b> (Already partially achieved prior to transposition of CDSM)
<b>SI</b>	<b>No</b>	<b>Yes</b>	<b>Yes</b> (Excluding contracts concluded by CMOs)	<b>Yes</b>

<sup>100</sup> In Spain, such lump-sum payments do not affect authors' and performers' statutory rights to remuneration for online exploitations.



<b>DE</b>	<b>Yes</b> (Must be justified)	<b>Yes</b>	<b>Yes</b> (Possibility of joint remuneration agreements)	<b>Yes</b>
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Source: European Audiovisual Observatory

### 3.1.3. Transparency obligation (Art. 19 CDSMD)

Among the countries under review, the transposition of the transparency obligation is rather literal. All seven countries implemented provisions relating to the provision of information on modes of exploitation, revenues generated and remuneration due. While Spain added a specific obligation for users of repertoires of works administered by CMOs, France provided for a transparency obligation regarding the number of times a work is downloaded, consulted or viewed on VOD services. On the other hand, Germany provides for possible derogations from the transparency obligation through joint remuneration agreements or collective agreements.

Six out of the seven analysed member states (Belgium, Germany, Hungary, the Netherlands, Slovenia and Spain) implemented specific provisions limiting the transparency obligation where the administrative burden resulting from the obligation becomes disproportionate in the light of the revenues generated by the exploitation of the work or performance. In those member states, the obligation is limited to the types and level of information that can reasonably be expected in such cases. France has not introduced such a possibility.

Likewise, while all six member states have also provided for a specific exception to the transparency obligation where the author's or performer's contribution is not significant having regard to the overall work or performance (unless the information is necessary to exercise the right to contract adjustment), France leaves it to professional agreements to lay down specific conditions for the submission of accounts.

With regard to the subsequent exploitation of works by a third party, the same six countries introduced measures allowing for authors and performers to request additional information either from the assignee, the licensee or directly from the third party. In addition, these member states also ensure that the assignee or licensee provides the author or performer with information on the identity of the third party. In France, a professional agreement determines who the author should contact to obtain information.



**Table 4. Transparency obligation**

<b>TRANSPARENCY (Art. 19 CDSMD)</b>				
	<b>Information</b>	<b>Limited obligation if disproportionate administrative burden</b>	<b>No obligation if contribution is not significant – except for contract adjustments</b>	<b>Measures related to subsequent exploitation</b>
<b>BE</b>	<ul style="list-style-type: none"> <li>- Modes of exploitation</li> <li>- Revenue generated</li> <li>- Remuneration due</li> </ul>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>DE</b>	<ul style="list-style-type: none"> <li>- Extent of use of the work</li> <li>- Proceeds and benefits</li> </ul> (Derogations are possible by agreements based on a joint remuneration agreement or collective agreement)	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>ES</b>	<ul style="list-style-type: none"> <li>- Modes of exploitation,</li> <li>- Revenue generated</li> <li>- Remuneration due</li> </ul> (Specific transparency obligation towards users of repertoires of works administered by CMOs)	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>FR</b>	<ul style="list-style-type: none"> <li>- Income generated and remuneration due for each mode of exploitation</li> <li>- Performers must also receive accounts</li> <li>- Number of times the work is downloaded, consulted or viewed on VOD services</li> </ul>	<b>No</b>	Professional agreements may lay down specific conditions for the submission of accounts	Professional agreement determines who the author/performer contacts to obtain information
<b>HU</b>	<ul style="list-style-type: none"> <li>- Manner and extent of use</li> <li>- Revenues derived for each type of use</li> <li>- Remuneration due</li> </ul>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>NL</b>	<ul style="list-style-type: none"> <li>- Modes of exploitation</li> <li>- Revenues generated</li> <li>- Remuneration due</li> </ul>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>SI</b>	<ul style="list-style-type: none"> <li>- Access to books/records on the basis of which the amount of revenue is determined</li> <li>- Uses of the work</li> <li>- Revenues derived</li> <li>- Royalties or remuneration due</li> </ul>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>

Source: European Audiovisual Observatory



## 4. Collective agreements

### 4.1. General overview

Based on Article 18 (2) of the CDSM Directive, EU member states are free to use different mechanisms to implement the principle of appropriate and proportionate remuneration of authors and performers at national level. In particular, Recital 73 CDSM clarifies that member states can use “different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law”. Furthermore, Article 18(2) of the Directive insists on “contractual freedom and a fair balance of rights and interests”.

A large degree of flexibility is therefore left to member states to ensure fair remuneration for authors and performers, taking into account the different approaches and legal traditions at national level. The CDSM Directive also gives member states the option of relying on existing mechanisms or creating new ones, without indicating a preference for one model or another. This freedom of member states to develop the mechanisms they deem relevant for the purpose is also strengthened by Article 20(1) and Recital 77 of the Directive, in relation to transparency obligations that shall be implemented at national level, where collective bargaining is expressly mentioned as a possible option for the relevant stakeholders to reach an agreement.

#### 4.1.1. The role of collective bargaining

According to the International Labour Organization (ILO), “collective bargaining” is a voluntary process used to determine terms and conditions of work and regulate relations between employers, workers and their organisations, leading to the conclusion of a collective agreement. Collective bargaining has the advantage that it settles issues through dialogue and consensus rather than through conflict and confrontation.<sup>101</sup> Although authors and performers in the European audiovisual sector rarely have employee status, the collective bargaining process can play a pivotal role in ensuring that they are treated fairly and enjoy balanced working conditions. Collective bargaining in the audiovisual sector encompasses a wide range of issues. It may concern working

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<sup>101</sup> Q&A on business and collective bargaining, ILO, [https://www.ilo.org/empent/areas/business-helpdesk/tools-resources/WCMS\\_DOC\\_ENT\\_HLP\\_CB\\_FAO\\_EN/lang--en/index.htm#ENOCB10](https://www.ilo.org/empent/areas/business-helpdesk/tools-resources/WCMS_DOC_ENT_HLP_CB_FAO_EN/lang--en/index.htm#ENOCB10)



conditions, health and safety standards, remuneration, intellectual property rights, and more. The negotiation process can be highly complex due to the diverse nature of jobs within the sector, from actors and directors to technicians and set designers.

The legal impact of these collective negotiations varies considerably by country, subject to national law and legal traditions, as there is no European harmonisation in this regard. It can range from comprehensive framework contracts with broad sector-wide influence to non-binding model contracts that serve as sectoral standards. Collective agreements also streamline the process by offering standardised contracts based on mutually agreed principles, reducing the need for individualised contracts for each situation. Ultimately, these collective agreements aim to establish common industry standards within branches of the concerned sector.<sup>102</sup>

## 4.1.2. Typology of collective agreements

In practice, authors and performers are affiliated with professional bodies, which represent them (e.g., directors, screenwriters, scriptwriters, performers) and facilitate dialogue with their contractual counterparts (e.g., representatives of producers, broadcasters, SVODs). Across Europe, various national entities, including professional associations, trade unions, guilds or, in some cases, CMOs, engage in negotiations with associations representing producers, broadcasters, SVOD, etc. to establish the terms of their working relationship and for exploiting content. Collective negotiations in this area aim to strike a fair balance in a context where bargaining positions are often asymmetrical. Collective bargaining agreements usually apply to predefined types of content (e.g. feature films, series, local content partially or fully financed by the counterparty) and are limited to a certain territorial scope (e.g. national scope) and for a certain duration (2, 5 years, renewable or not). The outcome of successful collective bargaining is often formalised in collective agreements, which can encompass social and employment terms and conditions, transparency obligations, and sometimes remuneration.

## 4.1.3. Collective agreements and competition law

Article 101 of the Treaty of the Functioning of the European Union (TFEU)<sup>103</sup> prohibits agreements between undertakings that restrict or distort competition within the internal market. While collective agreements between employers and workers are not subject to

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<sup>102</sup> Dussolier, S., Ker, C., Iglesias, M., Smits, Y., “Contractual arrangements applicable to creators: law and practice of selected member states”, (2014), European Parliament’s Committee on Legal Affairs, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURI\\_ET\(2014\)493041\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURI_ET(2014)493041_EN.pdf).

<sup>103</sup> Consolidated version of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.





EU competition rules, until recently there was legal uncertainty in certain jurisdictions regarding collective agreements involving creators. Indeed, as freelancers or self-employed persons offering services on the market for remuneration and carrying out activities as independent economic operators, creators may be considered as “undertakings” within the meaning of Article 101 TFEU. As a result, collective bargaining on remuneration or other commercial conditions risked infringing EU competition rules.<sup>104</sup>

Recently the European Commission put an end to this legal uncertainty, through its new Guidelines on collective agreements by solo self-employed persons, adopted in December 2022.<sup>105</sup> The Guidelines encompass various scenarios, one of which concerns collective agreements involving authors or performers. First, the Commission recognises that it “will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/ies”.<sup>106</sup> These scenarios all rely on the fact that the workers are in a weaker negotiating position, thus the Commission will not apply competition law in the following cases:

- When member states have transposed the CDSM Directive, by establishing mechanisms (including collective bargaining) to ensure fair remuneration for the exploitation of authors’ and performers’ work (Guidelines, paragraphs 37-39);
- When national law exempts situations in which the bargaining imbalance is solved via a collective agreement, or when the national law allows for collective bargaining in specific situations (Guidelines, paragraph 36);
- When the counterparty has strong buyer power, either because (a) it represents the whole industry or (b) it has a relative importance on the market, showing either (i) an aggregate annual turnover and/or balance sheet exceeding EUR 2 million, or (ii) a staff headcount equal to or more than 10 persons, or (iii) these non-cumulative criteria are jointly fulfilled by several counterparts (Guidelines, paragraph 34).

This first case scenario (i.e. when mechanisms are in place at national level to ensure fair remuneration as a result of the transposition of the CDSM Directive) is of particular interest. The European Commission now allows for collective agreements entered into by solo self-employed authors or performers with their counterparties as long as such practices are allowed by national legislation. These guidelines refer to all mechanisms, including collective bargaining, used by member states to ensure appropriate and proportionate remuneration in agreements for the exploitation of works or performances. It is important to note that this exemption is limited to the scope of collective bargaining agreements between solo self-employed authors or performers and their counterparty(ies)

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<sup>104</sup> See paragraph 10 of the Guidelines: “These Guidelines merely clarify the conditions under which certain solo self-employed persons and their counterparty/-ies can enter into collective negotiations and agreements without running the risk of infringing Article 101 TFEU.”

<sup>105</sup> Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/, <https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:52022XC0930%2802%29>.

<sup>106</sup> See paragraph 32 of the Guidelines.



within the limit of national measures taken in accordance with the CDSM Directive, as provided by paragraph 39 of the Guidelines:

*(39) In line with the provisions of Directive (EU) 2019/790 that are referred to under point (38) of these Guidelines, and without prejudice to the other provisions of that Directive, the Commission will not intervene against collective agreements entered into by solo self-employed authors or performers with their counterparty/-ies pursuant to national measures that have been adopted pursuant to that Directive.*

#### 4.1.4. The role of collective management organisations

Some EU member states have resorted to mechanisms that existed before the adoption of the CDSM Directive, based on collective rights management, in order to ensure authors and performers receive fair remuneration pursuant to Article 18 of the Directive. Collective rights management can indeed play an important role in assisting individual authors and performers so they can effectively enforce their rights. CMOs do not just facilitate rights clearance and increase legal certainty, they may also offer a solution to ensure fair and adequate remuneration of creators, as they may help rebalance unequal bargaining positions in the market, depending on the type of mandates received from rightsholders.

Following a European Commission Recommendation in 2005<sup>107</sup> recognising the need to improve the functioning of CMOs, new EU-harmonised rules were adopted in 2014 through Directive 2014/26/EU on collective management of copyright and related rights (CRM Directive.)<sup>108</sup> This section will examine how CMOs can play a role in relation to remuneration and transparency issues, notably by looking into their role and functioning in the context of the transposition of the CDSM Directive.

##### 4.1.4.1. EU harmonised provisions for collective rights management

The 2016 Impact Assessment accompanying the proposal for the CDSM Directive<sup>109</sup> made several references to the CRM Directive adopted in 2014 with a view to offering additional guarantees in terms of transparency and accountability of CMOs. It is also worth mentioning that in 2021, the European Commission presented a report on the

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<sup>107</sup> Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005H0737>.

<sup>108</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, op. cit.

<sup>109</sup> Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules accompanying the Commission's Proposal on copyright in the DSM, op. cit.



application of the CRM Directive<sup>110</sup> where a reference is made to the Directive CDSM as follows:

*The importance of collective management organisations' role in the European copyright market is further reflected in the recent modernisation of the copyright legal framework [Directive] [...]: collective management is directly required by a number of provisions of the new legal framework and is expected to play an important role in the practical application of the new rule. [.....].*

The CMOs' sole or main purpose is to manage copyright or rights related to copyright on behalf of more than one rightsholder, for the collective benefit of those rightsholders, as enshrined in Article 4 of the CRM Directive:<sup>111</sup>

*Member States shall ensure that collective management organisations act in the best interests of the rightsholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.*

With its 2021 report, the European Commission released a study on emerging issues related to collective licensing management in the digital environment.<sup>112</sup> According to the study, 259 CMOs were established in the European Union, and 46 of them exclusively operate in the audiovisual sector, while 76 cover multiple sectors (music and audiovisual industry for instance).

#### 4.1.4.2. Collective management and statutory remuneration rights

Some countries have introduced a new statutory right to remuneration for authors and performers for the exploitation of their work or performance in different media. This right is unwaivable and non-transferable, i.e. contracts by which the author/performer renounces the remuneration are invalid. These new remuneration rights are usually mandatorily managed by CMOs. Some hybrid models are also envisaged in certain countries, combining mandatory and voluntary collective management for certain rights, once they have been expressly transferred to the CMO. These new laws add on the existing remuneration rights for audiovisual authors or performers established before the adoption of the CDSM Directive.<sup>113</sup>

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<sup>110</sup> Commission Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, <https://ec.europa.eu/newsroom/dae/redirection/document/81237>, see page 3 of the report.

<sup>111</sup> Article 3a, CRM Directive.

<sup>112</sup> Ecorys, IViR and Erasmus University Rotterdam, study on emerging issues related to collective licensing practices in the digital environment, European Commission, <https://ec.europa.eu/newsroom/dae/redirection/document/81239>.

<sup>113</sup> For further details on national models, see Chapter 3 of this publication.



#### 4.1.4.3. Role and functioning of collective management organisations

CMOs also play a role in authors' and performers' remuneration, although the importance of this role differs by rightsholder groups, sector and member state. The role of CMOs can be limited to the mere collection and distribution of remuneration, or can include the negotiation of tariffs, as well as the actual exercise and enforcement of rights. A CMO is usually authorised by law or by assignment and is owned or controlled by its members (i.e. rightsholders). Based on the CRM Directive, a CMO's main tasks are:<sup>114</sup>

- The representation of its members (rightsholders) - Article 5 CRM Directive;
- The collection and distribution of rightsholders' remuneration - Articles 11 and 13 CRM Directive;
- The development of tariffs and licensing negotiations on behalf of its rightsholders - Articles 16-18 CRM Directive;
- The development of mechanisms of alternative dispute resolution - Article 34 CRM Directive.

These tasks are further presented below and accompanied by national examples.

##### 4.1.4.3.1. Representation of rightsholders

It is up to the rightsholders to designate the CMO of their choice for the rights they wish to see collectively managed (i.e., categories of rights, types of works and other subject matter of their choice, and for territories of their choice) (Art. 5(2) CMR Directive). While the rightsholders' freedom of choice is broad, it is sometimes limited by national legislation when dealing with remuneration rights.<sup>115</sup> This is reflected by the various types of collective management that coexist: mandatory collective management and voluntary (contractual) collective management. Mandatory collective management is imposed when dealing with remuneration rights by some member states. Voluntary collective management is the form of administering rights voluntarily assigned by the rightsholders to the CMO.

In practice, in some member states, rightsholders must register their work with a CMO in order to collectively manage their remuneration right. For example, in Belgium, the Society of Dramatic Authors and Composers, SACD (*Société des auteurs et compositeurs dramatiques*),<sup>116</sup> manages the right to remuneration of authors in the absence of an applicable collective agreement. In the same way, in Spain, legislation guarantees the remuneration of audiovisual authors and performers through mandatory collective rights management. The Spanish Society of Authors and Publishers, SGAE (*Sociedad General de*

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<sup>114</sup> These articles apply to all CMOs established in the European Union, regardless of sector. Parts of the CRM Directive apply specifically to the music industry but the articles presented under this Section apply *mutatis mutandis* to the audiovisual industry.

<sup>115</sup> For further details, see examples in Chapter 3 of this publication.

<sup>116</sup> Belgian SACD website available at: <https://www.sacd.be/fr/agir/le-comite-belge-de-la-sacd>.



*Autores y Editores*),<sup>117</sup> the Society for Audiovisual Authors (directors and screenwriters), DAMA (*Derechos de Autor de Medios Audiovisuales*),<sup>118</sup> and the Spanish collecting society protecting performers and actors, AISGE (*Artistas Intérpretes, Entidad de Gestion de Derechos de Propiedad Intelectual*), undertake this mission to manage collectively the remuneration right of audiovisual authors and performers. In Italy, Nuovo IMAIE and Artisti 7606 are CMOs entitled to collectively manage remuneration rights due to performers they represent. In the Netherlands, the right to fair and appropriate remuneration is exercised by legal persons aiming to represent the interest of rightsholders. For principal directors and screenplay writers, the Dutch CMO for film and television directors, VEVAM (*Auteursrechten vergoedingen voor regisseurs*),<sup>119</sup> is in charge of administering this right. In contrast, in Slovenia, the management of certain remuneration rights by a CMO is performed on a voluntary basis (with exceptions for a range of rights).<sup>120</sup>

#### 4.1.4.3.2. Licensing negotiations and setting tariffs: the other side of collection and distribution

CMOs conduct licensing negotiations for the use of works and other subject matters in their catalogues (Articles 16-18 CRM Directive). This includes the setting of tariffs for different kinds of works and exploitation, and conducting licensing negotiations with users on behalf of rightsholders. As provided by Article 16 of the CRM Directive, CMOs shall ensure “appropriate remuneration” for authors and performers when setting tariffs and negotiating with users (Art. 16(2) sub. 2 CRM). To remunerate authors and performers appropriately, CMOs and users should conduct licensing negotiations in good faith and apply tariffs which should be determined on the basis of objective and non-discriminatory criteria (Art. 16 (1) and 16 (2) sub. 1 CRM). Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, *inter alia*, the economic value of the use of the rights in trade, taking into account the nature and scope of the work and other subject matter, as well as in relation to the economic value of the service provided by the CMO (Art. 16(2) sub. 2 CRM).

CMOs should maintain a distribution policy setting out the basis for calculating entitlements to receive payments from rights revenues collected. Furthermore, to fulfil some parts of the transparency requirements, CMOs shall make public some information, such as standard licensing contracts and standard applicable tariffs (Art. 21(1)(c) CRM), and their general policies on management fees (Art. 21(1)(f) CRM) and on distribution of royalties to rightsholders (Art. 21(1)(e) CRM). Besides, CMOs shall make public an annual transparency report. It shall contain various kinds of information, including a financial statement (balance sheet or statement of assets and liabilities as well as an income and

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<sup>117</sup> SGAE website available at: <http://www.sgae.es/>.

<sup>118</sup> DAMA website available at: <https://www.damautor.es/>.

<sup>119</sup> See VEVAM website at: <https://www.vevam.org/>.

<sup>120</sup> For further details, see at Chapter 3 of this publication.



expenditure account for the financial year), an activity report, and a statement of rights revenue broken down per category of rights managed and per type of use (Art. 22 CRM).

#### 4.1.4.3.3. Alternative dispute resolution procedure

Mechanisms of alternative dispute resolution may be developed as well by CMOs, for instance for litigation with users (Article 34 CRM Directive). Article 21 of the CDSM Directive is a bit more specific as to the material scope of the mechanism: it includes disputes concerning the transparency obligation and the contract adjustment mechanism (Art. 19 and 20 CDSM Directive).

In France, Article L328-1 of the Intellectual Property Code<sup>121</sup> provides that CMOs shall give a decision on disputes relating to the conditions, effects and termination of the rights management authorisation and to the management of rights, addressed by their members, or other CMOs under a representation agreement, or by other rightsholders having a relationship with the CMO (by way of assignment, licence or any other contractual agreement). SACD, for example, handles complaints it receives by mail or email within a period of not more than two months) once the plaintiff has received an acknowledgement of receipt of his/her complaint). If the dispute is between a rightsholder and a user of the SACD's repertoire, the plaintiff may ask SACD to organise mediation to try to find an amicable solution (the mediation suspends the two-month time limit). If SACD rejects the claim, this decision of rejection may be brought before the competent courts.<sup>122</sup>

### 4.1.5. Models of collective agreements in the European Union

Collective agreements have existed in the film and audiovisual sector since well before the CDSM Directive was adopted and implemented, although existing agreements may not necessarily align with the provisions of the CDSM Directive on authors and performers' fair remuneration in exploitation contracts. These agreements stem from a diverse audiovisual landscape in the European Union, characterised by varying national copyright and related rights systems, labour law traditions, industry practices, and unique local production and distribution ecosystems across EU member states.

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<sup>121</sup> See the French article at:

[https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006069414/LEGISCTA000033677870/#LEGISCTA000033677870](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000033677870/#LEGISCTA000033677870)

<sup>122</sup> SACD's litigation procedure available at: <https://www.sacd.fr/fr/traitement-des-contestations-adressees-a-la-sacd>



According to an internal survey conducted by the Federation of European Screen Directors (FERA) among its members at the end of 2022,<sup>123</sup> three main types of collective agreements were identified:

- Mixed agreements (pre-existing collective bargaining agreement coupled with rights agreement), such as, for example, in Norway or Sweden;
- Agreements with trade unions, such as, for example, in Germany;
- Agreements with CMOs, such as, for example, in France, Italy or Spain.

These agreements differ significantly on the scope (i.e. types of works and territories covered), and regarding the types of remuneration covered. For example, **mixed agreements** with streamers analysed in the survey were mainly production-driven and concerned directors, actors, additional crew members, and screenwriters sometimes in separate negotiations; the works covered were local productions commissioned by the service (small volumes) of different types of works; they covered different time periods and included different types of remuneration such as:

- Remuneration for work through applicable existing collective bargaining agreement with local production companies;
- Remuneration for rights transfer;
- Success-based remuneration paid by the streaming service based on thresholds of number of views;
- Additional remuneration for potential future sales.

In contrast, agreements with CMOs examined in the survey were mainly exploitation-driven and concerned different types of rightsholders, of countries where on-demand uses are collectively managed, and no other type of remuneration. The survey also stressed that the negotiation process and existing deals are evolving fast due to the changing SVOD market.

## 4.2. National case studies

This section gives a concrete overview of different types of collective agreements found at national level. It includes a selection of specific examples as well as their legal basis, especially with regard to appropriate and proportionate remuneration, as set out in the CDSM Directive. In addition, these examples highlight their intrinsic nature, whether they come from CMOs, collective bargaining agreements (CBAs), or a combination of the two. The scope of these agreements is described, encompassing the rightsholders involved, the

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<sup>123</sup> Flash survey sent to FERA full members in October-November 2022 (not published): 31 respondents over 27 territories including 22 member states. The methodology included bilateral follow-up and interviews with member organisations, as well as selected experts.



types of works covered, and remuneration aspects. Other factors, such as their duration, and transparency obligations are also examined.

The examples given here cover several countries, including Germany, Denmark, France, Italy, the Netherlands, Poland and Sweden, based on information publicly available on the web. The first section sets the scene and provides a comparative overview of the selected examples, before exploring some of the specific features of the agreements described. A final section compares the main features of the American and European systems as regards collective negotiations mechanisms.

## 4.2.1. General overview

As previously seen in Chapter 3 of this publication, creators' remuneration is managed either individually or through collective mechanisms, either mandatory or optional. The 11 examples (7 countries) studied for this analysis aim to illustrate these two approaches:

- Optional collective agreements: examples in four countries (Denmark, Italy, Poland and Sweden [representing 6 agreements]),
- Mandatory collective agreements: examples in three countries (Germany, France and the Netherlands [representing 5 agreements]).

Four criteria were used to compare these examples: i) the signatories of the agreement, ii) the types of works covered, iii) the creators represented, and iv) the remuneration obligations contained in the agreement.

### ■ Signatories to the collective agreement

Signatories of collective agreements may vary widely between countries, irrespective of the form of the collective agreement: from a specific group of writers to a wider union of creators, from one single commissioning AVMS provider to a large group of AVMS providers. This diversity is reflected in the collective agreements examined in this section. Examples range from joint remuneration agreements between one type of creator and one AVMS provider, as in the case of the German ARD, to different types of creators and one AVMS provider only, as in the Danish and Swedish examples involving Netflix. In some cases, these agreements involved larger groups representing various sides of the industry, including creators and producers, as illustrated by the example of the French agreement.

### ■ Works covered by the collective agreement

The collective agreements, as exemplified in the selected cases, varied in terms of the works they encompassed. In some instances, they concerned a wide range of content, such as agreements involving CMOs, which specifically concerned works that were included in their repertoires, as seen in the Italian and Dutch examples. In contrast, other examples of collective agreements concerned one specific type of work, whether related to their commissioning nature, as observed in the Danish, German, and Swedish examples with their emphasis on local "originals", or based on the works' success, as seen in the





Polish pilot project. Some agreements limited their scope to certain defined categories, as exemplified by the French agreement.

■ **Creators covered by the collective agreement**

The examples studied for this section either include a large range of creators such as the Dutch (CMO), Danish (CBAs), Italian (CMO) and Swedish cases covering screenwriters, directors and actors, or they cover one type of creator only: the German CBAs involving ARD (screenwriters only) or RTL Vox (directors only), as well as the French interprofessional agreement (screenwriters only).

■ **Types of remuneration obligations**

Based on the selected examples, the collective agreements include sometimes one type of remuneration, sometimes two. They can be categorised as follows:

- Five of the studied collective agreements cover two types of remuneration: initial remuneration (for the creative work) and additional remuneration (success-based payment and/or exploitation remuneration). This is illustrated by the German CBA between VDD and ARD, the Danish CBAs with Netflix and the French interprofessional agreement.
- Six of the studied collective agreements only cover additional remuneration. The examples used here are those of the German CBAs (one involving Netflix and one with RTL), the Dutch and Italian CMO agreements (SIAE and PAM), the Polish pilot project undertaken by Netflix and the Swedish CBA (Netflix).

Finally, some of these examples publicly disclosed parts of their transparency measures, such as in the German RTL/Vox agreement with BVR (*Bundesverband Regie*) requiring RTL to report in writing to BVR on the actual number of viewers the previous year and RTL's sales revenues.

The main information related to i) the signatories, ii) the types of works covered, iii) the creators represented, and iv) the remuneration obligations contained in the agreements chosen for this analysis are summarised in a table, and later detailed in the following sections (4.2.2.-4.2.8.).

**Table 5. Overview summarising the selected agreements**

Country	Mandatory or optional collective mechanism	Type	Parties	Signing party representing authors		Signing party exploiting content		Content				
				Association	Trade union	Linear	VOD	Creators	Works	Initial rem. (creative work)	Add rem.	Transp
DE	Mandatory	CBA	VDD ARD	x		x		Screenwriters	ARD commissioned 90' fiction program	x	x	x
		CBA	Ver.di Netflix		x		x	Authors Performers****	Netflix commissioned series in DE (originals)	Ind. Agreem	x	x
		CBA	RTL Vox	x		x		Directors	RTL commissioned fictional pgm	Ind. Agreem	x	x
DK	Non-mandatory	CBA	Create DK Netflix		x		x	Screenwriters Directors, Actors	Netflix commissioned drama series in DK (originals)	x	x	ND



FAIR REMUNERATION FOR AUDIOVISUAL AUTHORS AND PERFORMERS IN LICENSING AGREEMENTS

		CBA	TV2*		x		x	Screenwriters, Directors, Actors	TV2 commissioned drama series in DK (originals)	x	x	ND
		CBA	Viaplay*		x		x	Screenwriters Directors Actors	Viaplay commissioned drama series in DK (originals)	x	x	ND
FR	Mandatory	Inter-professional agreement CBA / CMO	Many signing parties representing each side of the industry		x	Union		Screenwriters	Short serialised fiction	x	x	ND
IT	Non-mandatory	CMO	SIAE and RAI		x	x		Authors and music publishers	SIAE repertoire		x	X***



FAIR REMUNERATION FOR AUDIOVISUAL AUTHORS AND PERFORMERS IN LICENSING AGREEMENTS

<b>IT</b>	Non-mandatory	CMO	NUOVO IMAIE online platforms	x			x	Performers of audiovisual sector	Cinematographic/similar works	x		x
<b>NL</b>	Mandatory	CMO	PAM and RODAP		x	x	x	Screenwriters, directors and actors	PAM repertoire		x	ND
<b>PL</b>	Non-mandatory Pilot Project	Pilot project: Individual case	Netflix**	Individual local contracts			x	Film makers**	Netflix to select the programmes**		x	ND
<b>SE</b>	Non-mandatory	CBA	Scen & Film Netflix		x		x	Authors and performers****	Netflix commissioned series and films in SE (originals)	Ind. agreement	x	ND

*"Ind. Agr.": individual agreement; "ND": non-disclosed.*

*\*Agreements between Create Denmark and TV2 and between Create Denmark and Viaplay are reported by the press as similar to the agreement between Create Denmark and Netflix.*

*\*\*Poland: From the understanding portrayed in the press article, Netflix is launching an additional remuneration mechanism that is to be enforced within individual contracts. The project should result in individual implementation unlike with collective agreements. Not much information is available at this stage.*

*\*\*\*Italy: The information provided in this table relies on press releases and articles. No details pertaining to the transparency obligation were disclosed.*

*\*\*\*\* "Performers": the wording of this table refers to language used in the information found online (agreement or press release/article).*

## 4.2.2. Examples of CBAs: Germany

As presented in Chapter 3 of this publication, in Germany authors are entitled to contractually agreed remuneration for the granting of rights to use the work. Remuneration is deemed to be equitable if it is determined in accordance with a “joint remuneration agreement” (*Gemeinsame Vergütungsregeln* – “GVR”). Section 36 of the Copyright Act determines which parties have the capacity to take part in the negotiations on the collective agreements: these are the associations of authors together with associations of users of works or individual users.

### 4.2.2.1. VDD - ARD joint remuneration agreement

The *Verband Deutscher Drehbuchautoren* is an association representing screenwriters in Germany. It has a joint remuneration agreement (GVR) with ARD/Degeto (public broadcaster) and covers ARD’s commissioned fictional programmes (e.g., *Tatort* and *Polizeiruf 110*). It sets an initial and an additional remuneration for screenwriters as well as yearly reporting by ARD to screenwriters (usage reports). The agreement was signed in May 2019 and came into force retroactively as of 1 January 2019. The minimum remuneration for rights transfer was amended in March 2023.

**Table 6. Summary of VDD-ARD JRA**

Scope	Content of the agreement
Rightsholders covered	<b>Screenwriters</b>
Types of works covered	<b>Fictional programmes commissioned</b> by ARD/Degeto with a length of circa <b>90 minutes</b> (produced by ARD)
National legal basis	Appropriate and proportionate remuneration for the exploitation of the work (Art. 18 CDSM Directive and 32 UhrG)  Contract adjustment mechanism (Art. 20 CDSM Directive and Art. 32a UhrG and related information requests (Section 32d (2) and 32e (1)) on transparency.
Types of remuneration covered	<ul style="list-style-type: none"> <li>■ <b>Minimum remuneration for rights transfer</b> to the production company/commissioning broadcaster: <ul style="list-style-type: none"> <li>(i) Initial payment of EUR 66 495 (for contracts concluded after 1 January 2023), or EUR 66 820 (for contracts concluded after 1 January 2024) for the creation of a script for a fictional production with a length of around 90 minutes</li> <li>(ii) Initial payment of EUR 86 955 (for contracts concluded after 1 January 2023), or EUR 87 380 (for contracts concluded after 1</li> </ul> </li> </ul>



	<p>January 2024) for the production of a script for the <i>Tatort</i> series or for the <i>Polizeiruf 110</i> series.</p> <ul style="list-style-type: none"> <li>■ <b>Success-based remuneration</b> / Remuneration for the commercial exploitation of the work: <ul style="list-style-type: none"> <li>(iii) Revenue share of 4% of the gross income the broadcasters generate from the commercial exploitation of the production (a claim to revenue-sharing only arises if the total of these gross receipts in the calendar year exceeds EUR 2 500 (“applicability threshold”). The revenue share is then granted as per the entire gross income from the calendar year and not just as per the amount that exceeds the threshold. Billing can be carried out immediately by the user.</li> </ul> </li> <li>■ <b>Additional remuneration</b> granted once the show has been used a fixed number of times as agreed by the parties to the GVR</li> </ul>
Time period	1-year cycle
Exploitation data	<p><b>Yearly reporting</b> by ARD to screenwriters (usage reports)</p> <p>ARD to provide screenwriters with reports on the use of the work.</p>

Source: *Gemeinsame Vergütungsregeln (GVR) für Drehbuchautorinnen und -autoren, GVR VDD ARD 2019 and Änderungsvereinbarung GVR ARD 2023.*<sup>124</sup>

#### 4.2.2.2. VER.DI and BFSS’ joint remuneration agreement with Netflix

The *Vereinte Dienstleistungsgewerkschaft* (VER.DI)<sup>125</sup> is a trade union representing five sectors, including media (former Media Union – “*IG Medien*”). A joint remuneration agreement (JRA) *Gemeinsame Vergütungsregeln* – “GVR”) for performance-based additional remuneration between Netflix and VER.DI has existed since 2020.<sup>126</sup> The CBA provides for two types of additional remuneration (success-based payment and exploitation remuneration) for authors and performers for Netflix’s commissioned series in German. Additional provisions deal with transparency as well.

The GVR’s execution date is 1 January 2020, and it was signed in March 2020.

<sup>124</sup> *Verband Deutscher Drehbuchautoren* and GVR available at: <https://www.drehbuchautoren.de/themen-und-terminen/honorar-und-gvr/gvr-abschluesse> See both the GVR VDD ARD 2019 and its amendment “*Änderungsvereinbarung GVR ARD 2023*”.

<sup>125</sup> Website available at: <https://www.verdi.de/>

<sup>126</sup> “*Gemeinsame Vergütungsregeln film*”

**Table 7. Summary of VER.DI and BFSS JRA and Netflix**

Scope	Content of the agreement
Rightsholders concerned	<b>Authors and performers</b> participating in a production (Germany), with the exception of screenwriters (for whom Netflix negotiates concurrently another similar JRA). Music authors are also not included.
Types of works covered	<b>Series commissioned and fully financed by Netflix and produced by a German producer</b> in the German original language version
National legal basis	Contract adjustment mechanism (Art. 18-20 CDSM Directive and Art. 32a UhrG) and related information requests (Section 32e (1) and 32d (2) on transparency.
Types of remuneration	<p>Two remunerations in addition to the initial payment (undisclosed):</p> <p>i) <b>Additional remuneration</b>, i.e. a <b>success-based remuneration</b> based on a so-called “completer” (number of accounts of users that have watched at least 90% of a run-time of a production):</p> <ol style="list-style-type: none"> <li>1) EUR 250 000 within the first five-year period commencing with the start date of a production,</li> <li>2) EUR 175 000 within the subsequent five-year period commencing with the expiry of the first five-year period,</li> <li>3) EUR 100 000 for each subsequent five-year period commencing with the expiry of the second and each subsequent five-year period.</li> </ol> <p>Upon the end of each five-year period, the respective number of Completers below each Additional Remuneration threshold shall trigger a pro-rata payment of the applicable additional remuneration. This pro-rata payment is calculated as follows:</p> $\frac{\text{Completers} \times \text{applicable Additional Remuneration}}{10\,000\,000}$ <p>For instance (see Annex 2 of the agreement), if a production has achieved 5 million Completers by expiry of the first five-year period, the total additional remuneration would be EUR 125 000, after deduction of the screenwriters’ share: EUR 100 360,88 (50% pro rata payment). Netflix shall pay this additional remuneration to the beneficiaries. Beneficiaries are all authors and performers as defined by the copyright laws of their residence or Germany who participate in a production [...]. This applies irrespective of their nationality and/or membership in a beneficiaries’ association.</p> <p>ii) <b>Continuous secondary exploitation remuneration</b>, i.e. based on re-sales (i.e. “received by Netflix derived from all exploitations/uses of the production via a third-party, e.g., linear, non-linear and/or</p>

	<p><i>physical home entertainment exploitation (DVD, Blu-Ray) of third parties not affiliated with Netflix</i>). The agreements allow for a share of 15% of this secondary exploitation receipts. Net secondary exploitation receipts equal gross secondary exploitation receipts minus the following amounts: i) a distribution fee of 25%, ii) a flat distribution cost of 10%, and iii) actual documented costs incurred for the production of a non-German language subtitling or dubbing/voiceover version.</p> <p>According to the agreement, the creation is remunerated according to existing agreements with local production companies (i.e. “basic remuneration”).</p> <p><b>Actors’ fees:</b> initial actors’ fee of at least EUR 1 000 per shooting day. Fees are still freely negotiable individually above this first-time actors’ fee amount.</p>
Time period	5-year cycle
Exploitation data	<p><b>Accounting statements:</b> when using an intermediary bank (Deska) for the payment of the additional remuneration and the secondary exploitation participation, Netflix shall provide Deska with accounting statements.</p> <p><b>Achieved amount of Completers per production:</b> when using Deska, Netflix shall provide a yearly accounting statement containing the achieved amount of Completers per production.</p>

Source: Gemeinsame Vergütungsregeln, the joint remuneration agreement, dated 1 January 2020.<sup>127</sup>

#### 4.2.2.3. BVR joint remuneration agreement with broadcasters

The *Bundesverband Regie* (BVR) is an association representing audiovisual directors. It has negotiated and concluded several joint remuneration agreements (JRA) with broadcasters and the producer alliance. To date, nine agreements are available on the BVR website, some with broadcasters (JRA with RTL/VOX [including RTL’s SVOD service], JRA with ProSiebenSat1), with public service media (JRA with ZDF, GVR with ARD), with producers (JRA with *Allianz Deutscher Produzenten*, JRA with Studiocanal), and with Netflix (for mediation - alternative dispute resolution rules).<sup>128</sup> For the purpose of this publication, the JRA between BVR and RTL/Vox is presented below.

The JRA between BVR and RTL/Vox gives directors two remunerations in addition to the initial payment (success-based payment and sales participation) for RTL’s commissioned content the filming of which began before 31 December 2021. The agreement provides for a yearly reporting in writing by RTL to BVR (number of viewers

<sup>127</sup> [https://filmunion.verdi.de/++file++6007d9f176f2f64e176948c9/download/GVR-BFFS-Netflix-verdi\\_final-online.pdf](https://filmunion.verdi.de/++file++6007d9f176f2f64e176948c9/download/GVR-BFFS-Netflix-verdi_final-online.pdf)

<sup>128</sup> The list is available on the BVR website at: <https://www.regieverband.de/node/446>



and sales revenues). It was signed by the parties between December 2022 and January 2023.

**Table 8. Summary of BVR and RTL/Vox JRA**

Scope	Content of the agreement
Rightsholders concerned	Directors
Types of works covered	Commissioned fictional programmes for first broadcast in prime time (produced by broadcasters) the filming of which began before 31 December 2021
National legal basis	Contract adjustment mechanism (Art. 18-20 CDSM Directive and Art. 32a UhrG) and related information requests (Section 32e (1) and 32d (2) on transparency.
Types of remuneration	<p>Two additional remunerations based on two different success rates:</p> <p>i) <b>Additional remuneration, i.e. a success-based remuneration:</b></p> <p>First level of participation reached when the actual number of viewers of an RTL content exceeds the reference reach by 40%; the following remuneration rates apply:</p> <p><i>The reference reach is the basis for the reach participation of the director. To calculate the reference reach, all independent broadcasts of each RTL content belonging to the respective programme format (sitcom/series/movie) by definition were considered.</i></p> <p>Sitcom (Fictional program format with a length of approx. 22.5 minutes each): EUR 2 625</p> <p>Series (Fictional program format with a length of approx. 45 minutes each (net)): EUR 5 250</p> <p>Movie (Fictional program format each with a length of approx. 90 minutes (net)): EUR 10 500</p> <p>Second level of participation level reached (reference range plus 80%); the following remuneration rates apply:</p> <p>Sitcom: EUR 3 000, Series: EUR 6 000, Movie: EUR 12 000</p> <p>ii) <b>Sales participation:</b></p> <p>If RTL's sales revenue per content exceeds the following distribution participation thresholds:</p> <p>Sitcom: EUR 30 000, Series: EUR 60 000, Movie: EUR 120 000</p> <p>Then the Director receives a share of 4% of RTL's sales revenue that exceeds the distribution participation threshold</p>
Time period	Unlimited application to RTL content
Exploitation data	Yearly reporting by RTL (actual number of viewers the previous year and RTL's sales revenues) through notifications in writing to BVR (with details such as the

	title, season, and episode number, amount of reach share achieved). RTL shall send the first notification by 30 September 2023 (and no later than 30 March 2024).
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Source: *Gemeinsame Vergütungsregeln und Durchführungsvereinbarung "Primetime fiction I", the JRA.*<sup>129</sup>

### 4.2.3. Example of CBA: Sweden

In Sweden, according to Section 29 of the Act on Copyright to literary and artistic works (*Lag om upphovsrätt till litterära och konstnärliga verk*),<sup>130</sup> the author is entitled to “reasonable” compensation when (s)he transfers his/her copyrights to another person who intends to use the rights in commercial activities (“*har upphovsmannen rätt till skälig ersättning*”) as set in the agreement. If this remuneration later turns out to be disproportionately low compared to the user’s income, the author is entitled to an additional reasonable compensation (“*har upphovsmannen rätt till ytterligare skälig ersättning*”).

In Sweden, Netflix has collective agreements with Swedish Union Scen & Film that provide for an additional remuneration (success-based remuneration) to be paid to authors and performers for both Swedish Netflix original series and films. As for previous examples (see supra Germany), the success-based remuneration is distributed to authors and performers when a certain threshold of viewers have completed the viewing of the content. The amount to be paid is specified in the joint remuneration agreement. The agreement is not publicly disclosed, as reported by Scen & Film’s press release in February 2021.

**Table 9. Summary of Union Scen & Film and Netflix agreement**

Scope	Content of the agreement
Rightsholders concerned	Authors and performers
Types of works covered	Swedish Netflix original series and films
National legal basis	Contract adjustment mechanism (Art. 20 CDSM Directive and Section 29 of the Swedish Act on copyright and literary and artistic works)

<sup>129</sup> GVR BVR with RTL/Vox available at: [https://www.regieverband.de/sites/default/files/2023-01/RTL\\_BVR%20Verg%C3%BCtungsregel%20PT\\_Fiction\\_final\\_Lesefassung.pdf](https://www.regieverband.de/sites/default/files/2023-01/RTL_BVR%20Verg%C3%BCtungsregel%20PT_Fiction_final_Lesefassung.pdf)

<sup>130</sup> Swedish Act on copyright available at: [https://www-riksdagen-se.translate.goog/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-1960729-om-upphovsratt-till-litterara-och-sfs-1960-729/?x\\_tr\\_sl=auto&x\\_tr\\_tl=en&x\\_tr\\_hl=en-US&x\\_tr\\_pto=wapp&x\\_tr\\_hist=true#K2a](https://www-riksdagen-se.translate.goog/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-1960729-om-upphovsratt-till-litterara-och-sfs-1960-729/?x_tr_sl=auto&x_tr_tl=en&x_tr_hl=en-US&x_tr_pto=wapp&x_tr_hist=true#K2a)



Types of remuneration	While the initial remuneration is to be negotiated within individual contracts, the collective agreement between Scen & Film and Netflix provides for:  i) <b>Additional remuneration</b> i.e. success-based remuneration  Distributed to authors and performers when a certain threshold of viewers have completed the viewing of the content. The amount to be paid is specified in the joint remuneration agreement
Time period	Information not available online
Exploitation data	Information not available online

Source: The CBA is not disclosed but both Netflix and Nordisk Film & TV Fond reported it.<sup>131</sup>

#### 4.2.4. Example of CBA: Denmark

In Denmark, Act no. 680 amending the Copyright Act entered into force on 6 June 2023. The Copyright Act, in its Chapter 2a on CMOs, provides for appropriate remuneration (“*passende vederlag*”) of rightsholders for the use of their rights (Section 52a(4)).<sup>132</sup>

In Denmark, the Danish association “Create Denmark” (union representing creative workers) and Netflix reached an agreement (undisclosed) that includes a “guaranteed initial rights payment upon launch on the Netflix service, followed by additional remuneration based on the success of a show”. The agreement covers Netflix-commissioned Danish drama series, including an initial rights payment and an additional remuneration based on the number of viewers and includes, according to press articles, writers, directors and actors. The agreement should run until the end of 2024 according to a press release from the Danish Film Directors website (Danske Filminstruktører).<sup>133</sup>

The press release relates to similar agreements with TV2 and Viaplay.

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<sup>131</sup> The CBA is not disclosed but both Netflix and Nordisk Film & TV Fond reported it: <https://about.netflix.com/en/news/netflix-and-scen-and-film-extend-their-long-standing-partnership> and <https://nordiskfilmogtvfond.com/news/stories/netflix-extends-partnership-with-swedish-union-scen-film-on-remuneration> and <https://advanced-television.com/2022/09/07/netflix-scen-film-extend-partnership/> and at: <https://scenochfilm.se/ytterligare-ersattning-fran-netflix-for-serien-storst-av-allt/>

<sup>132</sup> Danish Act on copyright (Bekendtgørelse af lov om ophavsret) available at: <https://www.retsinformation.dk/eli/lta/2023/1093>

<sup>133</sup> Press release from 28 November 2022 available on Danske Filminstruktører website at <https://www.filmdir.dk/da/aftale-indg%C3%A5et-med-netflix>

**Table 10. Summary of Create Denmark and Netflix agreement**

Scope	Content of the agreement
Rightsholders concerned	Writers, directors and actors
Types of works covered	Netflix-commissioned Danish drama series
National legal basis	Appropriate and proportionate remuneration, contract adjustment mechanism (Art. 18-20 CDSM Directive and Sections 52a(4) and 55 of the Copyright Act)
Types of remuneration	The agreement should provide for: i) an <b>initial payment</b> , ii) an additional remuneration based on the number of viewers ( <b>success-based remuneration</b> ).
Time period	Until the end of 2024
Exploitation data	Information not available online

Source: The CBA has not been disclosed but the press have reported on it.<sup>134</sup>

#### 4.2.5. A pilot project: Poland

In Poland, while the transposition process of the Directive CDSM is not complete yet,<sup>135</sup> in November 2022, Netflix launched a pilot project to pay Polish film makers (screenwriters, directors, cinematographers and actors) additional remuneration (success-based rate) when the local productions prove popular. The project should result in individual implementation unlike the collective agreements presented before. Parts of the details were shared by ZAPA, the Union of Audiovisual Authors and Producers, in December 2022. According to press articles,<sup>136</sup> it is a pilot project Netflix has introduced while the

<sup>134</sup> There is no public information as to the deal, but the press has reported on it:

<https://www.screendaily.com/news/netflix-reaches-landmark-rights-agreement-with-create-denmark-exclusive/5176920.article>

<sup>135</sup> See aeopo-artis website, map of current situation in each EU country, available at: <https://www.aeopo-artis.org/policy/copyright-directive/#info>

<sup>136</sup> See articles at: <https://www.rp.pl/internet-i-prawo-autorskie/art37522611-netflix-zmienia-zasady-wynagradzania-za-serialowe-hity> . and <https://www.money.pl/gospodarka/netflix-wynagrodzi-polskich-tworcow-dodatkowe-pieniadze-za-popularnosc-produkcji-6839608630438464a.html> and:

transposition of the CDSM Directive into Polish Copyright legislation has not been finalised. The pilot includes a new remuneration system for Polish creators involved in the production of content that reaches a certain viewership on the VOD service. Netflix selects the productions to figure in the pilot for now. Besides, terms and conditions regarding the remuneration are to be determined with local producers.

**Table 11. Summary of Netflix’s pilot project in Poland**

Scope	Content of the agreement
Rightsholders concerned	Screenwriters, directors, cinematographers and actors
Types of works covered	Netflix’s decision (local popular content)
National legal basis	Contract adjustment mechanism (Art. 20 CDSM Directive)
Types of remuneration	The project should provide for: i) an additional remuneration based on the number of viewers ( <b>success-based remuneration</b> ).
Time period	Information not available online
Exploitation data	Information not available online

*Source: The pilot project has not been disclosed but the Union of Audiovisual Authors and Producers and the press have reported on it.<sup>137</sup>*

#### 4.2.6. Example of an interprofessional agreement: France

As presented in Chapter 3 of this publication, in France, authors shall receive a proportionate share of the revenue from the sale or the exploitation of the work when transferring their rights and the determination of remuneration is to be fixed by agreements concluded between professional authors’ organisations, CMOs, etc.

<https://www.pap.pl/aktualnosci/news%2C1494742%2Cnetflix-wprowadza-dodatkowe-premie-dla-polskich-tworcow-beda-nagradzani-za>

<sup>137</sup> There is no public information as to the deal, but ZAPA reported on it:

<https://www.zapa.org.pl/en/aktualnosci,2,175,ZAPA-039-s-statement-on-Netflix-039-s-pilot-program.html> ;

Press articles at: <https://www.rp.pl/internet-i-prawo-autorskie/art37522611-netflix-zmienia-zasady-wynagradzania-za-serialowe-hity> . and <https://www.money.pl/gospodarka/netflix-wynagrodzi-polskich-tworcow-dodatkowe-pieniadze-za-popularnosc-produkcji-6839608630438464a.html> and:

<https://www.pap.pl/aktualnosci/news%2C1494742%2Cnetflix-wprowadza-dodatkowe-premie-dla-polskich-tworcow-beda-nagradzani-za>



In March 2023, the *Guilde Française des scénaristes*, the *Société des auteurs et compositeurs dramatiques* (SACD), the *Union syndicale de la production audiovisuelle* (USPA) and the *Syndicat des producteurs indépendants* (SPI) signed an interprofessional agreement on contractual practices between screenwriters and fiction producers. The deal covers the agreement covers live-action works of fiction not intended for first cinematographic release, with the exception of three formats: serialised daily fiction, short-format fiction series, and interactive or immersive works of fiction and works of fiction exclusively intended for social networks. The agreement provides for initial payments (remuneration for drafting the project, and a minimum framework of expenses allocated to writing) and an additional one after recoupment of budget costs of the work. It refers to transparency rules as set up by the agreement between authors and producers of audiovisual works relating to the transparency of author-producer relations and the remuneration of authors (“Transparency Agreement”) (6 July 2017). It came into force on 1 July 2023 for an initial period of three years. It may be renewed by tacit agreement for a successive period of five years until termination by a party.

**Table 12. Summary of a French interprofessional agreement**

Scope	Content of the agreement
Rightsholders concerned	Authors: screenwriters
Types of works covered	<p>The agreement covers live-action works of fiction not intended for first cinematographic release, with the exception of:</p> <p>Serialised daily fiction</p> <p>Short-format fiction series (minimum of 50 episodes, with a duration of 6 minutes max per episode)</p> <p>Interactive or immersive works of fiction and works of fiction exclusively intended for social networks</p>
National legal basis	Contract adjustment mechanism (Art. 18-20 CDSM Directive and Art. L132-25-1 and L132-25-2 CPI) and related information requests on transparency.
Types of remuneration	<p>The interprofessional agreements provide for:</p> <p><b>i) An initial payment:</b></p> <ul style="list-style-type: none"> <li>– a minimum base of EUR 6 000 gross for the writing of the “bible (<i>sic</i>) of the series”, and in the absence of any commitment from a service publisher,</li> <li>– the minimum base is increased to EUR 11 000 gross if a development agreement is signed with a service publisher,</li> <li>– the minimum base is increased to EUR 20 000 gross if a series whose direct hourly expenses are greater than or equal to EUR 600 000 is put into production.</li> </ul> <p><b>ii) Minimum framework of expenses allocated to writing:</b> an envelope is allocated to the remuneration, in gross royalties, for all the writing work of the work concerned and the transfer of the related rights, excluding remuneration for the filming version:</p> <ul style="list-style-type: none"> <li>- 3% (or 3.6% in case of a structured writing group “ADES”) of direct expenditure for French works of fiction,</li> <li>- reduced to 2.25% (or 2.7% in case of ADES) of direct expenditure for French works of fiction adapted from a pre-existing audiovisual or cinematographic work.</li> </ul> <p>ADES is a structured framework aiming at promoting collaboration between authors, in particular through the operational coordination of writing by reference authors.</p> <p><b>iii) Additional remuneration after recoupment of budget costs of the work:</b></p> <p>The parties jointly define an automatic mechanism for additional remuneration of the author after recoupment of budget costs of the work for the benefit of writers of works of fiction falling within its scope of application.</p>

Time period	The agreement is valid for 3 years.
Exploitation data	The interprofessional agreement refers to Art. 2 of the Agreement between authors and producers of audiovisual works relating to the transparency of author-producer relations and the remuneration of authors of 6 July 2017, as soon as a screenwriter is asked to write content that is accompanied by a proportionate remuneration.

Source: *Accord interprofessionnel sur les pratiques contractuelles entre auteurs scénaristes et producteurs de fiction*<sup>138</sup>

The Transparency Agreement was signed on 6 July 2017 between the SACD, the *Auteurs groupés de l'animation française* (AGrAF), the *Association des cinéastes documentaristes* (ADDOC), the *Guilde française des scénaristes*, the *Société civile des auteurs multimedia* (SCAM), the Groupe 25 Images, the *Syndicat des agences de presse audiovisuelle* (SATEV), the *Syndicat des producteurs et créateurs de programmes audiovisuels* (SPECT), the *Syndicat des producteurs de films d'animation* (SPFA), the SPI and the USPA.

The Agreement provides for transparency obligations covering all French audiovisual production contracts (i.e. productions for TV & streaming, not film) between authors and audiovisual producers. It came into force on 1 January 2018 for an initial period of three years. It is renewed by tacit agreement for a successive period of one year until termination by a party.

**Table 13. Summary of the Transparency Agreement**

Scope	Content of the agreement
Rightsholders concerned	Any person who contributed to the development of the audiovisual work The agreement only applies to French law contracts between authors and audiovisual producers
Types of works covered	All audiovisual production contracts
National legal basis	Article 19 CDSM Directive and Article L131-5-1 CPI
Time period	Initial period of 3 years, tacit renewal every year until termination by a party
Exploitation data	Yearly reporting by the producer to authors for all modes of exploitation and territories (operating account, “ <i>compte d'exploitation</i> ”, including those for which the authors are remunerated by collective management

<sup>138</sup> See the press release on the SACD website at: <https://www.sacd.fr/fr/nouvel-accord-interprofessionnel-majeur-entre-scenaristes-et-producteurs-de-fiction-0> and the agreement at: [https://www.sacd.fr/sites/default/files/accord\\_interprofessionnel\\_22\\_03\\_2023.pdf](https://www.sacd.fr/sites/default/files/accord_interprofessionnel_22_03_2023.pdf)



Source: *Accord entre auteurs et producteurs d'œuvres audiovisuelles relatif à la transparence des relations auteurs-producteurs et à la rémunération des auteurs*<sup>139</sup>

#### 4.2.7. Example of CMO agreement with a broadcaster: Italy

In November 2021, Italy passed a legislative Decree to amend its Copyright Law (*“Legge in materia di diritto d'autore e di diritti connessi”* – “LDA”), thus transposing the CDSM Directive.<sup>140</sup> Authors are entitled to an “adequate and proportionate compensation” (*“un compenso adeguato e proporzionato”*) when transferring their right to a producer and shall receive a remuneration for each use of the works when communicated to the public (Art. 46-bis LDA). The same remuneration is foreseen for performers (primary and secondary) of cinematographic and/or assimilated works (Art. 84 LDA) for every single exploitation – including for the making available – of such works. Article 110 *quinquies* LDA provides for an adjustment mechanism when the initial remuneration is found to be overly disproportionate compared to the benefits from the exploitation of the work. Authors and performers may adjust their contract directly or through CMOs, without prejudice as to what may have been established on the matter by collective agreements.

The Italian CMO *Società Italiana degli autori ed editori* (SIAE) manages registered works on behalf of authors and editors (*autori ed editori*). It renewed its agreement with the public service media RAI in December 2022 for the additional remuneration (‘compenso’) of authors’ and publishers’ works which are registered in SIAE’s repertoire when exploited by RAI. It applies to all RAI’s channels and platforms. Few details are disclosed online by SIAE.

**Table 14. Summary of SIAE and RAI agreement**

Scope	Content of the agreement
Rightsholders concerned	Authors and publishers (“autore ed editori”)
Types of works covered	Exploitation by RAI of SIAE’s repertoire (music, cinema, dramatic and entertainment works, lyrical, literary and figurative arts) (overall agreement)
National legal basis	Remuneration: Art. 46-bis LDA (Art. 18 CDSM Directive)
Types of remuneration	Operating remuneration (for the exploitation of the work)
Time period	Information not available online
Exploitation data	Information not available online

<sup>139</sup> Agreement available at:

[https://www.sacd.fr/sites/default/files/2017\\_juillet\\_accord\\_transparence\\_audiovisuel.pdf](https://www.sacd.fr/sites/default/files/2017_juillet_accord_transparence_audiovisuel.pdf)

<sup>140</sup> Italian Copyright Law available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1941-04-22:633!vig=>



Source: SIAE's website<sup>141</sup>

In addition to this agreement with RAI, SIAE and Sky also signed a series of new agreements in November 2022, as reported by SIAE and the press,<sup>142</sup> regulating the use of musical and cinematographic rights of television programmes, films and TV series offered to viewers by Sky. The agreements apply to all Sky's distribution platforms. They deal with the operating remuneration of both cinema and music repertoires and those of dramatic, lyrical, literary and figurative works repertoires.

Regarding transparency in Italy, Article 110 *quater* of the LDA provides for the transparency obligation and requires users to provide authors (individually or through CMOs), at least every six months, with updated, relevant and complete information on the exploitation of the works and artistic performances, and the remuneration due (Art. 110 *quater* (1)).

SIAE publishes documents, information and data on its website. The information is immediately available and intended to be continuously updated. Information on collection per type of right and transparency is available on the "Transparency" page of SIAE.<sup>143</sup> SIAE informs about the methods, criteria, and timing for the allocation of revenues collected by the CMO for the use of works of the administered repertoire.<sup>144</sup> In its 2022 transparency report, SIAE reports on each type of administered right, the gross receipts, and the revenues to be distributed.<sup>145</sup>

The Italian CMO Nuovo IMAIE manages and collects the remuneration due to the represented performers according to Art 84 LDA. Based on the tariffs published on its website, Nuovo IMAIE negotiates with users of cinematographic and/or similar works (i.e. broadcasters and streaming platforms) the remuneration due to the primary and secondary performers that it represents by direct mandate or by virtue of representation agreements. For example, with regard to online platforms, Nuovo IMAIE has signed agreements with all relevant users operating in Italy. These agreements are based on a common standard agreement as reflected in the table below.

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<sup>141</sup> Press release available on Siae's website at: [https://www.siae.it/it/notizie/accordo\\_SIAE\\_Rai\\_2022/](https://www.siae.it/it/notizie/accordo_SIAE_Rai_2022/) La Stampa reported it about it as well: <https://finanza.lastampa.it/News/2022/12/27/diritti-dautore-siae-rinnova-accordo-con-rai-per-compenso-opere/ODVfMjAyMi0xMi0yN19UTEI>

<sup>142</sup> SIAE's press release available at: <https://www.siae.it/it/notizie/siae-sky-accordo-equo-compenso/> and in digital-news.it at: <https://www.digital-news.it/news/sky-italia/49828/accordo-siae-sky-per-compenso-sulle-opere-di-autori-e-artisti>

<sup>143</sup> See at <https://www.siae.it/it/siae-trasparente/>

<sup>144</sup> See "La ripartizione del diritto d'autore" available on the SIAE website at: <https://www.siae.it/it/autori-ed-editori/iscritti/ripartizione/>

<sup>145</sup> See page 60 of the report, "Relazione di Trasparenza 2022", available at: [https://d2aod8qfhzlk6j.cloudfront.net/SITOIS/Relazione\\_di\\_trasparenza\\_2022\\_7acd206ee7.pdf](https://d2aod8qfhzlk6j.cloudfront.net/SITOIS/Relazione_di_trasparenza_2022_7acd206ee7.pdf)

**Table 15. Summary of Nuovo IMAIE standard agreement with platform**

Scope	Content of the agreement
Rightsholders concerned	Performers of cinematographic and/or similar works (primary and secondary actors and dubbers)
Types of works covered	Making available by the platform of cinematographic and/or similar works
National legal basis	Remuneration: Art. 84 par 3 LDA
Types of remuneration	Percentage of the service's revenue in proportion to protected works. The remuneration due to Nuovo IMAIE is equal to the percentage of Nuovo IMAIE's market share.
Time period	Two years on average, with no tacit renewal
Exploitation data	Revenue accrued in Italy and data/usage reports (each year with regard to previous year).

Source: Nuovo IMAIE has published on its website related information (tariffs, standard agreements). The economic data on the remunerations collected and distributed are published yearly in detail in the Transparency Report.<sup>146</sup>

#### 4.2.8. Example of a CMO agreement with AVMS providers: the Netherlands

As presented in Chapter 3 of this publication, in the Netherlands, as regards a film or audiovisual work, authors are entitled to a proportionate fair compensation for the communication of the work to the public, exercised by a CMO. VEVAM (*Auteursrechten vergoedingen voor regisseurs*)<sup>147</sup> is the CMO for directors of film and TV works in the Netherlands. It collects royalties for the use of works in its repertoire (e.g., publication, retransmission, private copying, lending, of audiovisual works) and distributes them to its members, the directors of the films and television programs in question.

VEVAM is a member of PAM (*Portal Audiovisuele Makers*) (an organisation whose members represent rightsholders, together with NORMA (actors) and LIRA (screenwriters)). RODAP (*Rechtenoverleg voor Distributie van Audiovisuele Producties*) is the user organisation (representing film and TV producers, broadcasters and distributors). PAM<sup>148</sup> and RODAP<sup>149</sup> signed an addendum<sup>150</sup> to a previous exploitation contract with certain broadcasters and distributors (RTL, TALPA and CAIW), renewing cable retransmission fees, including those for certain catch-up broadcast services, as reported by the two

<sup>146</sup> See Nuovo IMAIE's website: <https://www.nuovoimaie.it/>.

<sup>147</sup> See VEVAM website at: <https://www.vevam.org/>.

<sup>148</sup> <http://pam-online.nl/auteurscontractenrecht/>.

<sup>149</sup> <https://www.rodap.nl/>.

<sup>150</sup> See amendment on VEVAM website: <https://www.vevam.org/wp-content/uploads/2021/02/Addendum-bij-het-Convenant-PAM-CBOs-RODAP-2020-2024-Versie-def-15-1-2021-voor-WEBSITES.pdf>.

organisations and the press in February 2021.<sup>151</sup> The new agreement, replacing a former one that expired on 31 December 2019, is an extension of the former for the period 2020 to 2024. The addendum was signed on 15 January 2021.

The agreement covers an important part of the collective compensation for the screenwriters, directors and actors represented by PAM. It includes compensation for broadcasting and retransmission of all channels to be received in the Netherlands. The PAM and RODAP agreement agreed on the rates and conditions for linear broadcasting or retransmission of channel packages.

**Table 16. Summary of PAM and RODAP agreement**

Scope	Content of the agreement
Rightsholders concerned	Film/AV workmakers (screenwriters, directors and actors), but limited to those with a significant role.
Types of works covered	Film/AV works broadcasted or retransmitted by cable that are in PAM's repertoires (VEVAM's, LIRA's and NORMA's repertoires), excluding foreign-represented repertoire.
National legal basis	For remuneration, in particular Art. 25c and 45d of the Dutch Copyright Act (Art. 18 CDSM Directive)
Remuneration	Remuneration for communication to the public (exploitation of the work): For linear broadcast or retransmission of film/AV works, the following rates apply (per subscriber per month (ex VAT)): <ul style="list-style-type: none"> <li>• from 0 to 39 channels, 19.5 cents</li> <li>• 40 – 79 channels, 22 cents</li> <li>• 80 – 119 channels, 22.5 cents</li> <li>• 120+ channels, 23 cents</li> </ul>
Time period	2020-2024
Exploitation data	Information not available online

Source: VEVAM's Jaarverslag-2022<sup>152</sup>

<sup>151</sup> See press releases at: <http://pam-online.nl/pam/akkoord-bereikt-collectieve-vergoeding-voor-film-en-tv-makers/> (PAM) and <https://www.rodap.nl/akkoord-bereikt-over-collectieve-vergoeding-voor-film-en-tv-makers/> (RODAP), as well as an article at: <https://plotmagazine.nl/akkoord-vergoeding-film-en-tv-makers/>.

<sup>152</sup> See VEVAM's Jaarverslag-2022 available at: <https://www.vevam.org/wp-content/uploads/2023/06/Jaarverslag-2022-Stichting-VEVAM.pdf> and VEVAM's website.

## 4.2.9. Works-made-for-hire contracts (United States)

In the United States, a federal statute from Congress governs copyright law: the Copyright Act,<sup>153</sup> first enacted in 1790, followed by four general revisions, the most recent one in 1976. There are some state laws dealing with issues not covered by the federal law too.

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<sup>153</sup> USA Copyright Act available at: <https://www.copyright.gov/title17/>

Section 201 reads as follows:

*(a) Initial ownership – Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.*

In the USA, the person who created/authored the work owns the work. However, this general principle has derogations, among them the “work for hire” one, as provided by Section 201 (b):

*(b) WORKS MADE FOR HIRE – In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.*

Ultimately, in this case scenario, employers become authors and owners of copyright in works created by their employees.<sup>154</sup> In May 2023, a massive strike in Hollywood by screenwriters and performers brought to the fore major concerns about improving working conditions and remunerations.<sup>155</sup>

A tentative agreement to amend the 2020 Minimum Basic Agreement (MBA) between the Writers Guild of America and the Alliance of Motion Picture and Television Producers was reached on 24 September 2023 (screenwriters). The agreement was ratified by 99% of WGA members, with a term starting from 25 September 2023 to 1 May 2026.<sup>156</sup> It includes significant gains relating to remuneration from online exploitation as well as protections regarding regulation of the use of artificial intelligence (AI).<sup>157</sup>

A summary of the deal terms is available on the WGA website.<sup>158</sup> The 2023 MBA amends parts of the 2020 MBA:<sup>159</sup>

- MBA minimums increases: by 5% on ratification of the contract, by 4% on 5/2/2024, and 3.5% on 5/2/2025.

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<sup>154</sup> For more details on the differences between the continental and the Anglo-American approaches to contracts, please see at Chapter 1, Section 1.3., § 1.3.1.3. of this publication.

<sup>155</sup> See: <https://www.hollywoodreporter.com/business/business-news/writers-guild-deal-reached-studios-end-of-strike-1235403981/>

<sup>156</sup> See <https://www.wgacontract2023.org/announcements/2023-mba-ratified>

<sup>157</sup> On AI, its use for projects covered by the MBA is now regulated: AI is not a writer, and AI-generated written material is not considered literary material, source material or assigned material under the MBA. While companies cannot require writers to use AI software, a writer may ask the company to use AI when writing as long as the writer follows the company policies. Besides, companies using writers' services shall disclose to writers if materials they received were generated by AI. Finally, on AI, the WGA reserves the right to assert that the exploitation of writers' productions to train AI is prohibited by the MBA or other law.

<sup>158</sup> See: <https://www.wgacontract2023.org/the-campaign/what-we-won>

<sup>159</sup> See: <https://www.wgacontract2023.org/the-campaign/summary-of-the-2023-wga-mba>



- A new viewership-based streaming bonus for “high budget subscription video on demand” series and films: a bonus of 50% of the fixed domestic and foreign residual to be paid to writers when the content is viewed by a minimum 20% of the VOD’s audience in the first 90 days of release (or in the first 90 days in any subsequent exhibition year).
- VOD will provide the WGA with streaming data, subject to a confidentiality agreement.
- For series employment, writers will see their weekly pay increase by the agreed rate under the MBA (5%, 4%, and 3.5%).

A tentative agreement to amend the 2020 Codified Basic Agreement between SAG-AFTRA (actors) and the Alliance of Motion Picture and Television Producers was reached on 10 November 2023.<sup>160</sup> The amendments cover areas such as:

- Meaningful protections around the use of artificial intelligence, including informed consent and compensation for the creation and use of digital replicas of members, living and deceased, whether created on set or licensed for use;
- Wage pattern increases: 7% upon ratification and 4% increase effective July 2024 and 3.5% effective 1 July 2025;
- Wages for background actors will increase by 11% effective November 12, 2023, and then by an additional 4% effective 1 July 2024 and by another 3.5% effective 1 July 2025
- New compensation stream for performers working in streaming.

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<sup>160</sup> For further details on the deals, see at <https://www.sagaftra.org/contracts-industry-resources/contracts/2023-tvtheatrical-contracts> and <https://www.sagaftra.org/sag-aftra-national-board-approves-tentative-agreement-recommends-ratification-2023-tvtheatrical>.

## 5. Case law

This section reviews some relevant case law examples at EU and national level in relation to key concepts related to “appropriate and proportionate” remuneration, “proportionate” versus “fair” remuneration and other concepts related to transparency and the exercise of rights.

As the CDSM Directive was transposed belatedly in many member states (at the time of writing, Poland is still at draft stage), there is as yet no relevant case law, apart from a few exceptions. However, certain concepts used in the Directive have been the subject of abundant case law for many years, which may be helpful in better understanding the limits of the concepts used in the Directive, such as the principle of appropriate remuneration or the “best seller clause”. This Chapter first reviews cases brought before the Court of Justice of the European Union (CJEU), followed by several ongoing or recently resolved cases at national level.

### 5.1. Court of Justice of the European Union

#### 5.1.1. Principle of appropriate remuneration for authors and performers

According to Recital 10 of the Infosoc Directive, “if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work”.<sup>161</sup> As stated in the Impact Assessment on the modernisation of EU copyright rules, creators should therefore be able to license or transfer their rights “in return for payment of appropriate remuneration which is a prerequisite for a sustainable and functioning marketplace of content creation, exploitation and consumption”.<sup>162</sup>

The purpose of copyright has been envisaged many times throughout the various judgments of the Court of Justice of the European Union (CJEU). Back in 1993, the Court

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<sup>161</sup> Directive 2001/29/EC, op. cit.

<sup>162</sup> Commission staff working document impact assessment on the modernisation of EU copyright rules, Part 1/3, op. cit.





held in *Phil Collins and others*<sup>163</sup> that the purpose of copyright “is to ensure the protection of the moral and economic rights of their holders”. It further emphasised that “the protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation”.

In addition to this, the Court has regularly recalled that “copyright and related rights are also economic in nature [...]”.<sup>164</sup> In joined cases 55/80 and 57/80 *Musik-Vertrieb membran v GEMA*<sup>165</sup> from 1983, and later in 1993 (*Phil Collins*<sup>166</sup>), and in 2011 (*Football Association Premier League and Others*<sup>167</sup>), the CJEU acknowledged that such rights “notably confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties”. This “form of control of marketing [is] exercisable by the owner, the copyright management societies and the grantees of licences”.<sup>168</sup>

Importantly, in *Coditel and others*,<sup>169</sup> a CJEU judgment from 18 March 1980, the Court established that the right of a copyright owner and their assignees to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work (paragraph 14). The Court further developed this principle, including in *OSA and others*<sup>170</sup> from 27 February 2014, which related to remuneration owed to rightsholders for the communication of their works to the public in a spa establishment and the lawfulness of monopolistic CMOs. The Court noted in paragraph 23 that the principal objective of Directive 2001/29 on copyright and related rights in the information society is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public.

In 2011, the Court however acknowledged that despite such a remuneration right, the issue generally remains that rightsholders are not guaranteed “the opportunity to demand the highest possible remuneration [...] [but are only] ensured appropriate remuneration for each use of the protected subject-matter” (Paragraph 108, *Football Association Premier League and Others*).

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<sup>163</sup> *Phil Collins and others*, Judgment of 20 October 1993, C-92/92, <https://curia.europa.eu/juris/liste.jsf?num=C-92/92>.

<sup>164</sup> *Ibid*, Paragraph 20

<sup>165</sup> *Musik-Vertrieb membran v GEMA*, Judgment of 20 January 1981, Paragraph 12, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61980CJ0055>.

<sup>166</sup> *Phil Collins and others*, Judgment of 20 October 1993, C-92/92, Paragraph 20, <https://curia.europa.eu/juris/liste.jsf?num=C-92/92>.

<sup>167</sup> *Football Association Premier League and Others*, Judgment of 4 October 2011, C-403/08, Paragraph 107, <https://curia.europa.eu/juris/liste.jsf?num=C-403/08&language=en>.

<sup>168</sup> *Phil Collins and others*, Judgment of 20 October 1993, C-92/92, Paragraph 21, <https://curia.europa.eu/juris/liste.jsf?num=C-92/92>.

<sup>169</sup> *Coditel and others*, Judgment of 18 March 1980, C-62/79, <https://curia.europa.eu/juris/liste.jsf?num=C-62/79>

<sup>170</sup> *OSA and others*, Judgment of 27 February 2014, C-351/12, <https://curia.europa.eu/juris/document/document.jsf?docid=148388&doclang=EN>.



## 5.1.2. Principle of equitable remuneration

In a judgment from 6 February 2003,<sup>171</sup> and later confirmed in cases from, for example, 2006,<sup>172</sup> 2012<sup>173</sup> and 2020,<sup>174</sup> the CJEU addressed an issue relating to the determination of the equitable remuneration to be paid to performing artists and phonogram producers for the broadcasting of phonograms by radio and television. At national level, the case pitted the Association for the Exploitation of Related Rights (*Stichting ter Exploitatie van Naburige Rechten* - SENA) vs. the Dutch Broadcasting Association (*Nederlandse Omroep Stichting* - NOS). While SENA was mandated to collect and distribute equitable remuneration under Article 15 of the Law on related rights (*Wet op de naburige rechten* – WNR), it could not come to an agreement with NOS as to the amount that constituted “equitable remuneration”, leading SENA to bring an action before the District Court of the Hague. The case reached the Dutch Supreme Court after the Court of Appeal stated that Directive 92/100/EEC on Rental and Lending Right does not harmonise the method for calculating the equitable remuneration and that it is up to the parties themselves to endeavour to produce in the first instance a calculation model that should be based on a number of factors, including the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by NOS or the tariffs applied by public broadcasters in member states adjacent to the Netherlands.

In its judgment, the CJEU found that the concept of equitable remuneration referred to in Article 8(2) of Directive 92/100/EEC is a Community concept in that the said provision makes no express reference to national law for the purpose of determining its meaning and scope, and must therefore be interpreted uniformly in all the member states. The Court and all the parties in the main proceeding further agreed that Directive 92/100/EEC gives no definition of the concept of equitable remuneration and it deliberately omitted the laying down of a detailed and universally applicable method for

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<sup>171</sup> Judgment of the Court (Sixth Chamber), 6 February 2003, Case C-245/00, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=48034&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2930367>.

<sup>172</sup> *Commission of the European Communities v. Kingdom of Spain*, Judgment of 26 October 2006, Case C-36/05, <https://curia.europa.eu/juris/document/document.jsf?text=C-245%252F00&docid=63938&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1092014#ctx1>.

<sup>173</sup> *Società Consortile Fonografici (SCF) v Marco Del Corso*, Judgment of 15 March 2012, C-135/10, <https://curia.europa.eu/juris/document/document.jsf?text=C-245%252F00&docid=120443&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1092014#ctx1>.

<sup>174</sup> *Atresmedia Corporación de Medios de Comunicación SA v Asociación de Gestión de Derechos Intelectuales (AGEDI), Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE)*, Judgment of 18 November 2020, Case C- 147/19, <https://curia.europa.eu/juris/document/document.jsf?text=C-245%252F00&docid=233869&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=1092014#ctx1>.

calculating the level of such remuneration. There is therefore no objective reason for the Community judicature to lay down specific methods for determining what constitutes uniform equitable remuneration, as this would result in its acting in the place of the member states. It is therefore for each member state to determine, in its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and Directive 92/100 in particular, adherence to that Community concept.

As to the criteria to be used for determining the amount of the equitable remuneration, and what limits are imposed on the member states, the CJEU stated that it is not for the Court itself to lay down the criteria for determining what constitutes equitable remuneration, nor to set general predetermined limits on the fixing of such criteria. It however provides the national court with the information it needs to assess whether the national criteria used for assessing the remuneration of performing artists and phonogram producers are such as to ensure that they receive equitable remuneration in a manner that is consistent with Community law. The Court therefore concluded that Article 8(2) of Directive 92/100 does not preclude a model for calculating what constitutes equitable remuneration for performing artists and phonogram producers on the basis of variable and fixed factors such as those raised by the Court of appeal in the main proceedings.

### 5.1.3. Unwaivable right to fair compensation

The *Luksan* case, from 9 February 2012,<sup>175</sup> in which Martin Luksan, film director for “Fotos von der Front”, opposed Petrus van der Let, the film producer, addressed the issue of an unwaivable right to fair compensation.

Both the director and the producer had signed an agreement to write a script and direct the film documentary on one hand, and to produce and exploit the work on the other. All exploitation rights were assigned to the producer though the agreement, with the exception of the right to make available the work to the public on digital networks and to broadcast it on closed circuit TV and pay TV.

Despite this, the film producer made the film available online and assigned the rights to an online video platform. The producer claimed that national law [Article 38(1) under the Austrian Copyright Law (UrhG)] allowed a departure from the said agreement insofar as it “provides for the original and direct allocation of the exploitation rights to the film producer alone” (paragraph 32) and that, consequently, any agreements diverging from that rule or a reservation having the same effect were void. In addition, according to the producer, “because of the contract awarding him all the exploitation rights in the film, all the statutory rights to remuneration [would] also vest in him” (paragraph 30). Besides,

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<sup>175</sup> *Luksan*, Judgment of 9 February 2012, C-277/10, <https://curia.europa.eu/juris/liste.jsf?num=C-277/10&language=EN>.

it is agreed that Austrian legal literature and case-law understand Article 38(1) UrhG as providing for the original and direct allocation of exploitation rights to the film producer alone, rather than for a 'statutory assignment' or a presumption of transfer of those rights. In addition, sentence two of Article 38(1) UrhG provides that statutory rights to remuneration, including the "remuneration for reproductions made on recording material", are to be shared equally by the producer and the author of the film, but expressly allows agreements derogating from that principle, even as regards the share vesting in the author.

Seized by the Austrian courts, the CJEU addressed the national court's first question related to the interpretation of several articles of the EU copyright acquis, as the notion of "author" in relation to that of "principal director", and the exclusive rights to authorise the communication of works to the public by satellite, the reproduction and the communication of works, the right of making other subject matters available to the public as well as rental and lending rights. This first question sought in particular to ascertain whether those articles are to be interpreted as meaning that the exploitation rights in a cinematographic work belong by operation of law directly and originally to the principal director, in their capacity as author of that work, and whether that precludes national legislation to attribute those rights by operation of law exclusively to the producer.

The Court therefore sought to discuss the status of the film director and concluded that he was indeed an author under the Satellite and Cable Directive, the Rental Directive and the Term of Protection Directive, which designate the (principal) film director as the author or one of the authors of the cinematographic work. It further established that, as an author, the film director had to be granted the right to fair compensation, which could not be waived, the purpose of it being "to compensate the rightsholders harmed for the prejudice sustained", which would be "conceptually irreconcilable with the possibility for a rightsholder to waive that fair compensation" (paragraph 106). The Court further established that the rights to exploit a cinematographic work vest directly and originally in the principal director by operation of law. National legislations which grant exploitation rights exclusively to the producer of a work by operation of law are thereby precluded (Paragraph 72).

The second question from the national court asked whether the presumption of transfer established for the rental right may also be laid down for other exploitation rights such as those at issue in the main proceedings (satellite broadcasting rights, reproduction rights and any other right of communication to the public through the making available to the public) and, if so, subject to what conditions.

In its reasoning, the CJEU recalled the principles laid down under Recital 5 of Directive 2006/115, according to which a balance must be struck between, on the one hand, observance of the rights and interests of the various natural persons who have contributed to the intellectual creation of the film, namely the author or co-authors, and, on the other, those of the film's producer, who has taken the initiative and assumed the responsibility for the making of the cinematographic work and who bears the risks connected with that investment. The Court also addressed the fact that ensuring a satisfactory return on cinematographic investments also extends beyond the context of



just protection of the rental and lending right. Based on these elements, the Court held that a presumption of assignment of exploitation rights to the film producer must also be capable of being applied to other exploitation rights, provided that such a presumption is not an irrebuttable one, precluding the principal director of that work from agreeing otherwise (Paragraph 86 and 87).

Regarding the national court's question on the matter of fair compensation, the CJEU stressed that both the principal director, in his capacity as author of the cinematographic work, and the producer, as the person responsible for the investment necessary for the production of that work, must be regarded as being the holders, by operation of law, of the reproduction right. The principal director of a cinematographic work must, consequently, be regarded as a person entitled by operation of law, directly and originally, to the fair compensation payable under the private copying exception.

In its last answer to the Austrian national court, the CJEU considered the possibility for member states to provide for a presumption of transfer of the remuneration rights vesting in the principal director of a work in favour of the producer. In addressing this matter, the Court first examined whether European Union law in fact precludes provisions of national law which allow the principal director of a cinematographic work to waive the rights to equitable remuneration. In doing so, it established that, following the wording of Article 5(2)(b) of Directive 2001/29, European Union legislature certainly did not wish to allow the persons concerned to be able to waive payment of that compensation to them, the concept of 'remuneration' being designed to establish recompense for authors, since it arises in order to allow compensation for harm to the latter. In addition, the Court stressed that it does not follow from any provision of Directive 2001/29 that the European Union legislation envisaged the possibility of the remuneration right being waived by the person entitled to it. The CJEU therefore concluded that member states do not have the option of establishing an irrebuttable presumption of transfer of the remuneration rights vesting in the principal director of that work in favour of the producer of a cinematographic work.

## **5.2. National**

### **5.2.1. France - Conseil d'Etat on the concept of appropriate and proportionate remuneration**

In France, the transposition of the CDSM Directive triggered concern, first in the industry and among professional organisations representing authors and, subsequently, in the French Courts.



Article 18 of the CDSM Directive was transposed by Ordinance n°2021-580 from 12 May 2021.<sup>176</sup> However, the issue in this case related to the distortion between the French transposition and the wording of the Directive. While Article 18 CDSM establishes the principle of appropriate and proportional remuneration for authors and performers, the French Ordinance from 2021 did not entitle authors who assign their exclusive rights to receive “appropriate” remuneration. Article L131-4 CPI only provides for “a proportional share of the revenue<sup>177</sup> from the sale or the exploitation of the work for the author” for the transfer of rights. This provision remained unchanged after the transposition of the CDSM Directive. Art. 131-5 CPI however transposed Art. 20 of the Directive on contract adjustment mechanisms.

On 12 June 2021, the *Comité pluridisciplinaire des artistes-auteurs et des artistes-auteurs* (CAAP) and the *Ligue des auteurs professionnels* (LAP) lodged a complaint on grounds of *ultra vires*, seeking to have the text annulled. The request for annulment was brought against Article 4, 5, 9, 11 and 12 of the Ordinance.

According to the *Conseil d’Etat*, although the contested Ordinance created, in Article L. 131-5 CPI, an action for revision of the terms of the contract on the grounds of unfairness or inadequate estimation of the proceeds of the work when the work has been assigned for a fixed fee, and, for the transposition of Article 20 of the Directive, a right to additional remuneration when the proportional remuneration initially provided for proves to be unreasonably low, it did not provide, contrary to what the Directive requires, that the remuneration be “appropriate” from the start. The French Court therefore agreed that both applicants are entitled to seek annulment of the said Ordinance, in so far as it does not provide that authors assigning their exclusive rights for the exploitation of their works are entitled to receive appropriate remuneration.

Based on this reasoning, the Ruling of the French *Conseil d’Etat* of 15 November 2022 annulled the 2021 Ordinance, and in particular Article 4 thereof.<sup>178</sup> Article L131-4 CPI, which had not been amended by the Ordinance, is therefore to be modified. The provisions on the remuneration of performers remain unchanged.

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<sup>176</sup> Ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'article 2 et des articles 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>. For more information on the French transposition of the CDSM Directive, please refer to Chapter 3 of this publication.

<sup>177</sup> « la participation proportionnelle aux recettes ».

<sup>178</sup> <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-11-15/454477>.

## 5.2.2. Belgium - request for annulment against law transposing CDSM Directive

When transposing the CDSM Directive, the Belgian legislator made use of the possibility given by Art. 18.2 and introduced two new remuneration rights to the Belgian Code of Economic Law (BCEL).

A first additional remuneration right (to be found in Art.XI.228/4 BCEL) offers authors and performers a right to be remunerated for the use of their work and performances by the OCSSPs which are identified by Art. 17 of the CDSM Directive.<sup>179</sup> 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 BCEL) 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 BCEL. This remuneration right is unwaivable and non-transferable. It is mandatorily collectively managed if no collective agreements are applicable. Both remuneration rights are 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 already applies to cable retransmission and direct injection.

These new remuneration rights became effective on 1 August 2022, when the Belgian law of 19 June 2022 entered into force. Just before the deadline of 1 February 2023, Google, Spotify, Streamz (a local streaming service), Meta, as well as several record labels (Sony Music, Universal Music, Warner Music, PIAS, N.E.W.S., CNR Records, and BRMA) filed a partial action for annulment before the Belgian Constitutional Court against the transposition law.<sup>180</sup> While the requests from Meta do not concern the new remuneration rights (but the transposition of the articles concerning journalists and press publishers), the other parties' requests concern one or both of the new remuneration rights.

Several parties representing authors and performing artists including SABAM, PlayRight, SACD, and SOFAM, have intervened in the procedure in support of the Belgian State in defending the new legal provisions, which are very similar to those in force in other member states, including Spain and Slovenia.

The case is currently under review. In 2016 the Constitutional Court already rejected a similar action for annulment when the Belgian law introduced a remuneration right for cable retransmission, confirming it was compatible with EU law.<sup>181</sup> Also in Spain,

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<sup>179</sup> Art. 17 CDSM Directive itself is transposed literally by Art. XI.228/2, XI.228/3 and XI.228/5 to XI.228/9.

<sup>180</sup> <https://www.const-court.be/fr/judgments/pending-cases#pending-cases-card-7922>.

<sup>181</sup> Cour Constitutionnelle belge, arrêt n° 128/2016 du 13 octobre 2016



the courts already confirmed twice that the Spanish remuneration right of performers regarding making available is compatible with EU law.<sup>182</sup>

It needs to be noted that an action for annulment does not affect the applicability of the Belgian legislation, which remains in force.

### 5.2.3. Germany - Contract adjustment mechanisms and best seller clause: Das Boot case

The German case *Das Boot*<sup>183</sup> involves a landmark decision in the field of claims for additional remuneration rights for authors and performers. It is based on the contract adjustment mechanism provided for in Article 20 of the CDSM Directive and transposed under Article 32a of the German Copyright Act (UrhG). At the time of the decision, Article 32a provided for further participation for the author if he/she had granted another person a right of use under conditions that were “conspicuously disproportionate” to the income and advantages from the use of the work. In Germany, this contract adjustment mechanism is known as the “fairness paragraph”, rather than the Directive’s “best-seller clause”. The UrhG in addition hereto also provided (and still provides) in Article 32 that if the agreed remuneration is deemed to be not equitable, the author can require the other party to consent to a modification of the agreement so that the author will thus receive equitable remuneration. A claim under Article 32 (as opposed to a claim under Article 32a), however, was time-barred because of a statute of limitations, as the case was only brought some 30 years after the film was produced.

The 2011 case pitted the chief-cameraman of the Oscar-winning film “Das Boot”, in two different courts, against the production company and the distributor of the film, as well as an association of public broadcasters which had broadcast the film many times on their channels. According to the plaintiff, there were clear indications that after 28 March 2002, when the fairness paragraph came into force, a “conspicuous disproportion” had arisen between the income and benefits achieved by two of the defendants on the one hand, and the agreed remuneration of the plaintiff on the other. Based on this, the chief cameraman asserted claims for additional remuneration, after the fairness paragraph was implemented in 2002. Facing a lack of transparency in respect of the exploitation of the work and the yielded revenues, he asserted claims for disclosure and accounting against the defendants, as a first step, in preparation for claims for equitable participation. It is in this context that the Federal Court of Justice (BGH) provided guidance on the interpretation of the term “conspicuously disproportionate remuneration”.

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[https://www.ejustice.just.fgov.be/cgi/article\\_body.pl?language=fr&caller=summary&pub\\_date=16-11-21&numac=2016205325](https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=16-11-21&numac=2016205325).

<sup>182</sup> See Provincial Court of Madrid, 31 March 2015 and Supreme Court Spain, 12 July 2017.

<sup>183</sup> BGH, Judgment of 22. 9. 2011 - I ZR 127/10 - Das Boot; OLG Munich (lexetius.com/2011,7240) <https://lexetius.com/2011,7240>.





In its decision, the BGH stated that the answer to the question as to whether there was indeed a conspicuous disproportion first required the determination of the remuneration agreed with the author and the income and benefits obtained by the user. The Court then established as a general rule of interpretation that there is a conspicuous disproportion if the agreed remuneration is only half of a remuneration deemed to be equitable. Such equitable remuneration is determined within the meaning of Art. 32(2) sentence 2 UrhG: “[...] 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 use granted, in particular the duration, frequency, extent and time of use, and considering all circumstances.” In addition, the entire relationship between the author and the user must be taken into account, since even minor deviations can, depending on the circumstances, justify a conspicuous disproportion.

The initial case from 2011 was decided by the courts for the first time before the revision of the UrhG in 2021, when the phrase “conspicuously disproportionate remuneration” was replaced with “disproportionately low remuneration”. Following this, the case underwent further legal proceedings and decisions by the BGH in 2020<sup>184</sup> and 2021.<sup>185</sup> On 1 April 2021, the BGH overturned the ruling of the OLG Munich Court from 2017 and the case was referred back to the Court of Appeal for a new hearing and decision. According to the BGH, systematic errors were made in the calculation of the possible claims for compensation, i.a. in establishing which part of the remuneration originally agreed upon was to be allocated to the period up and until 2002 as the year in which the claim for equitable remuneration first came into force. In the meantime both law suits have been finally decided or settled respectively.

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<sup>184</sup> Urteil des I. Zivilsenats vom 20.2.2020 - I ZR 176/18, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2023&nr=104709&linked=urt&Blank=1&file=dokument.pdf>.

<sup>185</sup> BGH, Urteil vom 1. April 2021 - I ZR 9/18 - OLG München, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=118990&pos=0&anz=1>.

## 6. Concluding remarks

While the creative industries are widely acknowledged as a significant source of employment and income for the EU economy, a driver of innovation and a contributor to the well-being of society, the contractual aspects related to copyright and related rights of creators have, until recently, scarcely been addressed.

With the implementation of Chapter 3 of Title IV of the CDSM Directive, the protection of authors and performers in contractual negotiations on rights exploitation has been brought to the forefront, with a view to redressing the asymmetry between contractual parties. The new provisions introduced by the Directive to ensure creators an appropriate and proportionate remuneration are accompanied by a comprehensive set of tools to ensure that this obligation is met. These include obligations for greater transparency throughout the value chain, the possibility of adjusting contracts if the remuneration initially agreed is deemed disproportionately low, the granting of a new right of revocation in favour of creators and the possibility of submitting disputes to an alternative dispute resolution procedure. By introducing these new tools, the legislator is intervening in the field of fundamental rights, and, in particular, in the fundamental principle of contractual freedom as recognised by the Charter of Fundamental Rights of the European Union. Beyond the contractual parties involved, this incursion into the field of fundamental rights is motivated by the need to guarantee the balance required for a healthy and dynamic creative environment.

It is still early to ascertain the practical implications of these new tools. National implementation of the provisions is taking place in a fragmented European legal context where member states have put in place different mechanisms and adopted different approaches due to the flexibility allowed by the CDSM Directive. These approaches range from collective bargaining to the establishment of new remuneration rights for creators, facilitated through mandatory collective management. Some member states already have relevant experience, as the protection of creators had already been addressed in their national law even before implementation of the CDSM Directive. In others, these are new provisions, often transposed literally, which will lead to further legal developments.

The interpretation of certain notions and concepts related to the remuneration of authors and performers will also be further addressed through case law. While the national and international courts have already examined a variety of matters, including the principle of appropriate and equitable remuneration and the unwaivable right to fair compensation there related, the transposition of the CDSM Directive is bound to trigger more questions on the interpretation and application of those concepts. Various cases



have already been or still are under review at national level since the transposition. While France has annulled certain provisions of the Ordinance transposing the CDSM Directive, an action for annulment has also been filed before the Belgian Constitutional Court. The case is currently still under review.

At the time of writing, two agreements have been reached in the US by the WGA and SAG-AFTRA, ending the strike started by screenwriters and actors earlier in May 2023. This shows how central the issue of fair remuneration for creators is at a global level, in particular in the context of streaming platforms, with a view to supporting the vitality and sustainability of the film and audiovisual sector. At the same time, the European Parliament adopted on 21 November 2023 a legislative initiative to improve social and professional conditions for artists and workers in the cultural and creative sectors (CCS).<sup>186</sup> In particular, the Parliament calls for an EU framework, combining legislative and non-legislative tools, including a directive on decent working conditions and correct determination of employment status of CCS professionals, Council decisions to work towards EU standards in the sector via a European platform for exchanging best practices, and adapting EU funding programmes to labour and social standards applicable to artists. These latest developments in the EU suggest that the issue of remuneration is only the first piece of a larger picture.

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<sup>186</sup> Report with recommendations to the Commission on an EU framework for the social and professional situation of artists and workers in the cultural and creative sectors, Committee on Employment and Social Affairs and Committee on Culture and Education, 21 November 2023, <https://www.europarl.europa.eu/news/en/press-room/20231117IPR12106/status-of-the-artist-better-working-conditions-for-artists-and-cultural-workers>.

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