How to Best "Sell" the "Best-seller" Clause?

A review on whether the Contract adjustment mechanism proposed by the EU draft Digital Single Market Directive can secure fair (additional) remuneration for authors and performers.

by

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Declaration

I, Katerina Stechova, confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by others, that this is duly acknowledged below and my contribution indicated. Previously published material is also acknowledged below.

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Katerina Stechova

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Abstract

The current - and very relevant - debate about the way authors and performers lose control over exploitation, and more importantly, revenue generated through use of their works and performances in the digital world somewhat overshadows the fact that there are existing scenarios arising from the normal course of dealings in such works where the same occurs and were remedy of any such "injustice" has not been fully enshrined in law. A right to additional fair remuneration is a concept recognised to various degrees in some Member States of the EU but not all, scaling from (seemingly) zero in the UK to quite an elaborate regulation in Germany. Where they are recognised, application and enforcement of relevant provisions also vary.

The EU sought to harmonise the issue of author´s and performer´s access to fair share of revenue generated from exploitation of their work or performance (for normal dealings and in digital spheres of copyright exploitation) in its new draft Directive. The Proposal for a Directive on Copyright in the Digital Single Market published in September 2016 dedicates its Chapter 3 of Title IV to Fair remuneration in contracts of authors and performers; contract adjustment mechanism introduced in Article 15 attempts to tackle the issue by proposing a statutory right to additional remuneration being introduced throughout the EU Member States. Or, was the aim of this provision originally even broader?

In this work, three main areas are addressed: (i) the background and justification of inclusion of such provisions into the Draft DSM Directive; (ii) current applicable law in Germany, Czech Republic and the UK; three countries each representing different historical and doctrinal approach to copyright law and thus providing unique benchmarks for the analysis, (iii) reconciliation of the first two parts: analysing what – if any – change in the national legislation would be needed for the three Member States to transpose the provision into the national laws.

By way of conclusion, recommendations to amend Article 15 of the draft Directive is based on the analysis made in the third part.

Table of Contents

Table of figures[1]

[1] Numbers of the figures do not go in a consecutive line; they reflect the number of the chapter or subchapter in which they are used.

Table of abbreviations

General Acronyms

´AV´	"audiovisual"
´Brexit´	planned exit of United Kingdom from the European Union
´EU´	the European Union
´CRM´ or	Collective Rights Manager, or also
´CRMO´	Collective Rights Management Organisation
´Commission´	the Commission of the European Union
´Internal Market´	internal market of the European Union - a single market in which the free movement of goods, services, capital and persons is assured
´MEP´	Member of the Parliament of the European Union
´MS´ or **´Member State´**	Member State of the European Union
´SMEs´	Small and medium-sized enterprises (SMEs) as defined in the EU recommendation 2003/361[2]
´T&C´	"terms and conditions" in the meaning of contract content
´UK´	the United Kingdom
´VOD´	"video on demand"
´WIPO´	World Intellectual Property Organization

Journals

E.I.P.R.	European Intellectual Property Review
Ent. L.R.	Entertainment Law Review

[2] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises

IIC	International Review of Intellectual Property and Competition Law
I.P.Q.	Intellectual Property Quarterly
JIPL&P	Journal for Intellectual Property Law and Practice

Studies referred to in this work

´2016 Print Remuneration Study´	a study called "**Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works**" prepared in 2016 for the European Commission DG Communications Networks, Content & Technology / DG Internal Market by Europe Economics and IViR (Study internal contract No. MARKT/2014/088/D1/ST/OP)
´2015 EU Remuneration Study´	a study called "**Remuneration of authors and performers for the use of their works and fixations of their performances**" prepared in 2015 for the European Commission DG Communications Networks, Content & Technology / DG Internal Market by Europe Economics and IViR as part of the Digital Single Market Strategy preparation (Study internal contract No. MARKT/2013/080/D)
´2014 Creators´ Contracts Study´	a study called **"Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States"** commissioned by the European Parliament, DG for Internal Policies in 2014 to a group of copyright and economics academics led by S. Dusollier (details in bibliography section)
´2010 SABIP Study´	a Research commissioned in 2010 to a group of copyright and economics academics by the Strategic

	Advisory Board for Intellectual Property Policy (SABIP) called "**Relationship between Copyright and Contract Law**"
´2002 EU IP Contracts Study´	a study called "**Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union**" commissioned by European Commission, DG Internal Market to IViR, Amsterdam in 2002 (Study contract No. ETD/2000/B5-3001/E/69)

Legislation and accompanying documents

International

´Berne Convention´	Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended, an international convention administered by World Intellectual Property Organisation
´TRIPS agreement´	Agreement on Trade-Related Aspects of Intellectual Property Rights

European Union

´Computer Programme Directive´	Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version)
´CRM Directive´	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

´Database Directive´	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
´DSMD´, **´Proposal´**, **´DSM Directive´** or **´Draft DSM Directive´**	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, published in Brussels, 14.9.2016, COM(2016) 593 final, 2016/0280 (COD)
´DSMD Impact Assessment´	the Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules *Accompanying the document* Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market *and* Proposal for a Regulation of the European Parliament and of the Council 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 (SWD(2016) 301 final)
´DSM Strategy´	Digital Single Market Strategy as introduced by the Commission in May 2015 (COM(2015) 192 final)
´InfoSoc Directive´	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
´Orphan Works Directive´	Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works
´Rental Directive´	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)
´Resale Right Directive´	Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art
´Term Directive´	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)
´TFEU´	Treaty on the Functioning of the European Union

National

´BCA´	Belgium – Law of 30 June 1994 on Copyright and Related Rights (*Loi relative au droit d'auteur et aux droits voisins*),
´CDPA´	UK – Copyright, Design and Patent Act, 1988
´CZCA´	CZ – Act no. 121/2000 Sb. on author´s rights, rights related to author´s rights, and amendment of certain acts (copyright act), as amended
´IP Code´	FR – Law No 92-597, Intellectual Property Code *(Code de la propriété intellectuelle)*, dated July 1, 1992, as amended
´KUG´	Germany – Act on Authors Rights in Relation to Works of Art and Photography of 9 January 1907 (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie – „Kunsturhebergesetz"*)

´LUG´	Germany – Act on Authors Rights in Relation to Works of Literature and Music of 19 June 1901 (*Gesetz betreffend das Urheberrecht an Werken der Literartur un der Tonkunst*)
´NCZCC´	CZ – New Czech Civil Code – Act. No. 89/2012 Sb., Civil Code
´UrhG´	Germany – Act on Copyright and Neighbouring Rights of September 9, 1965 (*Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrecht) vom 9. September 1965*), for convenience in the text sometimes also referred to as "German Copyright Act"
´UrhWG´	Germany – Act on the Administration of Copyright and Neighbouring Rights of 9 September 1965 (*Urheberrechtswahrnehmungsgesetz*)
´ZPO´	Germany – Code on Civil Procedure of 30 January 1877 (*Zivilprocessordnung*)

Judiciary

European Union

´AG´	Advocate General of the CJEU
´CJEU´	Court of Justice of the European Union (formerly known – and some materials thus still referred to – as European Court of Justice, the "ECJ")

National

´BGH´	Germany - Federal Court of Justice *(Bundesgerichthof)*
´LG´	Germany – State Regional Court *(Landsgericht)*
´OLG´	Germany – Higher State Regional Court *(Oberlandsgericht)*

Associations and Bodies

´SAA´	The Society of Audiovisual Authors (SAA), established in 2010 by European collective management organisations (CRMOs) to represent the interests of their audiovisual author members, in particular, screenwriters and directors**.**
´DG Internal Market´	The Directorate-General (DG) for Internal Market, Industry, Entrepreneurship and SMEs, the European Commission service responsible for completing the Internal Market for goods and services
´IMCO´	Internal Market and Consumer Protection Committee of the European Parliament

Chapter 1 – Introduction

1.1. Introduction

In September 2016, the European Commission released the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market[3] together with the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market[4].

Stakeholders and commentators were strongly divided on the Proposal. Much of the debate focused on the creation of a new neighbouring right for press publishers, the measures imposed on platforms storing and giving access to user-uploaded content, and the scope of the new text- and data-mining exception.[5] Due to the controversy of these issues and strong competing interests of various stakeholders, the Proposal has seen many changes throughout the legislative process.[6] Many of the disappointment also stems from the fact that the Commission "failed to critically question the actual fundaments of copyright"[7], or "have not taken full account of how copyright licensing works to provide incentives to invest in the great range of content that consumers enjoy"[8].

The proposed DSM Directive´s Title IV Chapter 3 deals with Fair Remuneration in contracts of authors and performers, and specifically in its Article 15 (Contract adjustment mechanism) introduces into the EU copyright law an author´s or performer´s claim to additional compensation from their contracting party to which they transferred exploitation rights if the remuneration received for such exploitation rights is disproportionately low compared to the proceeds generated through the use

[3] COM(2016) 592 final
[4] COM(2016) 593 final
[5] https://epthinktank.eu/2016/11/30/copyright-in-the-digital-single-market-eu-legislation-in-progress/, accessed June 2017
[6] More details are provided in Chapter 5.
[7] Comments of SA&S on the Directive Proposal on Copyright in Digital Single Market, http://www.auteursrechtensamenleving.be/en/comments-sas-on-the-directive-proposal-on-copyright-the-digital-single-market/, published December 1, 2016, accessed June 2017. The SA&S makes an appeal to the European Commission to effectively establish a major reform of copyright laws.
[8] ´Comments from The British Screen Advisory Council (BSAC) on the Digital Single Market Copyright Proposal published by the EU Commission on 14 September 2016´, <http://www.bsac.uk.com/wp-content/uploads/2016/12/BSAC-Response-EU-Sept-2016-Copyright-Package-FINAL.pdf>, published 6 December 2016, accessed June 2017. The BSAC also comments that legislative changes must not risk compromising the principle of territorial copyright licensing.

of the work or performance by such contracting party (providing for so called "bestseller clause", already implemented in some of the Member States´ laws). However, from the accompanying documentation driven by the Digital Single Market Strategy adopted in May 2015, it seems more likely that the initial goal of the EU legislator was not to introduce a "mere" bestseller clause. It seems more likely that the original goal was supposed to be ensuring that creators receive fair remuneration for uses of their creations throughout the whole supply chain in the flourishing digital markets, as well as traditional channels.

Authors and performers have traditionally been seen as the weaker parties in contractual transactions relating to the exploitation of their works and performances.[9] "One of the first relevant acts accomplished by the author, after the creation of an original work, is to entrust a publisher or producer to exploit commercially his/her rights, hence to give up some part of control over her work, in order to obtain access to the market. This first contract, transferring copyright over an artistic work might be a tricky episode for creators as they will in most cases be in a weaker bargaining position, due to their inexperience, lack of information or will to be published or produced at any cost."[10] Through personal as well as work-related contacts, the author of this thesis has been acquainted with many authors and performers in the Czech Republic and, knowing their personal stories, has for long felt that more attention could be paid to the – at least seemingly – imbalanced correlation between the creative efforts and the remuneration creators receive for such efforts, especially at the beginning of their careers. Such imbalance may be minimised when the creator becomes well recognised, but such recognition often is a result of luck or other unusual circumstance. Amount of creative efforts will not always be equal to amount of remuneration received. Unlike in some other professions, that is not how it works in arts, music, writing, etc.

Initially the research aim was to see if it makes any sense to introduce a harmonised European measure that would help bring closer together the piecemeal legislation of some EU Member States. In various forms and to different extent, laws of the EU

[9] See more details with regards to Germany in Chapter 4.1 and to Czech Republic in Chapter 4.2. Further commentary provided in http://gdknowledge.co.uk/ec-proposals-for-a-directive-on-copyright-in-the-digital-single-market/.

[10] The 2014 Creators´ Contracts Study, p. 6 (more on the study and its conclusions in Chapter 3)

Member States provide assistance and protective measures against unreasonable exploitation of the creators´ weakness.[11] There is, however, a vast difference in mechanisms employed by various jurisdictions. Common law jurisdictions, such as the United Kingdom, promote a relatively *laissez-faire* attitude towards the inclusion of protective measures within copyright law. It is believed that the optimal mechanism is a regulatory-free, economic environment encouraging the concepts of "freedom to contract", and collective bargaining and management. Civil law jurisdictions adopt a variety of measures, but overall promote a legal environment which ensures general protection against exploitative contracts, as well as conferring, or, at least, encouraging equitable authorial remuneration to both authors and performers. It is not very clear though which system produces optimal remuneration for authors and performers balanced with the financial risks taken by the producers and publishers.

While contemplating about the approach, the Commission introduced the Proposal for the DSMD. The way the Proposal deals with the Contract Adjustment Mechanism (Art. 15) was relatively surprising. It has always been the aim of the author of this work to focus on the contractually agreed remuneration rather than on different models of collectively managed rights, compulsory licensing, various digital schemes, new business models, etc. A lot has been written about these issues while analysis of the former is almost nonexistent.[12] The focus was always going to be very narrow in this respect anyway. But the fact that the wording of the Proposal seems to be tackling only such limited sphere and thus aligns with the research goal came as a surprise, especially after reading the accompanying documents which suggest otherwise. It is argued later in this thesis that this may have not been the initial goal and that the text in the form it reached its initial publication gave in to many compromises needed between all relevant stakeholders. The Proposed Article 15, as well as this thesis, primarily address the issue of fair contract-based remuneration for creators, allowing to reflect the creation´s exploitation success. Is such fair

[11] For example, ban of "opt-out" contractual clauses introduced in the Czech Copyright law in 2006 in relation to bestseller clause, or the whole German legislation aiming for strengthening authors´ bargaining position – see below.

[12] The Bibliography chapter provides many sources on the former but very limited on the latter, especially in relation to the UK, EU, and also Czech Republic. The only jurisdiction providing any leads is Germany.

remuneration secured in the national legislations observed? And, is the provision of Article 15 of the draft DSMD capable of tackling the issue on a European level? If the answers are no, what should follow?

Given that there is little empirical evidence to support a claim that preservation of copyright is economically inefficient[13] some suggest that the opposite is true[14]. From efficiency, a parallel can be drawn to "fairness" and to the lack of firm evidence that it is in fact not achieved. However, lack of evidence does not always mean non-existence of the issue. In this discussed topic, this may also result from insufficient research done to this respect. Therefore, until we have such research at hand, we may rely on the ever-present perception that the system is not always fair to creators; if not to all then at least to those who are at the beginning of their careers and need a "break-through".

There are several models applied to secure fair compensation to authors and performers through collective rights management, levy systems to compensate for private copying etc. However, only some EU Member States provide measures to secure fair compensation for uses dealt with through individual contracting. As indicated, this work specifically focuses on the remuneration based on these individual negotiations, and in particular on the way how an author or performer can claim equitable remuneration (in ideal scenario) or any additional participation, if it turns out to be due.

The content of exploitation contracts and the level of remuneration paid to authors and performers have not been subject to comprehensive regulation at the European level.[15] This results in a very diverse legislation of Member States, some having adopted protective measures to the benefit of authors and performers with respect to

[13] *Consultation on Copyright - Comments on Economic Impact*, (Oxford Economics (Commissioned by the UK Government), Oxford, 2012), at p. 1

[14] Discussed in S. J. Liebowitz, ´Is the Copyright Monopoly a Best-Selling Fiction?´ (School of Management University of Texas at Dallas, 2008). This specific study relates to the US copyright system and admits that before relying too much on the conclusions thereof, it should be scrutinized by more academics (at. p. 28). But it demonstrates that making claims of inefficiency or unfairness of a system is not as straightforward as it seems and should be accompanied by reliable empirical data. Lack thereof is exactly the factor missing for a bulletproof justification for introduction of measures such as the bestseller clause discussed in this work.

[15] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11 July 2001, COM(2001) 398 final, Annex 1, p38

scope of transfer of rights or the formation, execution, and interpretation of contracts concluded with broadcasters, publishers and other producers; other Member States leave it basically to the contracting parties (respecting fully the principle of freedom of contract) to negotiate the content of their agreements and the amount of remuneration of authors and performers.[16] Also, in many Member States authors and performers have formed trade unions or rely on CRMOs to provide support in the negotiation of contracts or the fixation of the level of remuneration.[17] The landscape is so diverse that – with the advancement of digital exploitation of rights and cross-border uses – it became virtually impossible for the authors and performers to follow, in already complex web of relationships and transactions, use of their works and fixations of their performances and the level of remuneration obtained. The European Commission has flagged this issue as one of the areas possibly hindering free movement of creative content and services throughout the Internal Market in the digital-driven world, and started - relatively recently - looking into the causes and solutions of the problem. The studies commissioned or accessed by the Commission which have direct relevance for this topic are discussed in this thesis. It is evaluated to what extent the EU legislator was able to project the outcomes and recommendations of these studies into the Digital Single Market Strategy and the final draft of the DSM Directive.

Some form of "best-seller" clause and other provisions helping authors and performers to secure fair remuneration for their creative effort can be imposed into given regulation in various ways. Through statutory contract law (as *lex generalis*), through statutory copyright law (as *lex specialis*), or through other mechanisms raging form case law or equity to collective bargaining, tariffs set up by CRMOs, etc. The primary focus of this thesis is a mechanism best described as the "best-seller" clause; however, it cannot be taken out of context. The primary goal of any "best-seller" clause is to secure for the authors and performers a fair compensation for their creative effort through portion of the proceeds made from every use of their work or fixed performance for the cases when the work or performance became very successful but the initial transfer does not reflect the possibility of the creator

[16] The 2015 EU Remuneration Study, p. 32

[17] S. Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, study prepared for the European Parliament, Committee on Legal and Parliamentary Affairs, PE 493.041, European Union, 2014

participating proportionately on the proceeds from exploitation of such creation. That can however be achieve through variety of routes, including (in addition to the bestseller provisions) rules on equitable remuneration in general (not only in reaction to specifically successful works), options to terminate transfer contracts due to various "failures" on the part of the transferees, reversion of copyright, collectively managed unwaivable statutory right for specific transfers of rights, etc. While in detail only the "best-seller" clause will be examined in relation to national provisions of Germany, Czech Republic and United Kingdom, and in relation to the new EU proposal, a lot of account will still be given to these other options as well.

A lot of European context will be provided through reproduction of conclusions of studies conducted in recent years on the issues of remuneration of creators, copyright and contract law within the European legal framework.

Evaluating all the data assessed, it will be argued in the end that the current wording of the Proposal is not capable of harmonizing sufficiently creators´ right to fair remuneration throughout Europe. Several recommendations will be done into how to possibly amend the proposed text of Article 15 of the DSM Directive. While rhetorical question is posed in the concluding chapter as to why even introducing such measures on a European level when there is no empirical evidence that a) it is needed and b) will resolve the issue at hand, this line of thinking is not much pursued in this work. The work will build on a premise that until proven otherwise one should assume that there can be certain degree of unfairness in the way some creators are remunerated for exploitation of their subsequently successful creations (or, in general, for their creative efforts), and that this topic needs to be addressed on a European level in order to achieve a truly free market with creative content within the EU. Accepting this premise, the analysis will go further in assessing whether the proposed text of the DSMD is capable of achieving the goal and/or whether it requires any amendments.

1.2. Methodology

In developing the arguments and recommendations presented in this thesis, mainly comparative approach has been adopted, on both micro- and macro- scale. The issues of creators´ contract-based remuneration, copyright law and law of contracts, and

their overlaps and interactions, were examined from different angles. On the one hand a microscopic revue of the legislation in three different EU jurisdictions, namely Germany, Czech Republic and the United Kingdom, has been conducted; looking at the historical development and justification of grant of copyright protection in those countries, including any constitutional basis for the protection and provision of reward to creators, analysis of current applicable law revolving around contract-based remuneration for creators, and – where any relevant exists – case law and market practice.

The sources for these data were academic literature, including commentary in journal articles, applicable law including case law, and with regards to the Czech Republic also personal practical experience and access to relevant stakeholders. In relation to Germany, the access to resources was limited by the need for materials in English language only. A lot of information was found in journal articles written by German scholars and practitioners in English and some reliance on specialised copyright blogs (by renowned authors) must be admitted. Given that English law in the area of copyright contract law is not too developed, English chapter is not very detailed in the examination of history and statutory provisions. More attention is paid to the area of case law in the area of contract law, where a weaker party to contract seeks to reverse a transfer of rights or obligation undertaken. This has been done with some, though limited, knowledge of the English legal system. Comparison with English law is insisted on though in order to demonstrate the whole scale of legal systems co-existing within the European Union. While Germany represents a monistic tradition within copyright law, and Czech Republic is a (quasi)dualistic civil law system, United Kingdom (or, England and Wales to be precise) is a typical common law country with all its specifics.

In order to put the national provisions into a broader, EU-wide, context, a lot of studies were consulted in great detail. It is impossible to capture all 28 EU jurisdictions and the studies reviewed provided a helpful sample of relevant data. To maintain enough space for own analysis, however, only a top-line overview of the conclusions of the research conducted by their authors is provided in Chapter 3. Basic information on the methodology of each of the studies consulted is provided in the text.

In addition to the study of these traditional resources, given the very topical nature of the overall analysis presented in this thesis, in relation to the European Proposal, the main source of information comes from the DSM Directive itself and the accompanying documentation forming the Commission's Digital Single Market Strategy. In addition, records of discussions and proposals made within various Committees in the EU structures were studied and used. This provided a very up-to-date insight into the overall acceptance of the Proposal in individual Member States and helped support the confirmation of the hypothesis set out below in the Objective and Scope of work.

Also, to demonstrate on a real practical example the differences between various jurisdictions´ solutions to the same problem, a case study was prepared. A non-fictional scenario is introduced and then it is discussed how such problem could be resolved in each of the three jurisdictions.

1.3. Previous research

There have been several studies conducted by academics for different EU or national governmental bodies that deal with the issues of copyright law, contract law, and remuneration, and correlation between them; not always factoring in all these areas in one study together though. Due to the multi-jurisdiction scope of each of the studies, there is a sufficient amount of data on these various aspects in various EU Member States. However, none of them cover all the 3 three areas mentioned above for all Member States. Also, whereas Germany and the United Kingdom are represented in all of them, none of them covers law applicable in the Czech Republic. While some of the studies do touch upon the topic of best-seller clause, no specific study has been conducted to see how variations of this clause have been utilised by creators and whether they provided them with any support in their bargaining. And there has not been a comparison yet provided to the new provisions of the draft DSM Directive.

Some of the studies listed below were specifically conducted for the European Commission as a supporting material in preparation of the DSMD Proposal or as help in shaping the Digital Single Market Strategy, but it nevertheless does not seem that conclusions made by the authors of those studies were taken into account to a great

extent by the EU legislator. Speculations as to why that is the case follow later in the analytical part.

Specifically, the studies supporting the research made during work on this thesis are the*´2016 Print Remuneration Study´* on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works; the *´2015 EU Remuneration Study´* on the remuneration of authors and performers for the use of their works and fixations of their performances; the *´2014 Creators´ Contracts Study´* looking into the contractual arrangements applicable to creators and the law and practice of selected Member States; the *´2010 SABIP Study´* providing insight into the relationship between copyright and contract law; and the *´2002 EU IP Contracts Study´* on the conditions applicable to contracts relating to intellectual property in the European Union, which was conducted in all (then only 15) Member States of the EU.

Since the DSM Strategy and the pieces of regulation introduced by the European Commission as tools to bring the Strategy into reality are all very recent, making the research very topical, it is needless to say that there is very limited amount of materials on this. Besides documents provided by the EU bodies, accompanying the DSM Strategy (which will tend to be critical and self-reflecting to only limited extent – compared to academic materials normally available in support of similar research), there is only a very limited amount of academic and practitioners´ commentary, available in journal articles.

There is almost no material on any of these areas of law with respect to the Czech Republic available in English. The ability to translate the relevant provisions into English from the author´s native language therefore also represents some, although small, contribution to the knowledge in the field.

With respect to language barriers, it needs to be emphasised that while there is surely plethora of commentary on the German copyright contract law in German language, not much work is available in English. General explanation and commentary on the new legislation is available in English (mainly through journal articles written by German academics), but a comprehensive commentary on the individual provisions of the German Copyright Law and their history and development has not been translated into English yet. This somewhat limits the possibilities of thorough

understanding of rationale behind the examined provisions by someone whose knowledge of German language is very limited.

Therefore, most resources are available on English law, although very little is available on measures helping to strengthen creators´ position in their contract negotiations due to the fact that such measures are almost non-existent. Since there is enough material available on general copyright and general contract law, only the minimum background is mentioned in this thesis which is necessary to provide comparable set of data to the Czech and German national rules and to support any arguments made. Therefore, the text related to English law is rather "poor" (hopefully, only in terms of quantity) on purpose, in order to save space for the "previously unexplored" topics.

1.4. Definitions and clarification of intent

Some concepts, terms, and doctrines follow like a thread through the whole text of this work. It seems to be beneficial for the easy flow of reading the text to explain these terms and also the scope of this work at the very beginning.

Copyright v. Authors' Rights

To clarify the differences between the two different approaches, when speaking about the rights to author's creations, term 'copyright' shall be used in relation to the UK and other common law jurisdictions, having its origin in the right to stop others from copying a work, while the term 'author's rights' shall be connected to civil law jurisdictions and thus refer to rights conferred to the author of a work, including both economic and moral rights as they together form author's rights. Therefore, where speaking only about one category of the author's rights, it will be explicitly stated whether economic or moral rights are addressed, otherwise the term should be taken to stand for both of them.

However, when referring to an area of law, either as applicable legislation or in a scholarly meaning, the term 'copyright law' is to be used for both common and civil law jurisdictions as it includes, in a broader sense, not only rights conferred to authors (exclusive rights and remuneration rights) but also provisions regarding rights to performances and other related rights, and is also a set term.

Authors or Performers?

This work aims to capture and analyse the protection granted to both authors and performers. In the description of the individual jurisdictions´ provisions, it will be specifically stated if (and where) there is a difference between the provisions regulating authors´ and performers´ rights. Specific provisions´ numbers will be provided for regulation related to author´s and performer´s rights or numbers of cross-referencing provisions.

For the sake of smoother reading and fluency of the text, however, in many cases only 'authors' will be mentioned, while also performers are meant to be included. Unless specifically pointed out otherwise, when describing a situation related to author´s rights same applies for performers *mutatis mutandis*. Also, to simplify, authors and performers may be collectively called ´creators´.

Transfers (Assignment, License, Waiver)

Once copyright/author's rights protection of a work is established under the relevant jurisdiction, an author has a right to exercise his rights to such work personally or to transfer their use to others, either by way of assignment or by way of a license, either in part or in their entirety, to one person or separately to different persons. He/she can also confide their administration to another person, for example to a collecting society.[18] In certain jurisdictions he/she can also waive the exercise of certain aspects of his rights.

For the purposes of this work, to unify the terminology; '*transfer*' shall mean any of these transactions: 'assignment', 'license', and 'waiver'. Thus, when referring to 'assignment', this shall mean specifically transfer of ownership, particularly outright transfer of author's economic rights, as one of the means of transfer under a copyright/author's rights regime.

Remuneration types

There are different ways to remunerate the author. The three most common forms used are (1) proportional remuneration, (2) equitable remuneration and (3) a lump sum. A combination is also possible. Proportional remuneration allows authors to be associated with the success of their works. On the other hand, payment of lump sum

[18]J.A.L. Sterling, *World Copyright Law*, (3rd Edition) Sweet & Maxwell 2008, at p. 580

can represent a certainty for the creators, as proportional remuneration (royalty) is dependent on the works success which at the beginning of dealing is not always certain. "Equitable remuneration" within the meaning of contract based remuneration (as oppose to remuneration provided as a compensation for uses based on copyright exceptions) is specific to German law. Beyond this meaning, there is no particular difference made between the terms reward/ compensation/ remuneration/ participation (with the term "remuneration" being used most frequently due to its usage in many of the documents analysed) and understanding of what is fair or equitable. Fairness is used more often due to its better understanding "on the continent", while "equity" is a concept enrooted in English law. Nevertheless, both terms will sometimes be used interchangeably in this work.

Best-seller clause

In order to make sure that creators are able to participate on the financial success of their work, some countries opt for a best-seller clause. The provision gives authors and/or performers a right to ask for modification of the remuneration based on their contract if they feel that the transferee is gaining a disproportionate economic advantage from the exploitation of the work in comparison to the payment agreed[19].

English law

This thesis examines the law of England & Wales, as distinct from Scottish law and Northern Irish Law, which are not in scope of this work. As such, while for the sake of variety reference to the UK will also be used in this paper, it always refers to the legal system of England and Wales; "English" law refers to the same, as does "UK" law. Hopefully, this inconsistency will be pardoned in the interest of colourful language.

International copyright law

In order to avoid unnecessary repetition in the subsequent chapters - mainly in the parts of national chapters dedicated to history and justification, when referring to the international copyright law, all the below listed international instruments are taken into account. Since all the three jurisdictions discussed in this thesis gradually

[19] This provision should be distinguished from general regulation of equitable remuneration as introduced in Germany.

accessed to all the relevant international copyright treaties and conventions, there is no need to mention them again in the individual subchapters. For more details on timings of accession of United Kingdom, Germany, and the Czech Republic to individual documents and their Protocols one can consult for example Chapter 23 of the latest edition of Copinger and Scone James on Copyright[20] or go to the World Intellectual Property Organisation website[21].

All the three above mentioned countries are members of the following treaties: Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended, Universal Copyright Convention of 1952, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of 1971, the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (the TRIPs Agreement), WIPO Copyright Treaty of 1996, WIPO Performances and Phonograms Treaty of 1996, Beijing Treaty on Audiovisual Performances of 2012. Only the latest 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled has not been accessed by either of them[22].

The major contribution to protection of authors and performers in the discussed jurisdictions is the Berne Convention´s introduction of the two fundamental principles of "national treatment" and "convention rights". As such, as of the Convention´s adoption an author can claim in any state which is a party to the Convention the same protection as the country of claim gives to its own nationals. And any author entitled to rights under the Convention can claim such rights, irrespective of whether the country of claim gives these rights to its own nationals.

[20] K.Garnett, G.Davies, G.Hardbottle, *Copinger and Skone James on Copyright. Volume 1* (17th edn., Sweet & Maxwell, 2016)

[21] hhttp://www.wipo.int/treaties/en/ (accessed July 2017), although this web site will only show WIPO-administered treaties.

[22] As per information on the WIPO web site http://www.wipo.int/treaties/en/ as accessed in July 2017.

Theoretical Background to Monism and Dualism in Copyright Law

There are fundamental theoretical differences between the copyright and author's rights systems and although, as Rahmatian[23] points out, they lead to similar results in everyday business, these differences are important for the present analysis. The system to which each jurisdiction belongs heavily influences how strong is the bond between the author or the performer and their work or performance respectively. That in turn influences how limited is the author´s dealing with the work and how much the legislator tends to protect the author, even from his/her own imprudence, when entering into contracts. "Assignment/licensing rules are directly dependent on the conceptual decision of copyright/author's rights system in question."[24]

Under copyright systems, the UK being a paradigmatic example, a work does not have to reflect its author's personality and it does not have to have any cultural or artistic merit; the author's skills and labour are protected.[25] This follows Locke's labour theory as a justification of property rights.[26] Rahmatian sums this up further: "copyright is not directed at the protection of 'creativity' or artistic creation of any kind; the general principle is that if the work originates from the author's own skill and labour, it represents a potential economic value and deserves protection (normally) in favour of its maker, and someone's copying indicates the protectable value of copied source.[27] "*This concept of protection affects rules on the transfer of copyright as "once a creation is protected, the copyright turns the creation into property*"[28]. In the UK, and in general also in other copyright systems, copyright in a protected work can be freely assigned[29] because it is merely a type of property and this entails transferability, or the use of the property without outright transfer can be granted by way of license[30] in the same way that real property can be sold or rented[31].

[23]A. Rahmatian, Dealing with Rights in Copyright-protected Works: Assignment and Licenses in E. Derclaye, *Research Handbook on the Future of EU Copyright*, 2009, Chapter 12, at p. 287
[24] Ibid
[25] Ibid at p. 288
[26] Ibid at p. 287
[27]Ibid, at p. 289, referring to Petersen J's decision in *University of London Press v. University Tutorial Press [1916] 2 Ch 601, 610*
[28]Ibid at p. 290
[29]Copyright, Design and Patents Act 1988 ("CDPA 1988"), s. 90 (1) – "Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property."
[30]CDPA 1988, s. 90 (2)
[31]Ibid Rahmatian, (2009), p. 291

First assignment splits the authorship and the ownership; after that the copyright vests in the assignee and no longer in the author. The author retains moral rights; however, these are quite a recent feature in UK copyright and are very fragile; in fact, they are often curtailed, especially by way of their waiver[32].[33] "*Thus moral rights have no decisive relevance in a copyright system and can almost always be ignored in the context of assignment and licensing rules*".[34]

Under authors' rights systems, on the other hand, moral rights are extremely important. In contrast to a copyright system, where they are merely an addendum to the copyright protection laws, they are arguably the backbone of an author's right system and the primary justification as to why protection is granted in the first place as Rahmatian argues[35]. This is definitely the case in countries accepting the monistic approach, like Germany or Austria, and even though recent commercialization of the area puts moral rights slightly on the back foot, it is in principle true for 'dualistic countries' as well. Protection of an author rests principally on the author's person, thus the author's right is primarily a personality right from which economic rights also originate[36]. The emphasis of the personal aspect of the modern author's rights is expressed in the protection criteria, which differ in theory significantly from copyright systems; a work is only protected by an author's right if it bears the "mark" or "stamp" of the author and is therefore "original"[37]. It falls upon national legislators, or eventually courts, to decide what level of originality is necessary in reality. However, in author's rights jurisdictions, reference to an author's person and/or his intellect is always involved in one or another way. Thus, in French law, a work is original if it represents a "work of mind"[38], German law requires "personal intellectual creation"[39], a Czech author's work has to be a "unique outcome of the creative activity of the author"[40], Bulgarian law provides that a work has to "result from creative work"[41], and so on.

[32]CDPA 1988, s. 87 (3)
[33]Ibid Rahmatian, (2009), 291
[34]Ibid
[35]Ibid Rahmatian, (2009), 292
[36] Ibid Rahmatian, (2009), 291
[37]Ibid Rahmatian, (2009), 254
[38]Article L.112-1 of 1992 IP Code – "all works of the mind, whatever their kind, form of expression, merit or purpose are protected"
[39]Article 2 (2) Act No. 35/1965 Coll., on Literary, Scientific, and Artistic Works (the "1965 Act")
[40]Article 2 (1) of CZCA
[41]Article 3 (1) of 1993 Law on Copyright and Related Rights

There are subsequently major differences between the regulations of civil law countries which have adopted a monistic approach to author's rights and those applying the dualistic concept. The essence of dualism lies in the legal independence (sovereignty) of author's economic rights and moral rights, in complete transferability of economic rights *inter vivos* and in the different duration of moral and economic rights after author's death.[42] The monist theory on the other hand regards author's rights as an indivisible whole with both personal and economic aspects[43]. In countries applying this approach, moral and economic (patrimonial) rights cannot be separated and assignment of author's right is not possible. There is also an issue regarding the duration of rights; both aspects of an author's right have the same term of protection in countries following a monistic approach.

1.5. Objective and scope of the thesis

The main objective of this study is to assess how likely is the proposed Contract adjustment mechanism set out in Article 15 of the DSMD Proposal to achieve its goal. That is, how likely is it to secure such fair remuneration of creators for the transfer of their rights in their creations which will reflect all the relevant uses taking place throughout the supply chain in both the "analogue" but also the digital channels, except where the remuneration for such use is managed through different channel than contractual arrangement (e.g. remuneration based on exception to copyright protection and collectively managed).

In order to understand all the relevant factors and complexities, however, closer look is taken at the correlation between remuneration for creators, copyright law and general contract laws. What are the tools used by legislators in these areas that somehow affect creator´s remuneration when they wish to strengthen their bargaining power? Given that the context here is EU-wide, but at the same time it is impossible to capture the situation in all the 28 markets, two actions were taken. Firstly, micro-approach was taken in relation to three jurisdictions within the EU, where each represents one of the traditions within copyright laws; that is namely monistic

[42]P.Tůma, *Smluvní licence v autorském právu (Contractual License in Author's Rights*, (1st Edition) 2007, at p. 13
[43]Ibid Rahmatian, (2009), 296

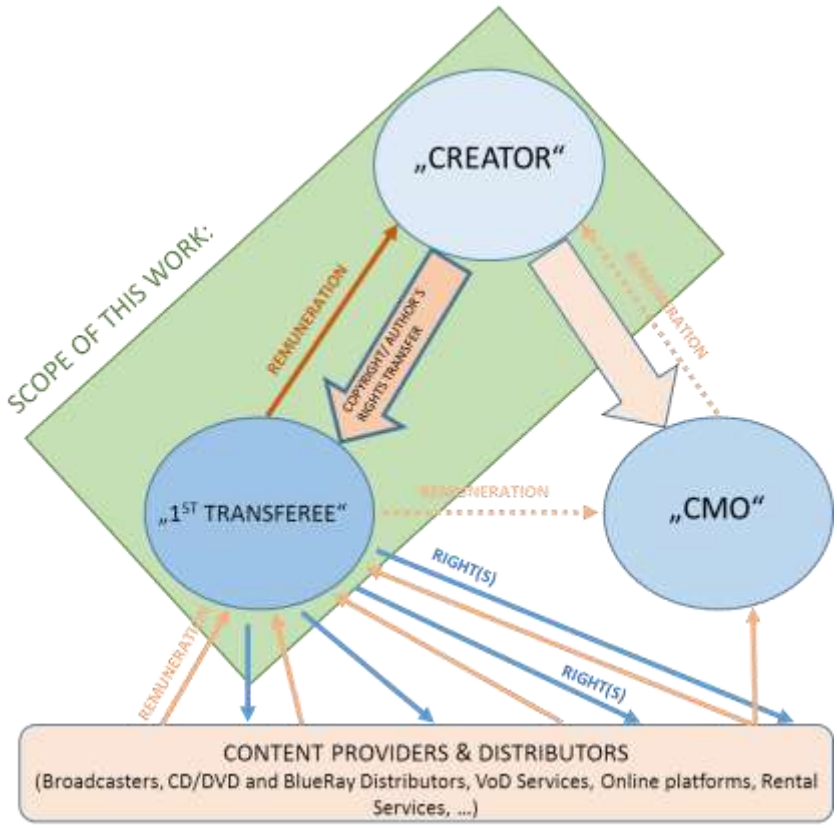
Germany, (quasi)dualistic Czech Republic, and common-law United Kingdom (England and Wales). Secondly, a lot of intelligence was taken from studies addressing the above outlined areas. The studies, in most cases conducted for multiple EU jurisdictions by larger teams of copyright (and economics) academics, provide a very useful set of information.

Together, these two sets of data should help not only to fulfil the main objective of answering the research question set out in the title of the work: How to best "sell" the best-seller clause? What steps should be taken (amendments made) to convince the national legislators to take on board the "contract adjustment mechanism" proposed by the Commission. Combining the two sets of data extracted from the analysis also enables to compare copyright contract frameworks of the three jurisdictions studied in detail within the practices throughout Europe.

As regards the scope of the study, it needs to be explained that the work focuses only on the first layer of relationships and contracts within the process of creative effort and subsequent dissemination. The relations analysed are those of authors and performers and their "first transferees", i.e. the publishers and producers they first go to with their creations. It does not concern subsequent intermediaries, such as broadcasting organisations, distributors, online platforms etc. Below in Figure 1.5. the scope of the study is outlined by the green box.

In addition, only the remuneration based on the contracts entered into with these first transferees, not remuneration based on exceptions to copyright law, collected by the collective rights management organisations or otherwise, is evaluated. Nevertheless, one must at least be aware of the whole context in which the contractual remuneration is provided, which includes these other forms of remuneration. However, mere acknowledgement of existence of those forms of remuneration is provided. This work does not attempt to analyse how collection and distribution of these funds are secured.

Figure 1.5.



Finally, in relation to the Proposal of the DSM Directive, the scope of detailed analysis is defined by Article 15. While some attention must be paid to the accompanying provisions of Articles 14 and 16, it is done only to the extent necessary.

The hypothesis of this work is that Article 15 of the DSMD, as drafted by the European legislator and introduced in September 2016, is not - in its current wording - fit to achieve its objective, which is to secure fair remuneration for authors and performers for the uses of their works and fixations of their performances. Comparing it to similar provisions in EU national legislations, it is not, arguably, even fit to secure fair *additional* remuneration, i.e. additional compensation for "bestsellers". This leads to another sub-hypothesis: the Commission must have not originally intended to impose on EU Member States an obligation to introduce a "best-seller" clause but rather a measure broader than that.

1.6. Limitations

The research provided in this thesis is limited by several factors. It is not possible on the space given to provide an overview of all the legal frameworks within the EU. For that reason, only three MS were chosen for in-depth evaluation. At the same time, however, since the materials were available, conclusions made in a detailed study of other MSs´ legal frameworks could be utilised by way of consulting several studies.

Also, there is a time limitation in play. The debate about the shape of the DSM Directive is at the point of submission of this thesis still ongoing, partially as predicted but partially against expectation. Therefore, the conclusions can only be made based on the status known by June 2017.

Additional limitation is given by language capabilities of the author. While Czech and English languages pose no problem, resources related to German copyright law can only be used where available in English (as none exist in Czech language). This limitation also drives the selection of countries examined in detail. Firstly, for example France could have been a better representative of dualistic civil law systems, but due to language barrier the author of this thesis would not be able to access enough materials. When choosing a monistic civil law jurisdiction, the limitations were twofold. First, there is very limited number of countries following monistic tradition. But also, only German lawyers and scholars produce sufficient amount of material in English language to provide enough basis for the study.

Finally, due to the limit of amount of words, a lot of issues has been taken for established and was not further analysed in the work, unless absolutely necessary. The extent of analysis is already quite extensive without providing explanations on differences between common law and civil law countries with respect to authorship of "entrepreneurial works", neighbouring and related rights, scope of employee and commissioned works etc. The author is aware of the differences between some concepts in civil and common-law copyright laws but chooses to ignore them unless crucial for the explanation provided in this thesis.

1.7. Thesis outline

By way of introduction, Chapter 1 sets the scene and explains the intention of the research, its scope, objective, methodology, previous research available, the terminology used, and extent of contribution of this work to knowledge in the field. It delineates the limitations of the work.

Chapter 2 provides further context for some of the topics and factors discussed further in the following chapters. Specifically, the chapter explains briefly the distinction between exclusive rights and remuneration rights and to what extent which of them are discussed; it explains the bargaining process and how copyright law justifies provision of compensation provided to creators; looks into the stakeholders involved in the creative industries, but only to the extent necessary to provide some background. This also means touching upon the levels of "copyright contracting". Further, the chapter provides an outline of various legislative tools used across EU Member States to protect creators in copyright contracts – both available in copyright law and general contract law; and non-contractual options such as collective bargaining.

Chapter 3 primarily deals with the Proposal for the Digital Single Market Directive, specifically its Title IV, Chapter 3 – Fair remuneration in Contracts of Authors and Performers. The provision under microscope in this work is Article 15: Contract adjustment mechanism. However, the overall context of that Chapter 3 must be considered, including the Transparency obligation (Article 14) and Dispute resolution mechanism (Article 16).

In an attempt to understand why the Commission chose the wording and scope of Article 15 in particular, and of Chapter 3 of the fourth Title of the draft DSMD in general, a thorough analysis of (i) the relationship between copyright and contract law at the European level, and (ii) issue of adequate remuneration of creators within the *acquis* is also discussed in Chapter 3. Reference is made to several studies about these issues commissioned by the European Parliament, the Commission, or UK Government to some European academic institutions.

At the beginning of Chapter 3, recent CJEU jurisprudence on authors´ remuneration is outlined in order to demonstrate that the notion of need to reward creators is

currently ever-present in the European couloirs. More importantly, it also demonstrates the other controversies of the Proposal.

Chapter 4 is divided into three subchapters, each dealing with the applicable national law on the additional participation of authors and performers on the revenues generated through the use of their creations and generally on creators´ contract- based remuneration.

Chapter 5 is divided into three equally important sections. First, capture of scholarly commentary and current debate within the European institutions on the wording of the DSMD proposal is provided, looking into any amendments proposed so far. Second part outlines what (if any) steps would need to be taken for the Article 15 to be transposed into the respective national copyright laws (and partially also deals with Article 14). Finally, a case study is presented, offering a real case considerable for the claim of additional adequate remuneration. It is discussed, how the outcome of such claim would differ applying the three national laws.

If the Commission primarily attempted to tackle with Article 15 DSMD what can be described as the need for harmonisation of a "best-seller" claim in European copyright law the outcome is not ideal but acceptable. If, however, provisions of Title IV, Chapter 3 aim at securing an overall fair distribution among right holders of revenues generated from all uses of works and fixed performances throughout the whole supply chain of copyright works, including digital uses and new business models, it is argued in the concluding chapter that the Article 15 must be amended. Some recommendations on how specifically to amend the Proposal and thus fill any gaps in the text to rectify the situation follow.

This study reflects the respective laws and status of the legislative debate as of June 30, 2017.

Chapter 2 – Context

This chapter aims to provide a wider context for the outline and analysis that follows in the subsequent chapters, which operate with variety of terms, and refers to legislative techniques used in order to modify positions of contractual parties. In order to avoid the need to explain these concepts within the respective text where they are discussed and thus achieve easier flow of the paper, these concepts are explained as a preamble to what follows in the main chapters of this work.

Specifically, this chapter explains the distinction between exclusive rights and remuneration rights; it explains the bargaining process and how copyright law justifies provision of compensation provided to creators.

Also, as an important pre-text to the discussion that follows, to the extent necessary for present debate, it maps the stakeholders involved in the creative industries, and what are the levels/layers at which copyright contracts are concluded.

Finally, the chapter provides an overview of various legislative measures used across EU Member States to protect creators in copyright contracts. Such measures are available in different jurisdictions mainly in copyright law and general contract law in addition to non-contractual options such as collective bargaining.

The measures discussed include restrictions related to the form of transfer of rights and in general requirements of specific form, compulsory determination of the scope of rights transferred or of the remuneration scope (incl. general obligation to specify the amount of remuneration in the contract) or type (proportional remuneration, equitable remuneration or lump sum).

Other measures how to give way to legislative goals are specific interpretation of contracts embedded in the law (e.g. lack of certain provision will be construed as meaning a limited transfer), automatic termination of contract upon certain triggers, or presumptions of transfer.

2.1. Exclusive rights and remuneration rights

Copyright (author´s rights) and related rights (or in some jurisdictions called neighbouring rights) are frequently described as a bundle of rights "[…] applicable to various types of use and defined by their technical nature, such as making copies (reproduction), performing in public, communicating (by wire or wireless means), renting, displaying etc.".[44]

Copyright laws grant exclusive rights to authors and performers that allow their owners to authorise or prohibit particular uses with respect to the works or fixed performances to which they pertain. Exclusive rights, forming part of this bundle, can mostly be transferred (via assignment or licence) or sometimes even waived in favour of a third party. It is up to the individual creator whether they decide to allow others to do what the law initially exclusively allows only them.

Rather than exclusive rights, the law in some cases confers on authors and performers a right to receive remuneration for the use of works or other subject matter by a third party. Under these conditions, the use can take place even without the prior consent of the creator if remuneration for the use is paid. These rights are called remuneration rights. They are usually non-transferable. Sometimes, depending on the wording of specific law, they can be waived though.

"In addition, EU law also provides an in-between model in the exercise of copyright and related rights, whereby the transfer of an exclusive right is coupled with a right of remuneration."[45]

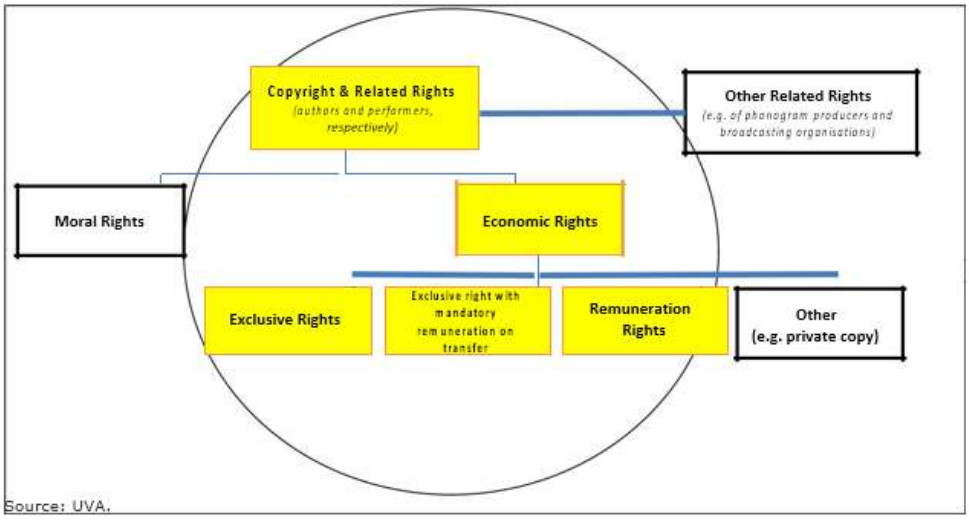
The below Figure 2.1. is taken from the 2015 EU Remuneration Study, because it not only depicts the types of economic rights of authors and performers, as perceived within the EU copyright law, but also because the scope of the study corresponds with the scope of this thesis. In addition to authors, it is only concerned with performers and not holders of other related rights. It does not deal with moral rights or systems of remuneration for private copying and similar "other" economic rights. In fact, as explained in Chapter 1, the 2015 EU Remuneration Study goes beyond the

[44] Daniel Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', in D. Gervais (eds) *Collective Management of Copyrights and Related Rights* (2nd edn., Kluwer Law International, 2010, the Netherlands), p. 2

[45] The 2015 EU Remuneration Study, at p. 23

scope of this thesis in that it addresses all the forms of remuneration, including those based on non-contractual arrangements, such as remuneration rights/exclusive rights with mandatory transfer. In the thesis, such forms of remuneration are not addressed in detail. They are only mentioned as complementing financial flows based on the exploitation contracts between creators and their first transferees.

Figure 2.1: (Legal) source of remuneration for authors and performers in the music and audiovisual industry[46]



2.2. Compensation to creators as part of justification for copyright

For many creators, the essential goal of the copyright contract is to secure remuneration for the transfer of their work so that they can "make their living" and continue creating. Despite the romantic notion of the urge to express oneself, only a small portion of creators does not seek any compensation for their efforts.[47] This notion is also repeated in the EU directives in the field of copyright. The InfoSoc Directive states that "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, as must producers in order to be able to finance this work"[48]. Securing appropriate reward for creators is a matter of "safeguarding the independence and dignity of artistic creators

[46] Figure taken from the 2015 EU Remuneration Study, p. 24
[47] Situations, when remuneration may not be the primary purpose of the exploitation of works and authors do not get paid specifically for the creative effort with the view of economic exploitation of the creation; will include scientific work and corresponding publications.
[48] Recital (10)

and performers"[49]. It is discussed later that irrespective of the legal tradition, the justification for copyright protection is always underlined by the economic interests of the author and/or the right to "reap what one sewn".

Agreeing on remuneration for the transfer of rights in a work or fixation of performance is the first opportunity for a creator to arrange some income in exchange for the transfer and to secure some participation in the revenue and economic exploitation of the work or the fixation of the performance. Such exploitation will be done by the transferee and subsequently by other exploiters with whom the creator may not (and most likely will not) have any relationship. This is why so much emphasis is given on the remuneration based on this first transfer of rights. At a later stage, if the reward is not properly negotiated, there are very limited options to secure additional agreement on payments.

The "first transfer contract" might determine the model for remuneration but will not automatically ascertain that any remuneration will be paid. This might be subject to the benefits generated (or not) by the work. But where the remuneration is proportional to such benefits generated (and the contract is well executed by the transferee), the creator will participate on the success achieved. If the reward agreed in this "first transfer" contract is unfavourable in the first place, the reasoning justifying introduction of copyright protection will have failed.

2.3. Stakeholder mapping

The below description does not aim to provide a comprehensive enumeration of all stakeholders ever involved in the activities taking place in relation to creative industries. It wishes to demonstrate on a few examples the complexity of the multi-layered web of relations and transaction involved and to (in addition to scope and limitations outlined in Chapter 1) set the "scene" for the following text.

It is impossible to list all stakeholders. In each layer of the relations there is an enormous multiplicity of players involved. There is a vast number of types of creators, of publishers/ producers, intermediaries and users. Creators (authors & performers) can be further divided into subgroups such as actors and stunts, (and in

[49] Recital (11)

some countries, a category of its own – voice over artists), recording artists and session musicians; authors of works musical (film scores, recording music, advertisement jingles), literary (books and articles, scripts, lyrics accompanying music, computer programs, databases), dramatic (directors), artistic (photograph, works of visual art, sets, costumes, visual effects, etc.). There are producers of films and book and music publishers, accompanied by music record producers. Producers will enter into deals with broadcasting organisations, DVD/BlueRay/CD distributors as well as providers of online services (VOD/streaming services, platforms such as iTunes, Spotify, etc.). We also should not forget collective management organisations. Ultimately there are users, who – in some sectors – may, however, be able to skip one of the layers. In some scenarios, creators are able to get to "users" directly or through just one intermediary, mainly where there is no complex or large scale "production" step.

The web of stakeholders involved will also vary depending on the specific sector in question. For example in the music industry, the supply chain is particularly complex. Distinction must be made between offline and online distribution of music, different repertoires and authors and performers. The offline supply chain will mainly involve publishers, playing essential part, and the authors (e.g. songwriters), who transfer their rights to the publishers. CMOs collect royalties and distribute them between the relevant right holders. But in the online sphere, the traditional dynamic between authors, publishers and CMOs has shifted. The role of CMOs in the online supply of music is more prominent compared to offline dealings. The record label (as a producer of phonograms) plays the central role in the supply chain for performers in the music industry both in the online and offline environment. In most cases, featured artists and session musicians transfer virtually all their rights to phonogram producers when signing a record agreement, with the exception of the right to equitable remuneration for the broadcasting and the communication to the public of commercial sound recordings, pursuant to Article 8 of the Rental Directive.[50]

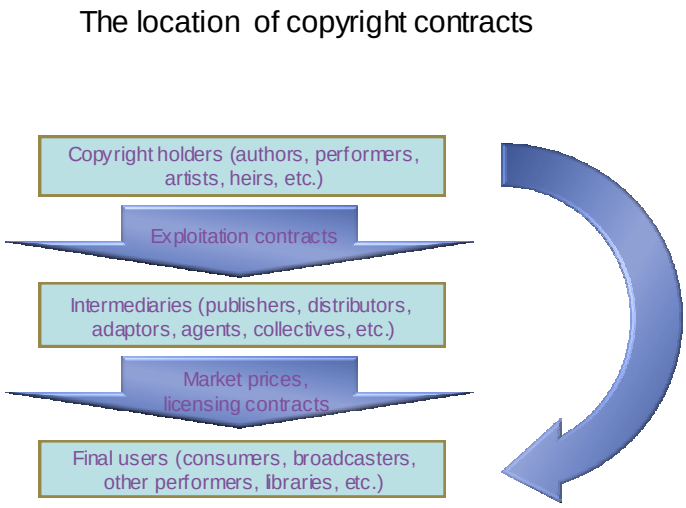
For authors and performers in AV sector, the dominant player is the producer who acts as a central point in the film and the TV industries; role of CRMOs is much more limited. In most cases, the producer is (by law or by contract) the initial owner of the

[50] The 2015 EU Remuneration Study, at p. 5

rights of creators in the audio-visual work. Producers, as the key right holders of a completed work are in charge of the granting of licences for the use of their products to the distributors and aggregators, while CRMOs play a role in granting licences and distributing the royalties collected from the cable retransmission right.[51]

Below in Figure 2.3., a "location of copyright contracts" depiction, borrowed from the later discussed SABIP study, is provided. This is just one example how the three (or more) layers of stakeholders can be visualised. This may vary when reflecting various sectors, some roles of the stakeholders outlined can be exchanged, etc.

Figure 2.3.: Copyright contracts – levels



Source: the SABIP Study, page 1.

As explained above in Subchapter 1.5. when defining the scope of this work, only the first layer of the above depicted contracts will be considered in this thesis, yet knowledge of the overall context is needed.

2.4. Contractual bargaining in copyright contracts

When creators transfer their authors rights/copyright to a publisher or producer, they do that in consideration of a contractual bargain, of a deal providing some advantages

[51] The 2015 EU Remuneration Study, at p. 6

in compensation of the transfer of their right.[52] The creator aims to have a work publicly distributed and disseminated so as to bring her some revenue and recognition. This first transfer contract is a fundamental act for the work, as it enables it to become an economic asset and to produce some revenue. The transferee is normally an economic actor which will provide to the author in exchange for the transfer the necessary investment in the production, publishing, and marketing of the work, its capacity of production and promotion, some endeavour in exploiting the work and finding channels for its public diffusion, access to the market, and the expertise and know-how in the said market.[53] The publisher or producer takes the risk of commercialisation of the work, by making it happen (film or phonogram production), by manufacturing commodities (books or phonograms publishing) or by including the work into some comprehensive product (newspapers articles or scientific articles). Sometimes, the creator does have the access to production capacities or the market on their own, but normally it is more practical to entrust the producer or publisher to assume such a role.

The transfer of rights is the contractual counterpart of the investment and risk undertaken by the transferee and, in return, remuneration should be paid to the creator for that transfer. With the producer exploiting the work, the author will hopefully be able to secure some profit.

This represents the essential bargain underlying copyright contracts between creators and producers or publishers. Creators expect in return for the transfer of rights not only fair remuneration. In addition, they utilise the access to the market provided by their transferee and seek the transferee's investment in making their work ready for such market. This is often overlooked or forgotten when discussing what is a fair benefit a creator should have from the exploitation of a work. If there were not these benefits from the transferees´ end of the bargain, creators might as well do without them and self-publish or otherwise exploit the work. After all, this is often the case with some online "self publishing". But in those cases, creators are usually willing to allow free use of their divulged creations. Because currently it is even more difficult to track the uses (and corresponding payments which are due) in the online sphere

[52] The 2014 Creators´ Contract Study, p. 22
[53] Ibid, p. 22

than in "physical" world. The ability to collect the proceeds from utilisation of works and performances is additional benefit the transferees provide to creators. Both, in digital and analogue worlds. Clearly, in many cases, if it was not for the transferee, the creator would obtain no remuneration, let alone fair.

In addition, creative works are "experience goods" in economic terms, which means that their value is only revealed after their use. This is projected in the difficulty to assess the value of the work and hence, the adequate remuneration for its transfer, in advance. It can be risky for the creator to request only proportionate remuneration, as there may be not enough revenue generated to even recoup any investment in the manufacture and expedition of the work. In those cases, the creator shares the risk with the exploiter. On the other hand, if the agreement is based on lump sum payment only, the creator will not be able to participate on success of the work. As such, it is argued that the optimal solution is the combination thereof.

2.5. Legal provisions possibly protecting authors in copyright contracts – copyright law

There are various tools specific for copyright law utilised across Member States in order to provide some form of support to authors and performers in a way that strengthens their bargaining position with their contractual counterparts to whom they transfer their rights. The most frequent or relevant ones are briefly outlined below.

Restrictions related to the form of transfer of rights

As explained above, the three main forms of transfer are (i) assignment, (ii) licence, and (iii) waiver of rights. Member States often use the limitation of certain form of transfer as another form of protection of authors. These limitations arise from the historical and philosophical justifications for copyright protection and differ rather dramatically across the jurisdictions. They can be generally grouped into three buckets. There are countries following common law tradition, civil law countries adhering to monistic system and civil law countries following dualistic system. The theoretical background to monism and dualism and how these two doctrines work is described below in Chapter 2, specific details on the link to history and justification of protection in all the three systems is provided in the national chapters.

Form requirements

Authors are better protected if there is a legal requirement of written form. For transferees, a written agreement is also useful if, for example, they wish to sue third party for infringement of transferred rights. Requirement of the contract to be in written form can also help the parties to lay down the scope of the transfer and the obligations of the parties, which would reduce further dispute.

Most frequently, written form is required for assignments of rights or provision of an exclusive licence, while non-exclusive license will often be concluded orally or by conduct.

Determination of the scope of rights transferred

Many countries implemented in their copyright laws mandatory contractual provisions to determine precisely the exact scope and terms of the rights transferred (including issues such as category of rights, geographical scope, duration, application to future works, unknown forms of exploitation, etc.). Authors can claim the nullity of a contract if certain of these mandatory items have not been laid down in it. This is another measure helping authors to have better position and to find some legal certainty, especially when applied in combination to rules on interpretation. It also allow authors to be more aware of the scope and the terms under which they transfer their rights. Indirectly, this helps limit the automatic transfer of the rights to one single exploiter.

These mandatory clauses can include the general obligation to determine the assigned/licensed rights and modes of exploitation in contracts, obligation to determine the geographical scope and duration of the transfer of the rights, prohibition to waive or assign some rights for remuneration, obligation to determine applicability to future works[54] or unknown forms of exploitation[55], restriction of

[54] Germany admits the possibility to grant exploitation rights for unspecified works that are not yet in existence but are to be created in the future; these rights do not need to be specified in an agreement but they need to be in writing; the contract can be terminated by either party after five years (all Sec. 40(1) UrhG). In the UK it is also possible to assign future rights according to case law (*Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All E.R. 616, discussed later), there are no rules limiting the transfer of future works to protect the interest of the authors.

[55] Technological changes and new digital media are opening new exploitation modes for authors to exploit their rights and rules on unknown forms of exploitation allow authors to retain a certain level of control over how their rights can be exploited in the future and ensure that they have the

transfer of moral rights.

Determination of remuneration

Remuneration of an author, especially within the context of this work, is one of the most important features of a contract. Given that authors are presumed to be in a much weaker position to negotiate an adequate level and type of remuneration some states introduce rules that can assist authors in obtaining an equitable/fair remuneration for the exploitation of their works. EU Member States generally tend to have some provisions on determination of remuneration, with the exception of the UK. In contrast, Germany has even recently amended the copyright law in order to recognise equitable remuneration as a key objective of copyright (Sec. 11 UrhG). Here are some examples how the sought determination of remuneration can be secured.

General obligation to specify the amount of remuneration in the contract

An obligation to specify amount of remuneration in the contract can also prove helpful. The national rules can also differ as to whether the remuneration amount can be zero, as long as it is explicitly stated in the contract, or if an actual amount must be agreed, even if just £1.

In Germany,[56] authors have a right to remuneration for the transfer of rights, but a contract will not be found null and void just because it does not mention it. If no specific payment is determined, the author will have the right to an adequate remuneration as discussed in detail below in the national chapter. According to Czech

freedom to exercise their rights in the way they consider would best serve their interests at the time such previously unknown form exploitation becomes evident. Author cannot evaluate the economic importance of the forms of exploitation that will arise in the future. Many countries adopted very stringent rules (Belgium, France, Hungary, Poland, Spain). In 2008, Germany has added a new provision in its legislation, stating that authors (not performers) are entitled to demand equitable remuneration for previously unknown forms of exploitation, rather than challenging the transfer of the rights as such. Before that, contracts on future uses unknown at the time of the licensing agreement were prohibited. The new rule simplifies dealing with copyright rights. Contracts dealing with unknown types of exploitation have to be in a written form and authors have the right to revoke the transfer of the right(s) within a period of three months after the transferee informed the author about the new form of exploitation. The author may not exercise this right contrary to the principle of good faith if her work is part of an entity of works that is being exploited (Sec. 31a UrhG). More details provided in the 2002 EU IP Contracts Study, p. 35.

[56] Sec. 52 UrhG

law, the remuneration must be agreed or it must stipulated that a licensee is provided free of charge.[57]

Type of remuneration (proportional remuneration, equitable remuneration or lump sum)

As explained above, there are several types of remuneration possible: proportional remuneration, equitable remuneration and a lump sum; or a combination thereof. Proportional remuneration best allows authors to be associated with the success of their works. Some jurisdictions insist on proportional remuneration[58].

Germany is the only country so far that has introduced the principle of "equitable remuneration" in the 2002 copyright law amendment as discussed in detail below. If the negotiated remuneration is not equitable, the author can claim an equitable remuneration. It provides for a mechanism to adjust contractual remuneration on a repeated basis if the qualifying circumstances occur. In addition, remuneration stipulated in the collective agreements is presumed to be fair[59].

In the UK, there is no provision on the remuneration of authors and only a consideration is necessary according to English contract law. A consideration of payment of pound will be deemed sufficient.

Best-seller clause

In order to make sure that creators are able to participate on the financial success of their work, some countries opted for a best-seller clause. The provision gives authors and/or performers a right to ask for modification of the remuneration based on their contract if they feel that the transferee is gaining a disproportionate economic advantage from the exploitation of the work in comparison to the payment agreed. This provision should be distinguished from general regulation of equitable remuneration as introduced in Germany.

[57] Section 2366(1), b) NCZCC, also stipulating that lack of agreed remuneration will not make the contract invalid, if it can be deducted that the parties wished to conclude the contract even without the amount of remuneration agreed; in such case, the licensee will pay a fee „customary for given use in given time".

[58] E.g. France, Spain. In France, the rule applies to all works unless the law stipulates otherwise and France has the most detailed set of rules on remuneration. In both countries payment of lump sum is allowed only under special circumstances. More in the 2014 Creators´ Contract Study, p.37

[59] Sec. 32(2) UrhG

Such provisions can be found for example in the copyright laws of Belgium, Czech Republic, Germany, Hungary, Poland, and Spain.[60] Generally, such claim will only be permitted if the creator received a lump sum payment, but for example German law does not provide such limitation. Neither does the Article 15 of the draft DSM Directive dictate the Member states to condition the claim under that provision by such form of payment.

Interpretation of contracts

Unclear contractual clauses, on exact meaning of which the parties are unable to agree, will have to be interpreted and clarified by the courts. The interpretation principle "*in dubio pro auctore"*[61] is discussed further below, but in general it means that any right or mode of exploitation not appearing in the contract is presumed not to be covered by the transfer. Such a principle supports legal certainty for the authors and limits the transfer of their rights.

Germany has interpretation rules that favour the author and follows the so-called "purpose-of-transfer" rule ("*Zweckübertragungslehre"*)[62]. Uses not envisaged by the parties at the time the contract was concluded will remain outside the scope of contract and the author will not have transferred her rights.

Czech copyright law also provides similar mechanisms which are discussed below in the national chapter. English law has not adopted any such approach in statutory provisions, general principles of contract law apply; there is some case law applicable to these scenarios discussed below.

In practice, these interpretation rules lead transferees to a careful formulation of transfer contracts, making sure that they are wide enough to cover different types of exploitation modes.[63]

[60] As stipulated in the 2014 Creators´ Contract Study, p.39, referring to Article 26(2)(2) of the BCA, Article 48 of the Hungarian Copyright Law (Act No. LXXVI of 1999 on Copyright, as amended), Article 44 of the Polish Copyright Act (Act of February 4, 1994, on Copyright and Neighbouring Rights, as amended), Article 47 of the Spanish Copyright Law

[61] Author´s free translation: „where in doubt, the interpretation goes in favour of the author".

[62] Sec. 31(5) UrhG – „If the types of exploitation have not been specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract."

[63] The 2002 EU IP Contracts Study, p. 57

Termination of contract

One of the means for the creators to regain control and reverse back the rights from the person to whom they transferred them are provisions on withdrawal from the license agreement or reversion of copyright. The circumstances will differ (lack of exploitation, exploitation against the author's interests, lapse of time, etc.). Reversing assigned rights to the author after a fixed period could be very beneficial for the creators. This possibility of reversion has been included in the recent Term of Protection Directive (Article 3.2a) as a way to promote the exploitation of the works after 50 years. In the US, in 2013 the reversion of copyright claims started occurring when the 35-years term since effective date of the 1976 Copyright Act lapsed (January 1, 1978). In both, the Czech Republic and Germany there is a provision enabling the author or performer to withdraw from a licence due to inactivity of the licensee.

Presumption of transfer in audio-visual contracts

In most of the countries in the EU there exists a presumption of transfer of rights to the film producer.[64] Therefore, unless agreed otherwise, authors of audiovisual works are presumed to have transferred their "exclusive exploitation" rights to the film producer. These rights will normally cover the rental and lending; the fixation right; the broadcasting and communication to the public right; and the distribution right. This presumption has been incorporated into the *acquis communautaire* through the Rental Directive which enables Member States to introduce a parallel presumption as regards rental rights only.[65] In such case, the author retains the right to an equitable remuneration. This remuneration right is unwaivable and its administration is normally entrusted to a collecting society representing the authors.

The presumption of transfer concentrates rights to all works and performances combined into an AV work in the producer's hands, which is justified by a number of economic and practical factors. The producer needs to have all the rights secured in order to ensure the exploitation of the work. Very high costs of the film production justify this limitation of creators' rights. The fact that the producers assume the economic risk of the production of the work, and the fact that in production of each

[64] The 2014 Creators´ Contract Study, p.47
[65] Article 3 (5 and 6) of the Rental Directive

film a great number of creators are involved, it makes it more convenient for film producers to have the rights "safely in hand" to be able to exploit the film effectively.

To limit the scope of the presumption of transfer, some countries excluded some rights or works; musical works are excluded in most countries. In the Czech Republic, the transfer does not cover private copy remuneration. Film producers cannot claim private copy levies on behalf of the authors involved in the making of the film. In Germany, the presumption of transfer does not apply to authors of pre-existing works, such as novels or screenplays[66] - they have the right to use their works for other cinematographic purposes after the expiration of ten years from the conclusion of the contract.[67]

Conclusion

There is no harmonisation across European borders with respect to copyright contract rules implemented with the goal to strengthen creators' position in contract negotiations. "The national legal frameworks are very fragmented and many disparities exist in their application. On the one hand, countries like Belgium, Germany, France and Spain have detailed rules to protect authors in their contractual relations, and on the other hand, Member States such as Sweden and the UK provide transferees with a high degree of contractual freedom."[68]

It is discussed in greater detail below in the national chapters how these various provisions in practice do or do not fulfil their aim.

2.6. Legal provisions possibly protecting authors in copyright contracts – contract law

It is important to realise that copyright contracts are, to some extent, contracts as any others. General rules on contract law will apply where copyright law is silent on specific aspect of the scenario. Although the principle of freedom of contract applies across Member States, rough edges – as they can be – of this principle are sometimes filed by principles such as good faith. While general legal rules are not intended to

[66] Sec. 89(3) UrhG
[67] The 2002 EU IP Contracts Study, p. 74
[68] The 2014 Creators´ Contract Study, p.49

protect creators and thus their application can sometimes fail to provide the intended results, they can still be explored in search for "fairness" where copyright laws have not caught up yet to the "digital" reality. Arguably, these general principles could play a more prominent role in legal systems where there are almost no specific protective rules in copyright law for authors[69]. This is explored in greater detail in Chapter 4.3. dedicated to English law on fair creators' remuneration.

General contract law principles will affect the formation, performance, and interpretation of contracts, including those related to creative industries. Where the "special law" does not provide any tailor-made guidance, general contract law will normally apply. These principles are strongly enrooted in each MS´s legal system and their application will differ state by state (which is one of the reasons why any previous attempts to harmonize EU contract law have been ricocheted back). Despite the differences though, there is always some form of the doctrine of good faith, fairness, equity, defect of consent, etc. Even in English law where "good faith" doctrine does not exist, doctrines such as "undue influence", "unconscionability" or "restraint of trade" may achieve setting aside of contracts exploiting other party´s weakness. These principles will, however, only be used in special circumstances. Otherwise the principle of freedom of contract will prevail in most cases. Parties to a contract are normally fully bound by their agreements. Other principles of contract law will only exceptionally lead to the modification or cancellation of contracts by courts.

Groups of concepts and measures available in contract law that can provide some form of influence over creators´ contracts are briefly outlined below.

Principle of Good faith

The principle of contractual freedom is "subject to the requirements of good faith and fair dealing"[70]. Good faith is a source of obligations for the parties to a contract and it also rules the negotiation process and may lead to the liability of the party who has

[69] The 2014 Creators´ Contract Study, p. 51

[70] The 2014 Creators´ Contract Study, p. 51, referring to the Principles of European contract law-PECL *(*O. Lando, H. Beale, *The principles of European contract law, I. Performance, non-performance and remedies, Commission on European contract Law* (Dordrecht, Nijhoff, 1995))

not acted in good faith in the negotiation[71]. Parties are also required to inform their negotiating partner of decisive facts and when determining whether good faith requires that a party disclose particular information, regard may be had to whether a party has a special expertise. In copyright contracts, this expertise will usually be with the publisher or the producer.

Rules of interpretation

Where a term of a contract is unclear or parties have different understanding of its meaning, courts may be asked to interpret contracts. Many national copyright laws stipulate a strict "*in dubio pro auctore"*[72] interpretation rule in the field of copyright. This is evident in both German and Czech copyright laws when providing rules on assumption on scope of rights granted through the license agreement where this is not captured adequately in the agreement or each party argues a different understanding. When interpreting unclear contracts, reference to the common will of the parties or purpose of the contract will also be used. Often, courts will first try to identify the common intention of the parties instead of relying on a mere literal reading of the contract. Some rules of interpretation may also lead to interpreting contracts so that, between two possible meanings, the one that is consistent with the law will be preferred.[73]

Another common rule of interpretation is the "*contra proferentem"* rule, which indicates that where the contract is a standard contract imposed by one of the parties (mostly the "stronger one" in the relationship) on the other as a take-it-or-leave-it contract, if the contract is unclear, it is interpreted against the party who has written it. The *contra proferentem* rule of interpretation is applicable in most countries, including the UK.[74] This aspect is also discussed later in the national chapters.

Purpose-of-grant interpretation rule[75] can also be helpful to authors. In English law, while there is no such rule of interpretation specific to copyright, in general law the

[71] The 2014 Creators´ Contract Study, p. 52, referring to the doctrine known in some countries as "*culpa in contrahendo".* More details and reference to further reading is available in the 2014 Creators´ Contract Study.

[72] Author´s free translation: „where in doubt, the interpretation goes in favour of the author".

[73] The 2014 Creators´ Contract Study, p. 53

[74] The 2014 Creators´ Contract Study, p. 54

[75] According to the purpose-of-grant rule, if the exploitation rights have not been specifically designated in the contract, the scope of the transfer will be limited according to what is necessary

purpose of the contract may lead the jurisprudence to limit the rights transferred. A classic example is *Ray v Classic FM*[76] where it was held that Mr Ray had granted an implied licence on the catalogues to Classic FM for the radio to use them, however, the licence was said by the court to be limited only to the use of the catalogues for broadcasting in the UK, and not abroad.

Legal provisions on unfair terms

Legal provisions on unfair terms acknowledge the existence of uneven bargaining positions and the fact that non-negotiated contracts often result in unfair terms to the weaker party.[77] The European Directive on unfair terms[78] is a prominent example of legal protection of the weaker party in contractual relationships (here the consumer) vis-à-vis the professional, stronger party. The Directive prohibits non-negotiated clauses that cause a significant imbalance to the detriment of the consumer and contains a black-list of terms considered unfair, which eases its enforcement. The Directive on unfair terms and its national transpositions will not generally apply to copyright contracts entered into by authors[79], as they do not fall under the category of "consumer" in these circumstances; they are acting as professionals when concluding contract with exploiters, although in a weaker position. But the overall technique of protecting consumers as weaker parties of a contract can help as inspiration when providing the same courtesy to creators. "In Germany, there are general terms and conditions provisions targeting unfair terms[80] which are not limited to consumer contracts. These rules can be invoked in professional relationships to invalidate a general term that causes an undue advantage to a party without adequate consideration of the other party. The hypothesis of a standard clause imposed by the transferee in an author's contract may obviously be addressed by this regulation. However, the regulation does not allow the assessment of the subject matter of the contract (the main provisions), the control of the jurisdiction being limited to what departs from the rules of law (excluding what is purely contractual). As an example,

for the exploitation undertaken by the transferee. This is the case for example in German copyright law as examined later.

[76] *Ray v Classic* FM [1998] FSR 622 (ChD)

[77] The 2014 Creators´ Contract Study, p. 56

[78] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

[79] In Germany, Hungary or Sweden, this limitation does not apply and authors can benefit from protection provided to consumers. See The 2014 Creators´ Contract Study, p. 56

[80] Section 305-307BGB (Germany Civil Code)

the remuneration itself could not be controlled by the courts through this regulation."[81]

Undue influence, unconscionability, restraint of trade

In the English law, contracts may also be set aside if a party exploits the other's poverty, ignorance or lack of advice, or if one party is in a position of domination on the other, which results in a manifestly disadvantageous contract. The doctrines of undue influence, unconscionability and restraint of trade may help target unfair contracts. But this approach is not widely used and remains an exceptional remedy. These individual doctrines are discussed in detail in Chapter 4.3.

Conclusion

The issue of unbalanced positions of authors and transferees in the contractual negotiations could - to some extent - be rectified by way of rules of contract law aiming at regulating and balancing contractual relationships. But the unspecific character of these general rules of contract law makes them unsatisfactory to efficiently tackle the weak position of authors. Also, because these rules are not designed to specifically protect creators, their application by case law to creators' contracts is not very frequent. As their application is subject to circumstances intended for whole variety of sectors, these rules often fail to take into account the weak bargaining position of creators. They fail to adequately address the peculiarities of creators' specific contractual position.

General contractual principles might be of some help but will not be tailored to address the creators' need of protection. Specific protective rules, that take adequate consideration of the contractual position of creators, are needed. Such rules (in line with the principles of general contract law) would better contribute to achieve the principles of contract law: freedom of contract and the equality of parties to a contract, which is necessary to enable creators' contracts to play their economic role in full.[82] But at least inspiration can be found in them.

[81] The 2014 Creators´ Contract Study, p. 57
[82] The 2014 Creators´ Contract Study, p. 60

2.7. Protection of authors in practice through collective agreements

Collective negotiations can also help protect authors' interests. Authors become members of (or in other form affiliate to) a professional body which represents and facilitates dialogue with the exploiters' representatives. Some form of collective negotiations exists in most European countries; depending on the country, such representatives will be professional associations, trade unions, guilds or even CRMOs. Due to the author´s weaker position in the "negotiation with the exploiter, collective negotiations between representatives of authors on the one hand, and representatives of exploiters on the other, may be a means to reach equilibrium"[83].

Collective agreements are the outcome of these collective negotiations and such agreements can concern a variety of issues from employment conditions, formal obligations applicable to the author and/or to the exploiter, or remuneration rates. The legal foundation for collective negotiations will depend on national legislation, unlike collective rights management this area is not harmonised within the EU. Therefore, in the eight countries considered, collective negotiations cover different realities. In some countries, the framework contracts have an extended effect for all the agents in given sector, in other countries model contracts are not binding, only represent a suggestion for best practices. On the other hand, in some countries such model contracts become a standard that is used even by those who are not members of the given organisations. Collective agreements also allow creators and exploiters to have an option to use standard contracts drafted according to rules accepted by both sides of the relationship without having to draw up specific contracts for each specific situation. The main contribution of these model contracts is that they provide collective agreements applying common principles specific for various industry sectors.

There are several specific uses of collective bargaining. In relation to Germany, it is paramount to mention collective agreements drafted to ensure "adequate remuneration". The German model is based on a deep-rooted collective negotiations tradition: collective negotiations are generally accepted as legitimate tools to regulate economic and social relations[84]. Preference of collective bargaining and common

[83] The 2014 Creators´ Contract Study, p. 61

[84] See more details in the 2014 Creators´ Contract Study, at p. 62. The German model is supported by the *Tarifvertragsgesetz* (Collective Agreement Act) which formalises the right for employees

remuneration standards is discussed in detail in the German national chapter (Ch. 4.1.). This model follows the American example, where groups of authors and groups of exploiters can negotiate collective agreements, also known as Guild Agreements that regulate the conclusion of exploitation contracts[85].

Although France is not in the focus of this work, to demonstrate how it is possible to cope with new exploitations, it is worth mentioning the French Framework Contract on e-publishing. Article L. 132-25 of the French IP Code, allows a collective agreement agreed upon by representatives of producers and of authors in the audiovisual sector regarding the remuneration of the authors to be made mandatory upon the totality of the agents of a defined sector by a simple *arrêté* (order) of the French Minister in charge of Culture[86]. "Facing the complexities related to the development of digital modes of exploitation for the book sector, the Minister of Culture mandated representatives of publishers and authors to negotiate on the conditions for digital rights' transferring and exploitation in the book sector. The Framework Agreement of March 21, 2013, on publishing contracts in the book industry, of the Permanent Council of Writers (*Conseil national des écrivains*) and the National Union of Publishers (*Syndicat national de l'édition*) represents a very interesting example of collective bargaining that is confirmed by the lawmakers."[87]

As legal scholars confirm, collective bargaining agreements are a relevant measure to resolve important issues when dealing with copyright contracts: "the conclusion of collective agreements between representatives of authors [...] on the one hand and

and freelancers to gather and negotiate with employers or exploiters' representatives on collective labour agreements. Freelancers are also able to negotiate collectively: for example, German journalists' representatives have signed and agreed collective agreements, joint remuneration rules, model contracts and memoranda of understanding with representatives of publishers. In this precise case, a different agreement is applicable for employees (*Gemeinsame Vergütungsregeln für freie hauptberufliche Journalistinnen und Journalisten*, 1. August 2010, 8 p.) and for freelancers (*Tarifvertrag für arbeitnehmerähnliche freie Journalistinnen und Journalisten an Tageszeitungen*, 29 January 2010, 8 p.). For freelancers, agreements are simply defining common remuneration standards. Many other agreements may be found in other cultural sectors in Germany: for example, in the audiovisual sector, screenwriters' guilds have signed agreements with broadcasters regarding remuneration terms and conditions, and so did the producers' representatives with the broadcasters regarding the terms of trade.

[85] The 2014 Creators´ Contract Study, p. 62; the 2002 EU IP Contracts Study, p. 91

[86] See in the 2014 Creators´ Contract Study, at p. 63, referring to the "Memorandum of Understanding" of October 12, 1999, completed by "Memorandum of Understanding" of February 2, 2002, April 12, 2002 and February 17, 2004, on the remuneration of cinematographic and audiovisual works ratified by Decree of February 15, 2007, in application of Article L.132-25 of the Copyright Code; reproduced in Annex III.

[87] 2014 Creators´ Contract Study, at p. 64

publishers, broadcasters or producers on the other, tends to provide the most satisfactory solution for all parties involved [...]. Consequently, collective bargaining offers perhaps the only guarantee that the interests of authors [...] will be duly taken into account"[88].

In addition, maybe even more importantly, collective organisations can play a key role in raising awareness which, as discussed later in this thesis, is essential for any of the proposed regulation to be utilised by those in whose benefit it is adopted.

[88] 2002 EU IP Contracts Study, p. 152 and 2014 Creators´ Contract Study, p. 65

Chapter 3 – Fair remuneration for authors and performers in European Union copyright law

The need for overall reform of the European copyright law has been surfacing for over a decade now, with many commentators claiming that the piecemeal harmonisation through Directives is not the right solution and that a Regulation replacing national laws is the best way forward, both in terms of form and content.[89] The furthest any of these initiatives have gotten was when The Wittem Project[90] published their proposal of the European Copyright Code.[91] In 2011, Cook and Derclaye argued that the Wittem Code shows that agreement even on the thorny questions is possible and that the gap between the common law and civil law traditions can be bridged elegantly and respectfully.[92] However, there was one major obstacle, emphasised by the Wittem Code´s opponents. Territoriality of copyright is very hard to overcome and it would take several generations to address the issue[93], not a few years in which the Commission now wishes to roll out the Digital Single Market Strategy. The measures introduced by the draft DSMD therefore represent yet another "provisional", fragmented regulation, attempting to "fire fight" the issues arising from the spread of digital world and emergence of new business models rather than conceptually shaping the environment.

The Wittem Code did contain a very short provision on remuneration, but only in relation to limitations, when at all payable. Such remuneration was, however, expected to be fair and adequate.[94]

The existing EU law only knows explicit provisions on remuneration in relation to limitations as well. No reference to contract based remuneration is currently present in EU copyright law.

While every person has their own notion of what is fair, it makes sense to start the search for fair compensation by providing some definition. Fair is something that is impartial, just, equitable[95]. This is the beginning of running in a circle. What is

[89] See for example T. Cook, E. Derclaye, ´An EU Copyright Code: what and how, if ever?´, I.P.Q. 2011, 3, 259-269, at p. 269.
[90] The Wittem Project is a project established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The result of their efforts is The European Copyright Code published in 2010.
[91] The European copyright code by the Wittem Project, April 2010
[92] Ibid Cook, Derclaye (2011), 269.
[93] Ibid Cook, Derclaye (2011), 269.
[94] See Art. 5.7.(1) of the Wittem Code.
[95] B. A. Garner, *Blacks Law Dictionary* (3rd pocket edn., Thomson West, St. Paul, USA, 2006), at p. 278.

equitable? The literature states that it is something which is just, consistent with principles of justice and right.[96] What does that entail, we ask? Something that is fair?

In the context of this work we may argue that fair means that every person receives a proportion of the proceeds arising in total from the utilisation of the work, such portion which reflects that person´s contribution to the creation, publication/ manufacture, distribution and collection of the proceeds throughout the whole creation and supply chain process for the entirety of the work´s life cycle. Therefore, fair remuneration for the creator should also take into account the publisher´s, intermediary´s and distributor´s participation on the financial success but at the same time should not be diminished in favour of their shares only because the creator is not in a position to negotiate a better deal. As, if it was not for the creator, the others would have nothing to exploit and thus profit from. But to conjure up a precise calculation on how to achieve such equilibrium is like chasing a Holy Grail. Many have tried but so far no one succeeded.

3.1. Concept of fair compensation in the EU law prior to the Proposal

It has been indicated above that, overall, this work is focused on compensation received by the creators based on contractual relationships with their transferees at the first stage of the rights transfer as depicted above in Figure 1.5. Therefore any remuneration collectively collected as a compensation for an exception, remuneration for rental, lending, transfer of rights to film producer etc., (even if resulting from the EU regulation), is not discussed more than by stating that these streams of remuneration need to be taken into account when assessing the extent of remuneration already received by the creator when evaluating whether remuneration already received was equitable and/or disproportionate to the proceeds generated through the use of a given work or fixed performance.

But a short intermezzo will be made with respect to a case heard recently before the CJEU which deals with authors´ remuneration, more specifically with the question whether publishers can also be deemed authors and claim a portion of the funds collected on behalf of authors. The case has several aspects that are relevant for this

[96] Ibid Garner (2006), at p.246.

work. It provides judicial confirmation within the EU law that fair remuneration for creators is a paramount objective to incentivize creative efforts and thus well-functioning market with creative content. In addition, it provides a signal that not everything concluded by the Court of Justice of the European Union is taken into account by the European legislator when drafting subsequent EU legislation. Such realisation can be both good and bad, depending on whether one hoped for a specific change or not. In this particular case, it seems that publishers will be happy that the Commission did not follow the earlier conclusions of the CJEU.

3.1.1. Reprobel (and Luksan) cases

The issue of fair compensation for authors (right-holders in general) was recently discussed before the CJEU in relation to fair compensation for reproduction and private copying exceptions under Article 5(2) of the InfoSoc Directive as applied in Belgium. In *Hewlett-Packard Belgium SPRL v Reprobel SCRL*[97] several questions about whether the way the levy system for reprographic and private copies is designed in Belgium is compliant with the InfoSoc Directive were asked in the request for a preliminary ruling addressed by the Brussels Court of Appeal.

3.1.1.1. Introduction

Belgian copyright law stipulated that half of the remuneration for reprographic uses shall be distributed to the publishers (i.e. directed to the "publishers' envelope"), while the other half is reserved for the authors (the "authors' envelope"). However, there was no mechanism in the law to ensure that the authors benefit in any way from the amounts collected into the publishers' envelope. The Belgian collecting society for reprographic uses (Reprobel)[98] was under no obligation to transfer any of the funds from the publishers' envelope to the authors. On the contrary, publishers claimed that - by signing publishing contracts - authors commonly assign their own right to fair compensation for reprographic and private copying (this in turn

[97] Case C-572/13; Judgement of November 12, 2015 (ECLI:EU:C:2015:750); Opinion of A.G. Cruz Villalón of June 11, 2015 (ECLI:EU:C:2015:389), Reference for preliminary ruling from the Brussels Court of Appeal, 23 October 2013; [2016] Bus. L.R. 73; [2016] E.C.D.R. 2

[98] jointly representing and acting for both, authors and publishers

increasing the part of the remuneration that should be given to the publishers).[99]

A question arose whether this was consistent with the principles of copyright law in general and Article 5(2) of the InfoSoc Directive specifically. Copyright law (in the strict sense – excluding related rights) is linked to the freedom of authors to create and should primarily remunerate the creative authors, and should not primarily grant rights to persons other than the individual creators. The European Copyright Society ("ECS")[100], a "group of academics concerned about the copyright reforms envisaged in the EU as well as by the interpretation and development of the law by the CJEU"[101], argues in their article[102] that "[This] principle (*the author principle*) applies to the exclusive rights within the copyright bundle. It also applies to any right to remuneration provided by law to compensate for the exempted uses of copyright-protected works. We believe that copyright is not the correct instrument by which to confer rights on legal entities to protect their investments." They admit that there are instances when publishers or producers deserve to get an adequate protection, but such protection should derive either from the contracts concluded with the individual creators or by way of a related right granted by law. The ECS believes that the CJEU should "clearly reaffirm the important principle of initial authorship for creators".

The Cour d'appel de Bruxelles (Court of Appeal, Brussels) decided to stay the proceedings before it and to refer several questions to the CJEU for a preliminary ruling. While they all have practical significance, this assessment only focuses on the third one. The Brussels Court of Appeal asked[103]:

"3. Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to allocate half of the fair compensation due to

[99] In the meantime (in reaction to the Reprobel case), Belgian law has been amended. Now it provides for the non-assignable character of the part of the fair compensation due to authors and the publishers therefore cannot rely any more on individual publishing contracts to claim a part of the fair compensation collected by Reprobel (ArticleXI.239, 7th indent of the Economic Law Code). The ECS (as defined below) thinks such an approach should be followed by the Member States as long as the assignability of rights is not dealt with at EU level.

[100] Represented in this case comment by Lionel Bentley, Robert Clark, Estelle Derclaye, Severine Dusollier, Christophe Geiger, Jonathan Griffiths, M-C. Janssens, Axel Metzger, Alexander Peukert, Marco Ricolfi, Ole-Andreas Rognstad, Martin Senftleben, Alain Strowel, Michel Vivant and Raquel Xalabarder

[101] ECS, ´ECS position paper on the Opinion of the Advocate General in the case HP Belgium v Reprobel before the Court of Justice of the EU´, E.I.P.R. 2016, 38(2), 71-74, 71

[102] ECS, ´ECS position paper on the Opinion of the Advocate General in the case HP Belgium v Reprobel before the Court of Justice of the EU´, E.I.P.R. 2016, 38(2), 71-74,

[103] Case C-572/13, (ECLI:EU:C:2015:750), [21]

rightholders to the publishers of works created by authors, the publishers being under no obligation whatsoever to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived?"

3.1.1.2. Facts

The company Hewlett-Packard Belgium ("HPB") imports into Belgium reprography devices for home and business use, in particular 'multifunction' devices, whose main function is to print documents at speeds which vary depending on print quality, and which can also be used to scan and copy documents and to receive and send faxes. Those multifunction printers, which are at the heart of the case in the main proceedings, are sold at prices not usually exceeding EUR 100.[104]

Reprobel SCRL is the collecting society responsible for the collection and distribution of the amounts in respect of fair compensation under the reprography exception.[105] On 16 August 2004 Reprobel sent HPB a fax informing it that the sale of multifunction printers involved, in principle, the payment of a levy of EUR 49.20 per device.[106] The meetings arranged and correspondence exchanged with Reprobel not having enabled an agreement to be reached on the rates applicable to those multifunction printers, HPB, by notice of 8 March 2010, brought an action against Reprobel before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels). HPB sought, first, an order from that court to the effect that no remuneration was payable for the devices it had offered for sale or, alternatively, that the remuneration it had paid corresponded to the fair compensation payable under Belgian legislation, interpreted in the light of Directive 2001/29. It sought, secondly, an order that Reprobel should, within the year, on paying of a penalty of EUR 10 million, perform a study consistent with that referred to in Article 26 of the Royal Decree of 30 October 1997, relating to, inter alia, the number of devices at issue and their actual use as copiers of protected works and comparing that actual use with the actual uses of any other devices for reproducing protected works.[107]

[104] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [11]
[105] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [12]
[106] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [13]
[107] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [14]

On 11 March 2010, Reprobel summoned Hewlett-Packard before the court so that the latter might be ordered to pay to Reprobel the provisional sum of EUR 1 towards the remunerative payments which Reprobel considered were owed pursuant to the Royal Decree.[108] The Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) joined those two sets of proceedings.[109] By judgment of 16 November 2012, the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) ruled that the first paragraph of Article 59 and the third paragraph of Article 61 of the LCRR (as defined below) were incompatible with EU law.[110] Hewlett-Packard and Reprobel have appealed against that judgment to the referring court.[111]

3.1.1.3. Legal context

EU law

The preamble to the InfoSoc Directive states that "A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. …"[112] and that "In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. […] In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive..."[113]

According to Article 2 of the InfoSoc Directive, 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram

[108] Case C-572/13; Judgment (ECLI:EU:C:2015:750); [17]
[109] Case C-572/13; Judgment (ECLI:EU:C:2015:750); [18]
[110] Case C-572/13; Judgment (ECLI:EU:C:2015:750); [19]
[111] Case C-572/13; Judgment (ECLI:EU:C:2015:750); [20]
[112] InfoSoc Directive (2001/29/EC), Recital (31)
[113] InfoSoc Directive (2001/29/EC), Recital (35)

producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

Further, Article 5(2) of the InfoSoc Directive provides:

'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, *provided that the rightholders receive fair compensation*; (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, *on condition that the rightholders receive fair compensation* which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

And pursuant to Article 5(5) of that directive: 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'.

Belgian law

Article 1(1) of the Law of 30 June 1994 on Copyright and Related Rights (the "BCA"), in the version applicable to the dispute in the main proceedings ('the LCRR'), provides: 'The author of a literary or artistic work alone shall have the right to reproduce that work or to authorise its reproduction in any way or in any form, whether direct or indirect, temporary or permanent, in whole or in part.[114]

Article 22(1) of the LCRR provides that "Once a work has been lawfully published, its author may not prohibit: ... (4.) the *reproduction* in part or in whole of articles or works of art or the reproduction of short fragments of other works fixed on a *graphic or similar medium* where such reproduction is intended for a strictly *private purpose* and does not adversely affect the normal exploitation of the work; (4a.) the

[114] Case C-572/13; Judgement (ECLI:EU:C:2015:750); [7]

reproduction in part or in whole of articles or works of art or the reproduction of short fragments of other works fixed on a *graphic or similar medium* where such reproduction is *intended for the purposes of teaching or scientific research*, in so far as it is justified by the not-for-profit purpose for which it is carried out and does not adversely affect the normal exploitation of the work ...(5.) reproductions of sound and audiovisual works made within the family circle and exclusively intended for that circle."[115]

On the payment of the levies, Articles 59 to 61 of the LCRR state: (Article 59): ´*The authors and publishers* of works fixed on a graphic or similar medium shall be *entitled to remuneration for the reproduction of such works,* including under the conditions laid down in Article 22(1), items 4 and 4a ... The remuneration shall be *made by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied*, at the time when such devices are put into circulation on national territory.´ (Article 60): "Furthermore, proportional remuneration, determined by reference to the number of copies made, shall be owed by natural or legal persons who make copies of works or, where appropriate, in lieu of such persons, by those who, for consideration or free of charge, make a reproduction device available to others." (Article 61): "The King shall fix the amount of the remuneration referred to in Articles 59 and 60 by decree … He shall specify the detailed arrangements for collecting, distributing and verifying such remuneration and the time at which it is due. Subject to international conventions, the remuneration provided for in Articles 59 and 60 shall be allocated in *equal parts to authors and publishers*. Subject to the conditions and detailed arrangements which He shall specify, the King shall entrust a company that is representative of all the rights management companies with the task of ensuring that remuneration is recovered and distributed…"[116]

3.1.1.4. <u>*Advocate General´s Opinion*</u>

Eventually, on June 11, 2015, Advocate General Pedro Cruz Villalón delivered his Opinion (hereafter in this subchapter as the "Opinion") in *HP Belgium v Reprobel*

[115] Case C-572/13; Judgement (ECLI:EU:C:2015:750); [8]
[116] Case C-572/13; Judgement (ECLI:EU:C:2015:750); [9]

addressing the issue whether it is permissible for a national copyright law to allocate a portion of the fair compensation for reproductions exempted under Article 5(2)(a) and (b) of the 2001/29 InfoSoc Directive directly to publishers, although they are not listed among the initial holders of the reproduction right under Article2 of the InfoSoc Directive?

The AG´s answer to this third question of the reference is generally welcome by the copyright law experts; not so much by the publishing industry. The AG opined:

"Article 5(2)(a) of Directive 2001/29 must be interpreted *as precluding* the Member States from *allocating some of the fair compensation provided for in that provision to the publishers of works created by authors*, without any obligation for the former to ensure that the latter benefit, even indirectly, from some of that fair compensation.

However, Directive 2001/29 must be interpreted as *not precluding* the Member States from *establishing remuneration specifically for publishers*, intended to compensate for the harm suffered by the latter as a result of the marketing and use of reprography equipment and devices, provided that that remuneration is not levied and paid to the detriment of the fair compensation payable to authors under Article 5(2)(a) and (b) of Directive 2001/29. It is for the national court to carry out the necessary investigations in that regard."[117]

As regards the first part of the Opinion, i.e. the question of the allocation of the right to fair remuneration, the response proposed by the Advocate General largely acknowledges the "author principle" and, to that extent, the Opinion is welcome. However, by leaving too much freedom to the Member States, some aspects of the Opinion[118] might create uncertainty. Specifically, there is a rejection of the view that Member States should be permitted to grant publishers a remuneration right as a related right as this would seriously reduce the harmonising effect of the InfoSoc Directive.[119] The InfoSoc Directive prohibits a system which automatically distributes part of the fair remuneration for the reprographic or private copies of copyright works to anyone but the authors. There is no legal basis or justification under copyright law for allocating an exclusive right or a right of remuneration to a

[117] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [149(3)]
[118] [132] to [143]
[119] ECS, ´ECS position paper on the Opinion of the Advocate General in the case HP Belgium v Reprobel before the Court of Justice of the EU´, E.I.P.R. 2016, 38(2), 71-74, 71

person other than the individual creator. Rights comprised within copyright (or author´s rights) should first belong to the individual creators. This is fully in line with standard justification for copyright/author´s rights protection which is to reward the individual creators and/or incentivise those individuals to exercise their freedom to create. This is confirmed by the wording of Articles 2 (as cited above) to 4 of the InfoSoc Directive[120], which grant the main economic rights to "authors".

Admittedly, provisions of Articles 5(2)(a) and (b) of the InfoSoc Directive do not explicitly refer to the authors as the beneficiaries of the associated fair compensation. The provisions allow for the introduction of the reprography and private copying exceptions "provided that the *rightholders* receive fair compensation". It is worth noting, that the notion of right holder is not as such defined under EU copyright law, but neither is there a definition of "author". In line with the previously discussed basic "author principle" it is, however, legitimate to expect the primary beneficiaries be the authors as individual creators.[121] Other “right holders” referred to in the InfoSoc Directive include the holders of related rights, i.e. performers, producers and/or broadcasting organisations. It is therefore argued that the notion of rightholder in Articles 5(2)(a) and (b) of the InfoSoc Directive should thus be interpreted as prohibiting a Member State from vesting in publishers the right to receive a share of the fair compensation.[122]

The remuneration paid to the publishers in Belgium is qualified as a sui generis compensation that is adopted outside the scope of the InfoSoc Directive and pursues an objective relating to cultural policy. Scholars argue that there is no legal basis for that approach as no reference to an objective of cultural policy can be found in the text of the relevant Belgian provisions.[123] The AG states that the InfoSoc Directive does not preclude Member States from establishing a right to “specific remuneration in favour of the publishers to compensate them for harm resulting from the marketing and use of reprographic devices”. In his opinion, this specific remuneration could exist "on the fringes" of the requirements of the InfoSoc Directive[124], provided that it

[120] InfoSoc Directive imposes on the Member States the obligation to provide authors with reproduction right (Article 2), communication to the public right (Article 3), and distribution right (Article 4).
[121] Ibid ECS (2016), 72
[122] Ibid ECS (2016), 72
[123] Ibid ECS (2016), 73
[124] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [138]

does not negatively affect the fair compensation due to authors in accordance with Articles 5(2)(a) and (b) of the InfoSoc Directive[125]. But it is argued that any such special compensation mechanisms should be provided *outside copyright law* only (e.g. as a cultural supporting measure for the publishers in the book chain), and only if it does not negatively impact the authors' fair compensation.[126]

It is worth noting that the Term Directive[127] allow Member States to maintain or introduce related rights for publishers. But in the long term, "such optional related rights are undesirable insofar as they create divisions within the Internal Market and render the law excessively complex" and "such a right might negatively affect what authors can obtain, as the fair compensation is arguably capped by the level of harm resulting from the exempted copies." [128]

In reaction to the AG´s Opinion in *Reprobel*, the ECS argued that the CJEU should rely on its *Luksan*[129] decision and thus solely confirm the first part of the Advocate General's Opinion[130] and reject the possibility of creating a related right for publishers.

In *Luksan* case, the principal director of a film, "in his capacity of *author* of a cinematographic work", is one of the "right holders" under Article5(2)(b) and "must, consequently, be regarded as a person entitled by operation of law, directly and originally, to fair compensation payable under the private copying exception".[131] Similarly, film producer is "the person responsible for the investment necessary for the production of the work", and must be regarded as a "holder, by operation of the law, of the reproduction right" under Article 2(d) of the InfoSoc Directive.[132] The court thus concludes that the producer can be considered a "right holder" of the fair compensation but suggests that (any other) right holder of the fair compensation should belong to the list of the initial beneficiaries of the reproduction right under Article 2 of the InfoSoc Directive. Entities which are not "holders by operation of

[125] AG´s Opinion in C-572/13, (ECLI:EU:C:2015:389), [143]
[126] Ibid ECS (2016), 73
[127] Recital 19, and Articles 5 and 11(1) of the Term Directive
[128] Ibid ECS (2016), 73
[129] Luksan v van der Let (C-277/10), Judgement of the Court of February 09, 2012; (EU:C:2012:65); [2013] E.C.D.R. 5
[130] [123] to [131]
[131] Case C-277/10; Judgement (ECLI: EU:C:2012:65); [2013] E.C.D.R. 5, [94]
[132] Case C-277/10; Judgement (ECLI: EU:C:2012:65); [2013] E.C.D.R. 5, [92]

law" of a reproduction right arguably cannot be the initial beneficiaries of the fair compensation. In addition, the court stipulates that in the Member States which have decided to establish the private copying exception, "the rightholders concerned must, in return, receive payment of fair compensation. It is clear from such wording that the European Union legislature did not wish to allow the persons concerned to be able to waive payment of that compensation to them".[133]

The CJEU referred to the principle of effectiveness, i.e. the obligation for the law to achieve a certain result require that the fair compensation for the right holders is "actually recovered".[134] A system allowing half of the remuneration for reprographic uses be automatically allocated to the publishers (who do not belong to the "holders, by operation of law" of a reproduction right under Article 2 of the InfoSoc Directive) is not compatible with EU law. In *Luksan*, the CJEU makes clear case in favour of a non-transferable right to fair compensation[135]. As such, the "claim of publishers to get half of the collected amounts could be founded on neither a presumed nor actual transfer of the right to fair compensation from authors; nothing suggests that the reasoning of the court, made under Article 5(2)(b) of the InfoSoc Directive for private copying in *Luksan,* could not be transposed to Article 5(2)(a) of the InfoSoc Directive for reprography in *Reprobel*."[136]

3.1.1.5. The Court´s judgement

In respond to the third question by the referring court, as discussed in detail above, the court held that:

> "Pursuant to Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29, the possibility for Member States to provide for the exceptions referred to in those provisions is subject to fulfilment by those States of their obligation to ensure that reproduction rightholders receive fair compensation.[137]
>
> However, publishers are not among the reproduction rightholders listed

[133] Case C-277/10; Judgement (ECLI: EU:C:2012:65); [2013] E.C.D.R. 5, [100] and see also [105]
[134] Case C-277/10; Judgement (ECLI: EU:C:2012:65); [2013] E.C.D.R. 5, [106]
[135] Case C-277/10; Judgement (ECLI: EU:C:2012:65); [2013] E.C.D.R. 5, [109]
[136] ECS, ´ECS position paper on the Opinion of the Advocate General in the case HP Belgium v Reprobel before the Court of Justice of the EU´, E.I.P.R. 2016, 38(2), 71-74, 74
[137] Case C-572/13; Judgement (ECLI:EU:C:2015:750); [46]

in Article 2 of Directive 2001/29.[138]

[...]

It follows from the foregoing that the answer to the third question is that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 **preclude national legislation,** such as that at issue in the main proceedings, **which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived."**[139]

It is therefore clear that the court was of the same opinion as the academics challenging the second part of the AG´s answer to the third question. The CJEU did not repeat the conclusion, formulated in the Opinion, that Member States are free to establish remuneration for reprography exception specifically for publishers, following its decision in *Luksan*[140].

3.1.1.6. Observations and comments

It addition to other learning from the analysis of the *Reprobel* case, pertinent for this work, it is worth noting that despite the CJEU´s decision (as distinguished from the AG´s Opinion in the case) and the academic commentary, the Commission did eventually introduce in Article 11 of the draft DSMD publishers right to fair compensation, albeit for digital copies and applied without prejudice to any remuneration due to the authors and performers (and other rightholders listed in Article 2 of the InfoSoc Directive)[141], however, with a claim to author´s share in fair

[138] Case C-572/13; Judgement (ECLI:EU:C:2015:750); [47]
[139] Case C-572/13; Judgement (ECLI:EU:C:2015:750); [49]
[140] Case C-277/10; Judgement (ECLI: EU:C:2012:65); [2013] E.C.D.R. 5
[141] *Article 11 - Protection of press publications concerning digital uses:* (1) Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.
(2) The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.
(3) Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.
(4) The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

compensation where the right was transferred to the publisher[142].

The question raised by *HP Belgium v Reprobel* is also relevant in Germany, where the allocation rule between authors and publishers is not enshrined in the law, but in the statute of the relevant collecting society (VG Wort). In a case pending before the Federal Supreme Court (*Bundesgerichtshof*) during the proceeding in *Reprobel*, one individual author has challenged the lawfulness of the practice of VG Wort of allocating a portion of the moneys for reprographic uses to the publishers, in particular when the author has first mandated VG Wort to collect the money for reprography before signing individual publishing contracts. In the first instance, the Munich Regional Court[143] held that publishers are not entitled to claim a 50% share of the money collected by VG Wort, relying inter alia on *Luksan*[144]. On 14 December 2014, the *Bundesgerichtshof* decided to stay the proceedings until the CJEU had delivered its judgment in the *HP Belgium v Reprobel* case. In April 2016, following the *Reprobel* decision, the Federal Supreme Court held that German publishers are not entitled to half the copyright revenues that were traditionally gathered for many years by the collection agency VG Wort.[145] This stirred a heated discussion, with the publishing industry claiming that this may cause bankruptcy of some publishers as in total German publishers are expected to return approx. EUR 300 million, collected and distributed based on the previous practice. Shortly after (September 14, 2016), the Commission introduced its Proposal for the DSM Directive, incl. Articles 11 and 12. The issue is therefore still to be resolved.

[142] *Article 12 - Claims to fair compensation:* Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right.

[143] Case 6 U 2492/12, 17 October 2013, [2014] G.R.U.R. 272

[144] Luksan v Van der Let (C-277/10) ECLI:EU:C:2012:65; [2013] E.C.D.R. 5 at [100] et seq.

[145] See more here: http://publishingperspectives.com/2016/09/no-agreement-copyright-controversy-germany-vg-wort/ (accessed July 19, 2017)

3.2. The Proposal for the DSMD

In September 2016, the European Commission released the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market[146] together with the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market[147].

The primary focus of the draft DSM Directive is digital environment and cross-border uses of content, but it also (one may argue somewhat unsystematically) deals with fair remuneration of authors and performers based on their contracts with transferees of their rights (i.e. primarily producers and publishers to whom the creators either assign – where possible – their rights, or grant licence to exploit their work or performance).

In the Explanatory memorandum opening the DSMD proposal, the Commission states that the evolution of digital technologies has changed the way works and other protected subject-matter are created, produced, distributed and exploited.[148] New uses have emerged as well as new actors and new business models. In the digital environment, cross-border uses have also intensified and new opportunities for consumers to access copyright-protected content have materialised.[149] The Commission believes that even though the objectives and principles laid down by the EU copyright framework remain sound, there is a need to adapt it to these new realities. Intervention at EU level is also needed to avoid fragmentation in the Internal Market.[150] Despite this proclamation, however, instead of rewriting of EU Copyright Law, the Commission does exactly what it wanted to avoid - provides some piecemeal tweaking in a few specific areas.

[146] COM(2016) 592 final
[147] COM(2016) 593 final
[148] Explanatory Memorandum, COM(2016) 593 final, p. 2
[149] Explanatory Memorandum, COM(2016) 593 final, p. 2
[150] Explanatory Memorandum, COM(2016) 593 final, p. 2

3.2.1. DSM Strategy and the path to the Draft DSM Directive

This is the background against which the Digital Single Market Strategy[151] was adopted in May 2015. DSM Strategy identified the need "to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU" and highlighted the importance to enhance cross-border access to copyright-protected content services, facilitate new uses in the fields of research and education, and clarify the role of online services in the distribution of works and other subject-matter.

In December 2015, the Commission issued a Communication '*Towards a modern, more European copyright framework*'[152], which outlined targeted actions and a long-term vision to modernise EU copyright rules. The Proposal for the DSM Directive is one of the measures aiming at addressing specific issues identified in that Communication.[153]

In addition to exceptions and limitations to copyright and neighbouring rights in the digital context as well as facilitation of cross-border access to works and other subject-matter, the Commission evaluates new business models emerging with evolution of digital technologies and strengthening role of the Internet as the main marketplace for the distribution and access to copyright-protected content.

In this new framework, rightholders face difficulties when seeking to license their rights and wish to be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter.[154]

Against this background, the Proposal claims to provide for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content. And fair sharing of value is also necessary to ensure the sustainability of the

[151] COM(2015) 192 final
[152] COM(2015) 626 final
[153] Explanatory Memorandum, COM(2016) 593 final, p. 2
[154] Explanatory Memorandum, COM(2016) 593 final, p. 3

press publications sector, which has been significantly affected by "the shift from analogue to digital". Press publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate.[155] In order to prevent the citizens' limited access to information, the Commission proposes introduction of a new right for press publishers aiming at facilitating online licensing of their publications, the recoupment of their investment and the enforcement of their rights.

Title IV of the propsed DSMD introduces measures aiming to achieve a well-functioning marketplace for copyright. Articles 11 and 12 (i) extend the rights provided for in Articles 2 and 3(2) of the InfoSoc Directive to publishers of press publications for the digital use of their publications and (ii) provide for the option for Member States to provide all publishers with the possibility to claim a share in the compensation for uses made under an exception.[156] Article 13 creates an obligation on information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders and to prevent the availability on their services of content identified by rightholders in cooperation with the service providers. Article 14 requires Member States to include transparency obligations to the benefit of authors and performers. Article 15, according to the Explanatory Memorandum[157], requires Member States to establish a contract adjustment mechanism, in support of the obligation provided for in Article 14. One would expect it to be the other way round – transparency obligation being introduced to support the creators in their claim of additional fair remuneration, so it is probably only a matter of formulation of the Explanatory Memorandum. Article 16 requires Member States to set up a dispute resolution mechanism for issues arising from the application of Articles 14 and 15.[158]

The Explanatory Memorandum states[159] that "[…] authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights." In order to rectify such status, the Proposal introduces in Article 15 so called

[155] Explanatory Memorandum, COM(2016) 593 final, p. 3
[156] Compare to the conclusions of the CJEU and the AG in the *Reprobel* case discussed above.
[157] Explanatory Memorandum, COM(2016) 593 final, p. 10
[158] Explanatory Memorandum, COM(2016) 593 final, p. 10
[159] COM(2016) 593 final, p. 3

"best-seller" clause, i.e. a claim of author or performer to additional appropriate remuneration under specific circumstances. Because transparency on the revenues generated by the use of the creators´ works or performances often remains limited, which ultimately affects the remuneration of such creators, the Proposal includes measures to improve transparency and better balanced contractual relationships between authors and performers and those to whom they assign their rights.[160]

Overall, the Commission expects the measures proposed in Title IV of the Proposal to have - in the medium term - positive impact on the production and availability of content and on media pluralism, to the ultimate benefit of consumers.[161] It is not entirely clear from the Proposal, specifically its Explanatory Memorandum, how newly better protected – and remunerated – authors and performers will represent "ultimate benefit to the consumers", however, one may suppose that this expectation relates more to the former provisions of Title IV, i.e. Article 11 of the DSMD, introducing protection of press publication concerning digital uses including claims to fair compensation[162] (and thus supporting creativity (and investment?) in news publishing sector), and Article 13 dealing with certain uses of protected content by online services.

3.2.1.1. Proposal´s fit within existing policy framework

When assessing consistency of the Proposal with existing policy provisions in the policy area it is noted that the DSM Strategy puts forward a range of initiatives with the objective of creating an Internal Market for digital content and services.

In December 2015, a first step has been undertaken by the adoption by the Commission of a proposal for a *Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the Internal Market*[163]. This discussed Proposal for the DSM Directive aims at addressing several of the targeted actions identified in the Communication '*Towards a modern, more European copyright framework'*[164]. Other actions identified in this

[160] Explanatory Memorandum, COM(2016) 593 final, p. 3
[161] Explanatory Memorandum, COM(2016) 593 final, p. 3
[162] Article 12 of the Draft DSMD
[163] COM(2015) 627 final
[164] COM(2015) 626 final

Communication are covered by the '*Proposal for a Regulation of the European Parliament and of the Council 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*'[165], the '*Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled*'[166] and the '*Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society'*[167], adopted on the same date as the Proposal for the DSM Directive.

The Proposal is noted to be consistent with the existing EU copyright legal framework. It is based upon, and complements the rules laid down in the Database Directive 96/9/EC[168], InfoSoc Directive 2001/29/EC[169], Rental Directive 2006/115/EC[170], Computer Programme Directive 2009/24/EC[171], Orphan Works Directive 2012/28/EU[172] and the CRM Directive 2014/26/EU[173]. These Directives, as well as the Proposal, "contribute to the functioning of the Internal Market, ensure a high level of protection for right holders and facilitate the clearance of rights", and

[165] COM(2016) 594 final
[166] COM(2016) 595 final
[167] COM(2016) 596 final
[168] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 077, 27.03.1996, p. 20-28).
[169] 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 (OJ L 167, 22.6.2001, p. 10–19).
[170] 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 (OJ L 376, 27.12.2006, p. 28–35).
[171] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16–22).
[172] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ L 299, 27.10.2012, p. 5–12).
[173] 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 (OJ L 84, 20.3.2014, p. 72–98).

the Proposal also complements Directive 2010/13/EU[174] and the proposal[175] amending it.[176]

3.2.1.2. Creators´remunaration on the Commission´s agenda

To carry through all of the initiatives within the DSM Strategy is an enormous task ahead of the Commission and is certainly commendable. The connection between enforcement of this agenda and the need for EU-wide harmonisation of "fair additional remuneration" (as introduced in Article 15 of the DSMD Proposal) is, nevertheless, still not evident.

It is only when looking in detail at the text of the DSM Strategy[177] that one finds some connection to the issue of remuneration. Specifically, question of remuneration is mentioned in its *Subsection 2.4. Better access to digital content - A modern, more European copyright framework,* when it states that *"[M]easures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content"*. Further in *Subsection 3.3. A fit for purpose regulatory environment for platforms and intermediaries* (in section addressing Role of online platforms) it is stated that *"[A]lthough their impact depends on the types of platform concerned and their market power, some platforms can control access to online markets and can exercise significant influence over how various players in the market are remunerated. This has led to a number of concerns over the growing market power of some platforms. These include a lack of transparency as to how they use the information they acquire, their strong bargaining power compared to that of their clients, which may be reflected in their terms and conditions (particularly for SMEs), promotion of their own services to the disadvantage of competitors, and non-transparent pricing policies, or restrictions on pricing and sale conditions."*

[174] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1–24).
[175] COM(2016) 287 final.
[176] Explanatory Memorandum, COM(2016) 593 final, p. 4
[177] COM(2015) 192 final, May 6, 2015

Later on, in the Press Release dated December 9, 2015[178] and accompanying the Communication 'Towards a modern, more European copyright framework'[179], it is stated that *"[O]verall, the Commission wants to make sure that Europeans can access a wide legal offer of content, while ensuring that authors and other rights holders are better protected and fairly remunerated. The key sectors of education, culture, research and innovation will also benefit from a more modern and European framework*." Further on, in the same document, when discussing creation of a fairer marketplace, it is assured that the Commission will assess if the online use of copyright-protected works, resulting from the investment of creators and creative industries, is properly authorised and remunerated through licences. The text further assures that the Commission will also analyse whether solutions are needed at EU level to increase legal certainty, transparency and balance in the system that governs the remuneration of authors and performers in the EU, taking EU and national competences into account.

In the 2015 SAA[180] White Paper[181], it is stated that "To create an equitable European internal market it is essential that current disparities and unfair practices are addressed – and solutions found to ensure that authors of audiovisual works are fairly remunerated whenever and wherever their films and programmes are screened, distributed, transmitted and accessed."[182] The SAA represents a fairly strong lobby organisation with frequent meetings with the Commission. They could be one of the forces behind the inclusion of Chapter 3 of the DSMD Proposal. While the Draft as eventually introduced may present a compromise to what they want to achieve, in

[178] http://europa.eu/rapid/press-release_IP-15-6261_en.htm, accessed 17.7.2017
[179] COM(2015) 626 final
[180] The Society of Audiovisual Authors (SAA) was established in 2010 by European collective management organisations (CMOs) to represent the interests of their audiovisual author members and, in particular, screenwriters and directors. The establishment of SAA was prompted by a perceived need to enforce the legal position of writers and directors and to fight for a fair, transparent and harmonised system to remunerate European audiovisual authors for the digital use of their work. Such a system should ensure that all authors are fairly remunerated in line with the success of their films and programmes and, at the same time, allow for easy distribution of, and access to, works. This. In their view can be achieved by securing an unwaivable right of authors to remuneration for their online rights, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred and would secure a financial reward for authors proportional to the actual exploitation of the works. See the SAA White Paper 2015, p. 3.
[181] *Audiovisual Authors' Rights and Remuneration in Europe. SAA White Paper* (2nd edn., Society of Audiovisual Authors, 2015)
[182] Ibid, at p. 36

July 2017 their aim was getting closer to being achieved by the votes of the European Parliament´s Industry and Culture Committees (see in details in Chapter 6).

Reading the documents and assertions above, one gets more and more the impression that the Commission wished to address the issue of overall fair compensation for authors and performers, with special emphasis on improving the situation with regards to remuneration for online uses. As such, the fact that the actual provision of Article 15 DSMD is drafted in a way that is traditionally in national legislations used only for a "bestseller" clause, not generally fair/equitable remuneration, seems to be less confusing. That is, if one supposes that the Commission wishes to right all wrongs related to adequate remuneration of authors only retrospectively and only in case works that become an actual best seller. But then a sardonic question may come to mind: Are only authors of best-selling works entitled to fair remuneration? It will be argued later that the Commission must have intended to provide protection to all authors and performers when it comes to their economic interests. It will also be argued that Article 15 should have been phrased slightly differently, taking example from some of the national regulation on this topic discussed later in Chapter 4. Such amendment, after all, was also frequently suggested by the MEPs and members of committees in the EU, discussing the Proposal. Details on the amendment proposals are provided in Subchapter 5.2.

When quarrying further into the Communication 'Towards a modern, more European copyright framework'[183], some additional explanation is provided under the discussion related to the achieving a well-functioning marketplace for copyright.

The Commission´s plan to achieve a well-functioning marketplace for copyright through remuneration for creators

The Commission has asked a question how should authors and performers be provided additional protection through guaranteed remuneration for the use of their creations? It can be agreed that one precondition for a well-functioning market place for copyright is the possibility for right holders to license and be paid for the use of their content, including content distributed online.[184] The Commission argues that the

[183] COM(2015) 626 final

[184] Communication 'Towards a modern, more European copyright framework', COM(2015) 626 final, at p. 9

production of rich and diverse creative content and innovative online services are equally important, and that both — creative content and online services — are significant for growth and jobs and the overall success of the internet economy.

There is a growing concern though about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users.

According to the Commission, this situation is not compatible with the Digital Single Market's ambition to deliver opportunities for all and to recognise the value of content and of the investment that goes into it. It also means the playing field is not levelled for different market players engaging in equivalent forms of distribution.

There are both legal and market-related reasons (including the relative market power of the parties involved) for such unequality. From a copyright perspective, an important aspect is the definition of the rights of communication to the public and of making available as these rights govern the use of copyright-protected content in digital context. Their definition (which has proven to be extremly difficult and generates plethora of questions being referred to the CJEU for preliminary rulings) therefore determines what constitutes an act on the internet over which creators and the creative industries can claim rights and can negotiate licences and remuneration.

In the Communication 'Towards a modern, more European copyright framework', Section 4 - Achieving a well-functioning marketplace for copyright, the Commission discusses how these questions create uncertainty in the market and put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated. Such lack of clarity on the definition of these rights can also generate uncertainty for ordinary internet users. It also raises questions whether, for example, news aggregators' specific right should be introduced. The Communication also points out that platforms also consider that they are not engaging in copyright-relevant acts at all, or that their activities are exempt from the liability by way of the e-Commerce

Directive.[185] Such thinking prompted a debate on the scope of this exemption and its application to the fast-evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.

All these concernes are subsequently addressed in the Proposal for the DSMD. They are not, however, relevant for the debate on Article 15 of the DSMD. It is only in the last paragraph of Section 4 of the Communication (Achieving a well-functioning marketplace for copyright) that it is stated: "[A]nother relevant issue is fair remuneration of authors and performers, who can be particularly affected by differences in bargaining power when licensing or transferring their rights. Mechanisms which stakeholders raise in this context include the regulation of certain contractual practices, unwaivable remuneration rights, collective bargaining and collective management of rights." Yet again, this seems like an enormous mental leap from discussing the need to secure appropriate remuneration for each use within digital context (generation of any value/revenue permitting) and what in the end came out from the Commission´s endeavours in Article 15 as a "best-seller clause".

Possibly, the underlying rationale for the best-seller clause in Article 15 of the draft DSM Directive (and its accompanying Articles 14 and 16) is that once (through the other measures adopted on the EU level within the DSM Strategy) it is secured that value is shared for all uses which generate any revenue fairly with the relevant stakeholders (but primarily the creators who – as opose to their transferees – do not have the bargaining strength to achive such result without the legislator´s help), such creators have a "statutory" claim with their (first) transferees (or their sub-transferees) that enables them to participate addequately on any value generated by use of their works or performances. Such claim would be equally applicable for share in remuneration for online uses as well as for "traditional" revenue sources (e.g. sale of books, DVDs, etc.). If that is the rationalle though, it has not been communicated adequately by the Commission (for example in the Explanatory Memorandum to the Propsed DSMD) and it is - as discussed below in this work – questionable if the objective is achievable through the current wording of Article 15 DSMD. After all, even in jurisdictions with very detailed copyright contract law provisions, such as

[185] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

Germany, it may be difficult to determine who should pay the equitable remuneration, who generates it, what is in fact equitable in given scenario and industry for given form of use, etc. Given the complexities and uncertainties pertaining to value flow in these sectors, any legislator should aim to be as clear and comprehensive as possible.

In the concluding remarks of Section 4 of the Communication[186], it is stated that:

> "The Commission is reflecting and consulting[187] on the different factors around the sharing of the value created by new forms of online distribution of copyright-protected works among the various market players. The Commission will consider measures in this area by spring 2016. The objective will be to ensure that the players that contribute to generating such value have the ability to fully ascertain their rights, thus contributing to a fair allocation of this value and to the adequate remuneration of copyright-protected content for online uses.
>
> In this context, the Commission will examine whether action is needed on the definition of the rights of 'communication to the public' and of 'making available'. It will also consider whether any action specific to news aggregators is needed, including intervening on rights. The role of alternative dispute resolution mechanisms will also be assessed. The Commission will take into account the different factors that influence this situation beyond copyright law, to ensure consistent and effective policy responses. Initiatives in this area will be consistent with the Commission's work on online platforms as part of the digital single market strategy.
>
> The Commission will also consider whether solutions at EU level are required to increase legal certainty, transparency and balance in the system that governs the **remuneration of authors and performers** in the EU, taking national competences into account."

The Proposal deals with all the issues outlined in the 2015 Communication. The first part of the problem is not subject of this discussion and it will be argued below that while such initiative is laudable and welcome, the part on remuneration of authors and performers could have been handled differently in order achieve its designated objective.

[186] Communication 'Towards a modern, more European copyright framework', COM(2015) 626 final, p. 10

[187] The Commission is consulting on these and other issues related to online platforms: https://ec.europa.eu/eusurvey/runner/Platforms.

3.2.1.3. Consistency with other EU policies and legal basis for adoption of the DSMD

The Proposal, as stated in its Explanatory Memorandum, would facilitate education and research, improve dissemination of European cultures and positively impact cultural diversity. The prposed DSM Directive is therefore consistent with Articles 165, 167 and 179 of the TFEU. Furthermore, the Proposal contributes to promoting the interests of consumers, in accordance with the EU policies in the field of consumer protection and Article 169 TFEU, by allowing a wider access to and use of copyright-protected content. [188]

The Proposal is based on Article 114 TFEU, which confers on the EU the power to adopt measures which have as their object the establishment and functioning of the Internal Market. It is quite unquestionable that the Proposal has as its main objective functioning of the Internal Market with digital content and related issues.

3.2.1.4. Subsidiarity (for non-exclusive competence) and proportionality

The EU does not have an exclusive competence over all the issues dealt with in the Draft DSMD though. Specifically, the contract laws governing remuneration of authors and performes would normally be out of scope. But the Propsal states that authors and performers should enjoy in all Member States the high level of protection established by EU legislation. In order to do so and to prevent discrepancies across Member States, it is necessary to set an EU common approach to transparency requirements and mechanisms allowing for the adjustment of contracts in certain cases as well as for the resolution of disputes.[189]

The Proposal is claimed to be proportionate as it will not affect retroactively any acts undertaken or rights acquired before the date of transposition, and the transparency obligation contained in the proposal only aims at rebalancing contractual relationships between creators and their contractual counterparts while respecting contractual freedom.[190]

[188] Explanatory Memorandum, COM(2016) 593 final, p. 4
[189] Explanatory Memorandum, COM(2016) 593 final, p. 5
[190] Explanatory Memorandum, COM(2016) 593 final, p. 5

3.2.1.5. Stakeholder consultations and collection and use of expertise

On the path towards the publication of the Proposal, several public consultations were held by the Commission. The consultation on the review of the EU copyright rules carried out between *December 5, 2013 and March 5, 2014*[191] provided the Commission with an overview of stakeholders' views on the review of the EU copyright rules, including on exceptions and limitations and on the remuneration of authors and performers.

Later, the public consultation carried out between *September 24, 2015 and January 6, 2016* on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy[192] supplied evidence and views from all stakeholders on the role of intermediaries in the online distribution of works and other subject-matter. Finally, a public consultation was held between the *March 23, 2016 and June 15, 2016* on the role of publishers in the copyright value chain and on the 'panorama exception'. This consultation allowed collecting views notably on the possible introduction in EU law of a new related right for publishers. In addition, between 2014 and 2016, the Commission had discussions with the relevant stakeholders on the different topics addressed by the proposal.

More importantly, legal[193] and economic[194] studies have been conducted on the application of the InfoSoc Directive, on the economic impacts of adapting some

[191] Reports on the responses to the consultation available on: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

[192] First results available on https://ec.europa.eu/digital-single-market/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries

[193] Study on the application of Directive 2001/29/EC on copyright and related rights in the information society: http://ec.europa.eu/internal_market/copyright/studies/index_en.htm; Study on the legal framework of text and data mining: http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf; Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions: http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf; Study on the remuneration of authors and performers for the use of their works and the fixation of their performances: https://ec.europa.eu/digital-single-market/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations; Study on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works: [hyperlink to be included – publication pending]

[194] Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU" : http://ec.europa.eu/internal_market/copyright/docs/studies/131001-study_en.pdf and "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options":

exceptions and limitations, on the legal framework of text and data mining and on the remuneration of authors and performers. Unfortunately, the first economic study listed below does not consider remuneration of rightholder at all; the second one considers remuneration for uses falling under exceptions. Remuneration for contract based uses are not assessed in these studies.

3.2.1.6. Impact assessment

An impact assessment was carried out for this proposal (hereafter as the "Impact Assessment")[195]. The Impact Assessment examines the baseline scenarios, policy options and their impacts for eight topics regrouped under three chapters, namely (i) ensuring wider access to content, (ii) adapting exceptions to digital and cross-border environment and (iii) achieving a well-functioning marketplace for copyright. The impact on the different stakeholders was analysed for each policy option. As regards fair remuneration in contracts of authors and performers, these options were considered:

- Option 1 consisted in providing a recommendation to Member States and organising a stakeholder dialogue. This option was rejected since it would not be efficient enough;
- Option 2 foresaw the introduction of transparency obligations on the contractual counterparts of creators.
- Option 3 proposed on top of Option 2 the introduction of a remuneration adjustment mechanism and a dispute resolution mechanism.[196]

It was Option 3 that was chosen since Option 2 would not have provided enforcement means to creators to support the transparency obligation.

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http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf

[195] Commission Staff Working Document – Impact Assessment ("Impact Assessment") on the modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council 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 (SWD(2016) 301 final). Also available here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0301 (accessed July 2017)

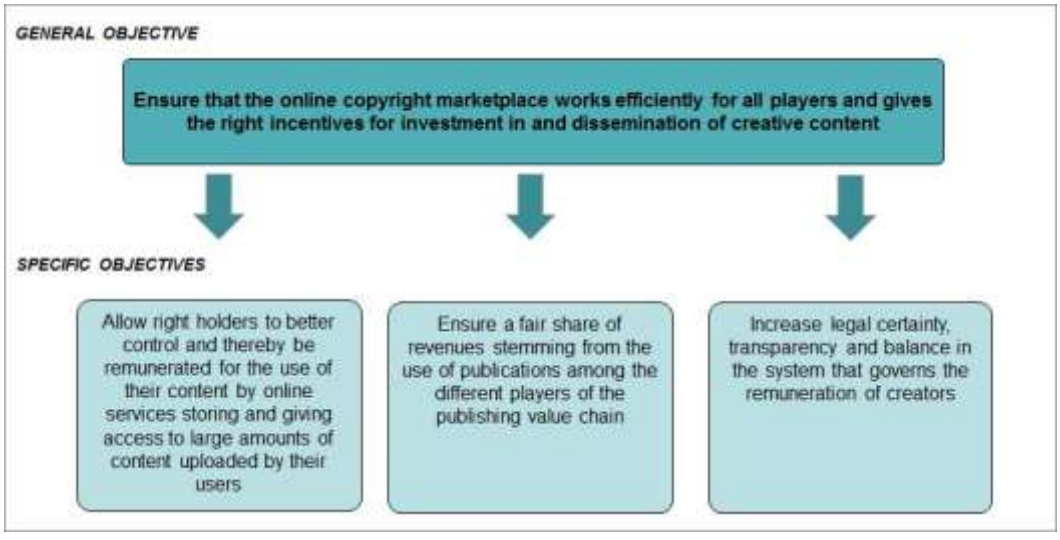
[196] Explanatory Memorandum, COM(2016) 593 final, p. 8

The Impact Assessment mentiones under a driver called “weaker bargaining power of athors and performers in contractual negotiations” that the main underlying cause of this problem is related to a market failure: there is a natural imbalance in bargaining power in the contractual relationships, favouring the counterparty of the creator, partly due to the existing information asymmetry. The IA states that the difference in bargaining power can also create a "take it or leave it" situation for creators and therefore full “buy-outs” using catch-all language that covers any mode of exploitation without any obligation to report to the creator.[197]

By the way this argument is constructed, it seems that the proposition is that by solving the “information asymmetry”, the balance of bargaining powers will be achieved. Ergo, by enacting the Transparency obligation, bargaining powers will be equal. However, the imbalance in negotiating positions happens way before the creator needs to have access to information about the extent of uses and revenues generated. The creator needs to strengthen their bargaining position when negotiation about the contract based on which the sufficient information is provided is taking place. Not after.

The Impact Assessment provides a figure depicting the objectives of the Proposal with respect to “well-functioning market place”, provided below as Figure 3.2.1.6.

Figure 3.2.1.6.: Objectives to ensure well-functioning digital market place



[197] Ibid, p. 175

3.2.1.7. Cost assessment

It was presented, when seeking simplification of existing models, that the sought after mechanisms aiming to improve licensing practices are likely to reduce transaction costs and increase licensing revenues for rightholders. SMEs in the fields (producers, distributors, publishers, etc.) as well as other stakeholders (such as VOD platforms) would be positively affected. The Proposal also includes several measures (transparency obligation on rightholders' counterparts, introduction of a new right for press publishers and obligation on some online services) that would improve the bargaining position of rightholders and the control they have on the use of their works and other subject-matter. The discussed mechanisms are expected to have a positive impact on rightholders' revenues.

The Proposal includes new obligations on some online services and on those to which authors and performers transfer their rights which may impose additional costs. It is assertained in the Explanatory Memorandum[198] of the Proposal that the costs would remain proportionate and that, when necessary, some actors would not be subject to the obligation. For instance, the transparency obligation will not apply when the administrative costs it implies are disproportionate in view of the generated revenues. As for the obligation on online services, it only applies to information society services storing and giving access to large amounts of copyright-protected content uploaded by their users.

The Proposal foresees the obligation for Member States to implement negotiation and dispute resolution mechanisms, which implies compliance costs for Member States. In some cases, however, MSs could rely on existing structures thus limiting the costs.

The Memorandum claims that the Proposal "ensures a balanced bargaining position between all actors in the digital environment." In the light of the below debate, this claim seems to be somewhat bold.

[198] COM(2016) 593 final, p. 9

3.2.1.8. Fundamental rights and the Proposal

By improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right, protected under Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'). Such positive impact should be reinforced by the measures improving licensing practices (as contained in the fourth title of the Proposal) and thus ultimately improving rightholders' revenues. On the other hand, new exceptions that reduce to some extent the rightholders' monopoly are justified by other public interest objectives. These exceptions are likely to have a positive impact on the right to education and on cultural diversity. These two public interests are deemed to be reasonably balanced in the Proposal.

3.2.2. The Proposal

3.2.2.1.Subject matter and scope of the Proposal

The Proposal lays down the subject matter and scope of the regulation by stipulating in Article 1 (1) that the (DSM) "Directive lays down rules which aim at further harmonising the Union law applicable to copyright and related rights in the framework of the Internal Market, taking into account in particular digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations, on the facilitation of licences as well as rules aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject-matter."

Except in the cases referred to in Article 6 of the DSMD[199], the Draft DSM Directive leaves intact and in no way affects existing rules laid down in the Directives currently in force in the area of copyright, in particular Directives 96/9/EC (Database Directive), 2001/29/EC (InfoSoc Directive), 2006/115/EC (Rental Directive), 2009/24/EC (Computer Programme Directive), 2012/28/EU (Orphan Works Directive) and 2014/26/EU (CRM Directive).[200]

The objectives of the Draft DSM Directive, namely the modernisation of certain aspects of the European Union copyright framework to take account of technological developments and new channels of distribution of protected content in the Internal Market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at EU level. Therefore, the EU adopts measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, the Draft DSM Directive does not go beyond what is necessary in order to achieve those objectives.[201]

[199] Article 6 of the Draft DSMD provides amendment of some of the exceptions in the Database Directive (Directive 96/9/EC; i.e. amending Article 6(2), point (b) and Article 9, point (b)), and the InfoSoc Directive (Directive 2001/29/EC; amending Article 5(2), point (c); Article 5(3), point (a); Article 12(4))

[200] Article 1 (2) Draft DSMD, COM(2016) 593 final

[201] Recital (44), Draft DSMD, COM(2016) 593 final

3.2.2.2. Chapter 3 of the Propsed DSM Directive - Fair remuneration in contracts of authors and performers

Title IV of the Proposal (Measures to achieve a well-functioning marketplace for copyright) provides in its Chapter 3 (Articles 14 – 16) provisions on fair remuneration in contracts of authors and performers. Proposed Article 15, the focal point of this thesis, introduces so called ´contract adjustment mechanism´, therefore the proposed Articles 14 – 16 will not be introduced chronologically here below. The provision of biggest interest here will be addressed first.

Contract adjustment mechanism

The focal point of this thesis and its hypothesis is provision of Article 15 of the Draft DSMD. It stipulates that:

> "Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances." [202]

Recital (42) of the Draft DSMD states that certain contracts for the exploitation of rights harmonised at EU level[203] are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title.[204] Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a transfer of rights is disproportionately low compared to the relevant revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive.[205] The assessment of the situation

[202] Article 15 Draft DSMD, COM(2016) 593 final
[203] At first sight, reading the text, one can think that „contracts for the exploitation of rights" are harmonised at EU level. It should be clarified that the "rights" are deemed to be harmonised at EU level, not the contracts.
[204] Recital (42), Draft DSMD, COM(2016) 593 final
[205] Recital (42), Draft DSMD, COM(2016) 593 final

should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors.[206] Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.[207]

Triggered presumably by the information provided under the transparency arrangement as described below, this is clearly of great potential significance (and cost) to publishers, as commented by Paul Herbert[208]. He asks many good questions which will be further discussed in the analytical Chapter 5: "Would an author's royalties which are paid on a ratchet according to sales be vulnerable to being disproportionately low? Again it may be that these conventional arrangements are not sufficiently granular for the purposes of the EC's proposals. Or would they only apply where the author has received a fixed fee rather than a royalty based payment? In any event they are certainly at variance with the UK's long established freedom of contract principle. They also create many potential uncertainties, not least if the licensee has sold on the rights and no longer benefits from them. Would the right then attach to the sub-licensees?"[209]. Similar concerns were raised in Germany when the provisions on the strengthening of bargaining position of creators were being adopted. Unfortunately, while Germany does have very detailed regulation on copyright contract law, answers to all these questions are not known yet. Partially due to short time passed since the German legislation´s adoption and partially due to lack of reliable studies on the regulation´s impact.

Transparency obligation

In order to achieve fair remuneration in contracts of authors and performers, the Commission introduces in Article 14 of the Draft DSMD so called ´transparency obligation´, i.e. an obligation imposed on the transferees of rights to provide

[206] Recital (42), Draft DSMD, COM(2016) 593 final
[207] Recital (42), Draft DSMD, COM(2016) 593 final
[208] Paul Herbert, ´EC Proposals for a directive on copyright in the digital single market. Implications for book publishers.´ <http://gdknowledge.co.uk/ec-proposals-for-a-directive-on-copyright-in-the-digital-single-market/>, accessed June 2017
[209] Ibid

information necessary for the creators to assess what may constitute, in the given case, fair remuneration.[210]

The Proposal stipulates that Member States must ensure that authors and performers receive on a regular basis (and taking into account the specificities of each sector) timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.[211]

Such obligation should be proportionate and effective and must ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, such obligation may be adjusted by the Member States, provided that the obligation remains effective and ensures an appropriate level of transparency.[212] Member States may also decide that such obligation does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.[213] How does one determine whether the contribution of the creator is or is not significant without first employing a judiciary or arbitrary assessment is not explained. Or, are the transferees themselves allowed to assess whether such contribution is insignificant and in such case refuse to provide the information?

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[210] *Article 14: Transparency obligation: "*(1) Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.
(2) The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.
(3) Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
(4) Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU."

[211] Article 14 (1) Draft DSMD, COM(2016) 593 final

[212] Article 14 (2) Draft DSMD, COM(2016) 593 final

[213] Article 14 (3) Draft DSMD, COM(2016) 593 final

Where a transparency obligation is imposed on the collective management organisations according to the CRM Directive[214], Article 14 of the Draft DSMD will not apply and the CRM Directive will take precedence.[215]

The Proposal stipulates that authors and performers need information to assess the economic value of their rights; this is especially the case where the creators transfer their rights in return for remuneration.[216] As authors and performers tend to be in a weaker contractual position when they transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.[217]

When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered.[218] The Commission suggests that the Member States should consult all relevant stakeholders as that should help determine sector-specific requirements. Recital (41) also admits that collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period of additional 12 months is provided for[219].

Dispute resolution mechanism

Article 16[220] of the draft DSMD stipulates that Member States shall secure that disputes concerning the transparency obligation under Article 14 and the contract

[214] Articles 18 to 22 of the CRM Directive (Directive 2014/26/EU) – Chapter 5 (Transparency and reporting) in Title II (Collective Management Organisations) of the CRM Directive
[215] Article 14 (4) Draft DSMD, COM(2016) 593 final
[216] Recital (40), Draft DSMD, COM(2016) 593 final
[217] Recital (40), Draft DSMD, COM(2016) 593 final
[218] Recital (41), Draft DSMD, COM(2016) 593 final
[219] Article 19 Draft DSMD, COM(2016) 593 final
[220] *Article 16: Dispute resolution mechanism: "*Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure."

adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.[221]

Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. The Commission therefore feels that Member States should provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism as introduced in Articles 14 and 15 of the Draft DSMD.[222]

While the provision of Article 15 is designed as a right to make a request, some commentators argue[223] that Commission intends it to take this seriously since Member States would also be required to create this dispute resolution mechanism to deal with claims for additional fair remuneration. Equivalent provisions are already in force in Germany and the Netherlands and it seems to those commentators that the Commission in seeking to roll them out on a wider basis.

3.2.2.3. Application and transposition provisions

As far as transposition of the Draft DSMD is concerned, Member States will need to bring into force the laws, regulations and administrative provisions necessary to comply with the DSMD´s provisions within 12 months after its entry into force, which is 20 days after its publication in the Official Journal.[224] This seems to be quite a short period given the document´s controversy and split of positions in general.[225] More importantly, Member States are often given longer period for adjustment; usually the more technically complex to transpose a Directive or the more onerous on various stakeholders to comply, the longer period provided.[226] It the case of DSMD, one could argue the issue is more on the ´very complex´ side of the scale.

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[221] Article 16 Draft DSMD, COM(2016) 593 final

[222] Recital (43), Draft DSMD, COM(2016) 593 final

[223] Paul Herbert, ´EC Proposals for a directive on copyright in the digital single market. Implications for book publishers.´ <http://gdknowledge.co.uk/ec-proposals-for-a-directive-on-copyright-in-the-digital-single-market/>, accessed June 2017

[224] Article 21 (1) Draft DSMD, COM(2016) 593 final

[225] As discussed for example in Ed Baden-Powell, Karim Amijee, ´European Commission proposal to modernise copyright´, Ent. L.R. 2017, 28(1), 9-12, 11 or Ted Shapiro, ´Legislative Comment: EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM)´, E.I.P.R. 2016, 38(12), 771-776

[226] Within the more recent issues in copyright law field it was, for example, approximately 18 months for the InfoSoc Directive (Directive 2001/29/EC), approximately 21 months for the

The DSMD will apply in respect of all works and other subject-matter which are protected by the Member States' legislation in the field of copyright on or after transposition deadline[227] but without prejudice to any acts concluded and rights acquired before such date[228]. Therefore, in order to maintain legal certainty, provisions of the DSMD (incl. Article 15) will not apply retrospectively for works and performances (and dealings with them) that are out of copyright protection, but creators can rely on the protection provided through Title IV, Chapter 3 of the DSMD as regards new contracts for exploitation of works and performances that are still protected. With respect to contracts concluded prior to the effective date of the DSMD, Article 18 (3) should be read as meaning that such exploitation contracts cannot be challenged.

The Transitional Provision stipulates that agreements for the transfer of rights of creators shall be subject to the transparency obligation in Article 14 as from one year after the transposition deadline.[229] In addition, the obligation does not apply to agreements concluded with collective management organisations as those are already subject to (stricter) transparency obligations under CRM Directive.[230]

Database Directive (Directive 96/9/EC); approximately 24 months for the CRM Directive (Directive 2014/26/EU) and the Orphan Works Directive (Directive 2012/28/EU); and even around 50 months for the Resale Right Directive (Directive 2001/84/EC).

[227] Article 18 (1) Draft DSMD, COM(2016) 593 final

[228] Article 18 (3) Draft DSMD, COM(2016) 593 final

[229] Article 19 Draft DSMD, COM(2016) 593 final

[230] Recital (41), Draft DSMD, COM(2016) 593 final

3.2.3. Conclusion to Chapter 3.2

Since this chapter primarily focuses on Title IV of the Proposal (Measures to achieve a well-functioning marketplace for copyright provides in its Chapter 3 (Articles 14 – 16) and as such does not provide sufficient overview of the overall impact of the Proposal, not more than the issue of the Contract adjustment mechanism should be evaluated. There is more commentary and overview of the acceptation of the draft provided in Chapter 5, but just one comment for all is mentioned.

The 2014 Creators´ Contracts Study[231] stipulates that so-called "best seller clauses" should in principle benefit the authors, but in practice these clauses are not very useful as judges are often reluctant to modify contracts and prefer to respect the principle of contractual freedom of the parties as they wish to avoid creating legal uncertainties. Another factor that works against actual application of these clauses is the fact that authors are hesitant to start legal proceedings before the courts, as they are afraid of damaging their relations with the transferee. "[232]

Therefore, given that it has been admitted that best-seller clauses do not work that well, and seeing that in the current version of the Proposal there is nothing more to secure fair contract-based remuneration for creators, this brings some scepticism about whether the Draft DSMD will fulfil its goal.

As already mentioned, more resentment, however, is focused on other provisions than the "best-seller" clause anyway. Commentators often question the EU´s competence to introduce the publishers' right or proportionality of the proposed measures.[233]

It seems there is a lot of debate and work to be done ahead of us on all the fronts.

[231] Described below in more detail
[232] The 2014 Creators´ Contract Study, p.40
[233] Ana Ramalho, ´Beyond the cover story - an enquiry into the EU competence to introduce a right for publishers, IIC 2017, 48(1), 71-91, p. 89

3.3. Studies addressing copyright and contract law, and remuneration in the EU

Many studies have been conducted in the past few years on the interplay between copyright and contract law, economic aspects of copyright law, remuneration of creators in various sectors. The four below mentioned studies are chosen due to several factors: they have been conducted relatively recently, they include various Member States (and more) and thus represent a wider sample for study than just the three jurisdictions examined in more detail in this thesis, and they have been commissioned (except for the first one) by the European bodies in preparation (or at least expectation thereof) of the documents presented as part of the Digital Single Market Strategy, mainly the draft DSM Directive.

The goal here is not to repeat all the analysis and conclusions made in those studies but to choose those parts which are most relevant for the present analysis and compare them (in a hindsight) to the "final" provisions (in as much as they can be final at this stage of the European legislative process) of the Proposal. Many of the aspects discussed in those studies were eventually reflected in some of the other documents forming the DSM Strategy. In the below discussion, these aspects are not evaluated due to limited scope and length of this thesis, although it may bring further interesting realisations.

3.3.1. The 2010 SABIP Study

The relationship between copyright and contract law was evaluated in quite a detail in a study called "*Relationship between Copyright and Contract Law*"[234], a research commissioned by the Strategic Advisory Board for Intellectual Property Policy (SABIP)[235] in 2010 and carried out by a group of copyright and economics academics[236]. While there may be some bias present in the study, it has been chosen to be discussed here to provide some background information, despite not directly affecting the preparation of the DSMD, because it was conducted in cooperation with experts in

[234] Further in this sub-chapter the „SABIP Study" or where context evident, the "Study".

[235] A body providing the UK Government with strategic, independent and evidence-based advice on intellectual property policy. The body only stayed in existence between 2008 and July 2010 when its responsibilities were transferred to the Intellectual Property Office. Despite some reservations against their work, the SABIP´s main contribution to the field laid in steering the debate regarding the interface between IP in practice and the policy considerations that should drive it in future; claiming IP reform should be evidence-based. As repeated many times in this thesis, hard evidence is very scarce to back or counter any claims made in this thesis

[236] *Martin Kretschmer*, Professor of Information Jurisprudence, Director, Centre for Intellectual Property Policy & Management, Bournemouth University; *Estelle Derclaye*, Associate Professor & Reader in Intellectual Property Law, School of Law, University of Nottingham; *Marcella Favale*, Postdoctoral researcher, University of Nottingham; *Richard Watt*, Associate Professor, Department of Economics, Canterbury University (NZ)

economics, which provides additional dimension to its findings. The research primarily deals with English law. In the national Chapter 4.3. some finding of this Study are also mentioned in the context of applicable copyright law.

The Study was conducted with the aim to address the supply-and-demand-side issues in creative industries[237]. On the supply side, policy concerns include whether copyright law delivers the frequently proclaimed goal of securing financial independence of creators.[238] But the complaints that they fail to benefit from the dramatic increase of availability of digital forms of copyright materials come from both creators and producers.[239] On the demand side, the issue of copyright exceptions and their policy justification has become central to a number of reviews and consultations dealing with digital content. Are exceptions based on user needs or market failure? Do exceptions require financial compensation? Can exceptions be contracted out by licence agreements? In addition to creators´ contracts, the Study also looks at users contracts and all these issues are to some extents addressed by the Draft DSMD. In the following paragraphs, only the conclusions relevant for this thesis – creators´ contracts with their transferees - will be addressed.

The Study found that under the standard economic conception of property rights, it is copyright law that allows contracts to be written: copyright law defines the characteristics of the work and the property rights in the work – the contract space. The core methodological problem was found to lie in how to conceptually distinguish the role of statutory copyright in contractual arrangements. The study worked with two simple examples. In one, a literary author assigned in a typical contract the copyright in a work to a publisher, against an advance and a royalty on copies sold. In the other example, a professional footballer is bound by a typical contract to play exclusively for the club against a signing-on fee and salary payments that depend on appearances and success. The former is a typical copyright contract, the latter a contract not based on a right defined by statute. Yet, their commercial features look a lot like each other.[240]

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[237] The SABIP Study, p. 2

[238] Such as stated in Recital 11 of the InfoSoc Directive '*A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.*'

[239] In a survey of 25,000 British and German literary and audio-visual writers conducted in 2006, only 14.7% of UK authors and 9.2% of German authors claim to have received specific payments for Internet uses of their works. For audio-visual authors the figures are even lower (UK: 11.1%, Germany: 6.9%). See M. Kretschmer, P. Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers*, Report published by Bournemouth University, UK; Centre for Intellectual Property Policy & Management (CIPPM); (216pp) December 2007, p. 32.

[240] The 2010 SABIP Study, p. 3

Looking at copyright contract through economics optics, one would expect copyright law to affect contracts, depending on time preferences; risk, and risk aversion; outside and inside options; and the extent of asymmetric information between the parties - but there is no evidence that this is empirically the case. The important finding in the Study therefore is that a major research gap is how a change in copyright law will affect the bargaining outcome between parties contracting over material protected by copyright law[241]. Will the proposals to change the shape of European copyright law have the requested effect? Will they solve the imbalance in bargaining power? It does not seem we have the answer to this question yet. The changes to EU copyright law were proposed irrespective of the economists' criticism and it remains to be seen "who was right"?

Creator contracts - contract bargaining

Cultural markets are winner-take-all markets. They are very risky for both creators and investors. The data obtained for the Study indicate that the top 10% of creators receive a disproportionally large share of total income in the creative professions (for literary authors about 60-70% of total income; for composers/songwriters about 80% of total income). For most other creators, 'portfolio lives' are typical. That means that about two thirds of professional creators have earnings from a second job and the income of creators is overall well below the national[242] median income. "Unsurprisingly, the bargaining outcome over rights is tilted towards bestsellers. Creators with a track record of success are able to negotiate contracts that preserve their interests. For most others, in particular new entrants to the entertainment industries, assignment of rights is common."[243] The Study thus confirms the premise on which this thesis is based – at the beginning of their creative (and bargaining) cycle, creators are most vulnerable and need most support. However, the Study claims that mechanisms of collective bargaining (such as through unions, professional associations and collecting societies) seem to have a greater effect than statutory (ownership) rights because the latter, typically, will be varied and/or transacted by contract. This would back up the view that, as English law stands now, copyright law (specifically the statutory part, dealing mainly with transfers and ownership) does not provide any support for "new-joiners" of the creative sphere. Later, in relation to the UK, there are some suggestions provided how this could be dealt with within common law or equity. And if the DSMD still gets to form part of the English law

[241] Ibid
[242] The Study was conducted in the UK, for the purposes of UK Government. Therefore any reference to national etc. has to be read correspondingly.
[243] The 2010 SABIP Study, p. 4

(if transposed before Brexit[244] and through Great Repeal Bill incorporated into English law, or Brexit for some reason does not take place) the proposed "best-seller" clause may provide some help.

Creator contracts - current range of regulatory tools

The Study identifies several regulatory tools in regulation of copyright contracts in other jurisdictions that attempt to balance the bargaining powers of the parties. The provisions identified relate to ownership; requirements of form; scope of rights transferred; rights to remuneration; effects on third parties; revision and termination; and unfair contracts. More or less identical tools were recognized in the other studies discussed later. The Study then in detail provides several methodological suggestions how regulatory tools could be assessed if there was a policy decision taken to adjust the bargaining outcome between creators and investors. The options identified included intervening in situations of non-exploitation; strengthening rights that cannot be transferred (such as the right to be credited as the author); and privileging instruments of collective bargaining, etc. It was noted that regulating contracts would create potential inefficiencies.245 Given that this Study was provided to the Government in 2010 and the law in this respect has not changed, it is safe to say that balancing bargaining powers through regulatory tools did not become a priority. Now the Government will have to deal with the issue due to the Commission's Proposal. One can expect reluctance with its transposition, similarly as was the case with remuneration for private copying.

The Study also examined effects of certain rules on creators' contract in the UK. Systematically, it makes more sense to deal with these issues in the chapter specific to English law. The effect of rules on first ownership, on moral rights, on rights to remuneration, and rules on reversionary term have on creators´ contracts is therefore explored in Chapter 4.3.

In the section dedicated to Research gap II: Normative aims of contractual regulation, the Study also looked into the notion of Fairness from the economic point of view. It states "that economists regard copyright law in terms of its 'efficiency' effects in providing an incentive to increase creative output rather than in terms of equity. There may not be an inherent clash between these views but economics has a much less developed view of

[244] The draft DSMD has by the time of submission of this work gone through the first stage at the European Parliament and is now with the Council of Ministers. If the Council finds the proposals unobjectionable the Directive is likely to become effective within the two year notice period which the UK is required to give in order to achieve Brexit. However, it will still be for the UK to decide whether or not it wishes to implement the Directive by means of enacting domestic legislation.

[245] The 2010 SABIP Study, p. 5

fairness than of efficiency. On the specific notion of fairness that is often invoked in policy discussion about creator and user contracts, there are a number of questions that need to be explored, relating to economic, legal and moral notions of fairness. How should 'fairness' be defined for the context of copyright contracts? Are existing contracts really 'unfair'? Do alternative contracts, within the current copyright law, exist that would be perceived as being 'fairer'? If they do exist, do those contracts sacrifice efficiency? To what extent does any perceived 'unfairness' depend upon copyright law? Can copyright law be altered in order that the balance of bargaining positions be changed and the resulting contracts are 'fair'?"[246] As evident, for economists the balance of bargaining power is more about efficiency than fairness. But the argumentation of the European legislator goes along the line that if copyright contracts are not induced to be fairer, they will – mid to long-term – seize to be efficient either as there will not be sufficient incentive to create and put the content "out there". It is safe to say that everyone would be satisfied in copyright transfer contracts were both, fair and efficient.

3.3.2. 2014 Creators´ Contracts Study

"*Contractual arrangements applicable to creators: Law and practice of selected Member States*"[247] is a study requested by the European Parliament's Committee on Legal Affairs and the manuscript was completed and presented by the European Parliament´s Directorate General for Internal Policies (Policy Department C: Citizens´ Rights and Constitutional Affairs, Legal Affairs) in January 2014 (herein after as the "2014 Creators´ Contracts Study", or the „Study" in this specific sub-chapter). The Study was conducted by a group of academics led by Séverine Dusollier, CRIDS (University of Namur), with national reports contributors being copyright specialists from seven EU Member States.

The resulting report discusses the legal framework applicable to copyright contracts as well as the practices in artistic sectors in Belgium, France, Germany, Hungary, Poland, Spain, Sweden, and the UK. The authors conducted a careful revision of the copyright provisions, contractual law principles and case law in these 8 Member States. These provisions and principles are presented together with a more specific analysis of a set of issues such as collective bargaining, digital exploitation, imbalanced contracts, and reversion rights, etc. A set of recommendations aiming at improving the level of fairness in copyright contracts is proposed at the end of the Study. While the Study´s primary

[246] The 2010 SABIP Study, p. 9
[247] The document is available at: http://www.europarl.europa.eu/studies (accessed July 2017)

focus is not remuneration, its relevance for this thesis due to the focus on „fairness in copyright contracts“ is undisputable. This study has been accepted as helpful also by the practitioners because not only it shows the various problems in the framework of digital exploitation, but also illustrates the legal difference in the individual Member States handling with this topic.[248]

Objective of the Study

After creation of a work, an author will transfer copyright over the work to a publisher or producer to exploit the work commercially and thus secure the author access to the market. While such contracts can contribute to securing financial autonomy of creators, granting them some remuneration, if imbalanced in favour of the undertakings exploiting the works, such contracts may fail to provide a fair share in the financial return deriving from the exploitation of the work. The Study evaluates the rules and legal provisions applicable in the European Union that intend to protect creators in their contractual dealings. European harmonisation on legal provisions related to creators' contracts had not been under way at the time of the Study[249], the matter has been left to national laws which differ enormously, from very detailed provisions to non-existent ones. This is discussed in more detail in the national chapters in Chapter 4. Before analysing the relevant national legal provisions offering protection to creators, including both specific provisions of national copyright laws and the general principles of contract law, the Study considers the context of the exploitations of works and of the contractual relationships pertaining thereto. Part of the Study is devoted to the analysis of some specific issues where the author might appear to lack protection and assesses the efficiency of the legal protection in practice in particular contexts. These issues include digital exploitation, rights reversion, imbalance between the waived rights and envisaged exploitation, contractual waiving of rights to remuneration, collective management of transferred rights in audiovisual works, dual licensing. These issues are not specifically examined in this thesis but are reflected in the conclusions and recommendation of the 2014 Creators´ Contracts Study and through that also affect the findings of this work.

The Study emphasises that copyright contract concluded between the creator and the transferee will govern their relation all the way from the negotiation of the contract to its

[248] Study of the European Parliament on the Protection of Creator's Rights in a Changing Environment´, White & Case, accessible at <www.whitecase.com/ publications/article/study-european-parliament-protection-creators-rights-changing-environment>, published 26 February 2016, accessed June 2017

[249] The first attempt to do so is by way of the draft DSM Directive and only to the extent as relates to transparency obligation and fair additional remuneration, which does not seem to be sufficient.

execution and termination. Protection of creators is necessary at each stage of the contract: during the negotiation, to counterbalance her weaker position and lack of information; during the exploitation of the work, to guarantee the creator his/her fair remuneration and control over the enforcement of the contract, if needed; in the termination of the contract, to enable the author to get out of an unfair deal.[250]

The authors of the Study point out that throughout all these stages of the contract's life, remuneration of the author should have a prominent importance. The Study, however, also acknowledges, that whether the creator effectively gets a fair share of the revenues of his/her work along the whole value chain will strongly depend on elements other than the first contract. The first transferee of the copyright will enter into contractual relationships with subsequent exploiters (broadcasters, retailers, on-line platforms, video-on-demand providers, etc.), in which authors will have no say. This is further impacted by the intervention of collective management organisations which will also try and secure some fair remuneration for their authors in some modes of exploitation. The balance achieved in the contract between creators and publishers or producers should be considered in this bigger context.

The Study then examines in detail legal provisions protecting the author in copyright contracts. Specifically, the Study examined in the context of national laws of the 7 countries (i) restrictions related to the form of transfer of rights, (ii) form requirements, (iii) determination of the scope of rights, (iv) determination of remuneration, (v) obligations of the parties[251], (vi) interpretation of contracts, (vii) Termination of contract, (viii) transfer of contracts, (ix) rules applying to some types of contracts[252], and (x) specific types of contracts[253]. Specifics of these measures are explained for most of them above, in the Contextual Chapter 2.

The Study emphasises, that there is lack of harmonisation and great disparities in the application of the existing rules, from legal regimes with very detailed provisions to regimes favouring higher degree of contractual freedom. In relation to rules on remuneration, the Study emphasises that it is essential to provide some fair participation

[250] The 2014 Creators´ Contracts Study, p. 7

[251] An obligation to exploit the work is sometimes imposed to the transferee, but not always or in all types of contracts.

[252] examined specific rules of Member States for works created under employment and for commissioned works that are less favourable towards the author and give employers and commissioners more rights to exploit the works created by their employees.

[253] publishing contracts or contracts of production of audio-visual work, are regulated by more specific contractual provisions where the rights and obligations of the author and transferee have been detailed more precisely in the law

of the author in the revenues of his/her creation, however, it is also noted that while such rules exist in many countries, they sometimes do not prove efficient in practice to secure fair remuneration to creators. This is the case of the Czech Republic, for example, as explained later. Czech copyright law has several measures discussed above implemented but in reality they do not secure sufficient protection for creators.

Authors of the Study also evaluated some general principles of contract law, such as the principles of good faith, fairness and equity; usages; rules of interpretation; defect of consent and other conditions for the formation of contract; legal provisions on unfair terms; undue influence, unconscionability, and restraint of trade; and revision of contract given unforeseen circumstances and concluded that specific protective rules, that take adequate consideration of the contractual position of creators, should be preferred over general contractual principles not tailored to address the creators' need of protection.[254]

Collective agreements as another tool to protect creators were also considered, specifically looking at German and French models, and it was concluded that collective negotiations and agreements have many assets, as they can help all creators to get a balanced bargain when transferring their rights, but there is one – important though - limit: they cannot determine the remuneration due to the creator or the tariffs for the exploitation of works, as this might be against competition law.

This examination, as well as discussion over specific legal issues, such as digital exploitation, rights reversion, imbalance between scope of waiving and exploitation, contractual waiving of rights to remuneration, transfer of rights in audiovisual works and collective management, and dual licensing, led the authors of the Study to the following conclusions and recommendations.

The overall, rather alarming but surely not surprising, conclusion is that the existing contractual protection of creators, as included in copyright law and, indirectly, in general contract law, appears to be insufficient or ineffective to secure a fair remuneration to creators or address some unfair contractual provisions.

Considering all aspects, including new emerging issues, such as the increasingly dynamic markets for exploitation, notably digital markets, and the fact that the contract between the publisher/producer and the creator is only but one element in a web of contractual relationships and revenues streams, the team suggested that the following issues are addressed by the European institutions in search for a harmonised approach to balancing

[254] The 2014 Creators´ Contracts Study, p. 10

bargaining powers and securing fair remuneration to creators even in changing, digital driven, environment.

For the avoidance of losing some meaning in summarising and paraphrasing the recommendations, the text is provided in verbatim below:

"In conclusion, the following recommendations are made by the present study:[255]

1. The real contractual nature of copyright contracts should be restored: authors agree on some reciprocal bargain in which effective exploitation and fair remuneration are the counterparts for the transfer of copyright. This ***contractual bargain*** would justify:
    i. The imposition of **minimal formalities** in contracts transferring copyright, such as written form and the mandatory determination of the exact scope of the transfer and of the due remuneration.
    ii. The imposition of an **obligation of exploitation** for each mode of exploitation that has been transferred, allowing authors to get their rights back for any mode of exploitation not pursued by the publisher or producer.
    iii. **Reporting obligations**, that is, the obligation to detail on a regular basis the modes of exploitation undertaken and the revenues yielded by all exploitations, imposed on first transferees but also on other content providers and exploiters in order to enable the author to have a broader understanding of the financial flows related to her work and her actual share in its economic exploitation.
    iv. The introduction of an **unfair terms model** in copyright law to balance the contractual bargain between the creator and the transferee. By analogy to consumer protection, such a scheme would preclude "black" terms (determined in the law) as well as any provision causing a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the author.
2. Authors deserve some ***fair remuneration*** for all exploitations made of their works, which would justify:
    i. The drafting of an **economic study on the remuneration of authors** as well as **further research on the impact on competition law on the admissibility of collective agreements.**
    ii. The imposition of the **determination of a fair remuneration** of the author in the contract for each mode of exploitation, clarifying its mode of calculation and, if proportional, the types of revenues on which it will be based.
    iii. **Obligations of transparency and reporting of financial streams and revenues** related to the exploitation of works.

[255] The 2014 Creators´ Contracts Study, p. 14-15

iv. A principle of **unwaivability of the right to equitable remuneration** or fair compensation.

v. The enactment of other **unwaivable rights to remuneration**, notably for some kinds of digital exploitations.

3. The ***dynamic process of copyright contracts*** should guide the protection of authors in copyright law, in order to effectively protect the author at all stages of the contractual process (from the negotiation, exercise, enforcement, to the termination of contract). That would justify:

   i. The validity of transfer of rights for **unknown forms of exploitation**, upon the condition of a fair remuneration of authors and with the possibility of rights reversion.

   ii. The **limitation in time** of contracts transferring copyright from an author to a publisher or producer, including the possibility of some renegotiation or clause of revision (for the author) in consideration of the evolution of the modes of exploitation, of business models or models of consumption of works.

   iii. A general **principle of reversion** of the rights transferred to enable the authors to terminate a contract, namely in case of lack of exploitation, lack of payment of the remuneration foreseen as well as lack of regular reporting.

   iv. Some manoeuvre for **dual licensing** to enable authors to develop non-commercial exploitation.

   v. Fostering a European **dialogue among stakeholders towards more flexible contracts and exchange of best practices**.

4. The protection of authors regarding their contractual relationships could further rely on ***collective agreements, management and enforcement:***

   i. **Collective agreements or model contracts** should be encouraged to secure a fair protection and remuneration of authors in individual contracts.

   ii. **Collective actions** should be allowed, namely by representatives of the authors, to act on a collective basis, particularly in the case of adhesion contracts, including by setting up collective mechanisms of alternative dispute resolution and mediation procedures.

   iii. **Education and awareness of creators** should be developed to better inform authors and enhance their bargaining position."

After having introduced the provisions of the Draft DSMD in the previous subchapter, it is evident that not all the recommendations could the European legislator take into account. Some of them may have been addressed in the other proposals resulting from the roll-out of the DSM Strategy, but there are some that – if implemented – should have formed part of the DSMD agenda. The emphases on this omission is given here, because

in the concluding chapter of this thesis it is argued that some of these measures should have been introduced by the Proposal to achieve its goal – fair remuneration for creators for overall exploitation of their creations in "digital-driven" environment.

From the above introduced recommendations, the reporting obligation set out in point 1.iii and 2.iii has been introduced in the Proposal (Article 14). The Commission also conducted economic studies on the remuneration of authors as suggested in point 2.i (discussed further below), and provided for a dispute resolution mechanism (Article 16 DSMD). The most important recommendation relating to "fair remuneration for all exploitations made" (point 2. above) made, i.e. to impose a determination of a fair remuneration of the author in contract for each mode of exploitation (2.ii) has not been introduced. Instead, an obligation to introduce a bestseller clause has been imposed on Member States. Neither of the other measures that could have supported creators in their negotiations has been adopted. Principle of reversion or a limitation in time with possibility to renegotiate[256] would have been also helpful.

Many of these tools already exist in Germany, which arguably, is the most advanced jurisdiction in terms of strengthening creators´ bargaining position. In the conclusions therefore it is suggested that more example should be taken from the German copyright legislation if the goal set by the Commission truly is to be achieved.

3.3.3. The 2015 EU Remuneration Study

"Remuneration of authors and performers for the use of their works and the fixations of their performances", is a study prepared for the European Commission DG Communications Networks, Content & Technology by Europe Economics and Lucie Guibault, Olivia Salamanca and Stef van Gompel at the Institute of Information Law (Instituut voor Informatierecht) of the University of Amsterdam[257] (hereafter in this subchapter only as the "Study") for the purposes of the Digital Single Market agenda (part of) evaluation in 2015.

The Study analysed the current situation regarding the level of remuneration paid to authors and performers in the music and audio-visual (AV) sectors and compared, from

[256] Introduced recently in Germany in relation to exclusive exploitation contracts and discussed in more detail below.

[257] European Union (2015), Internal identification: Contract number MARKT/2013/080/D; SMART 2015/0093, ISBN 978-92-79-47162-9 (the "2015 EU Remuneration Study")

both a legal[258] and economic perspective, the existing national systems of remuneration for authors and performers and identified the relative advantages and disadvantages of those systems for them. Moreover, it also explored the need to harmonise mechanisms affecting the remuneration of authors and performers, and to identify which ones are the best suited to achieve this. The Study also examined potential impact of such models on distribution models and on the functioning of the Internal Market. In its conclusion, the Study outlines a series of policy recommendations based on the analysis conducted. These recommendations will now be examined in the light of the final Proposal of the DSMD and it will be discussed whether the Commission took those recommendations on board and to what extent. Before that, some of the analysis made in the Study is discussed below.

The Study focused specifically on lyricists, composers, songwriters (lyricist and composer) as authors within the music industry and at both, featured artists and session musicians representing performers in the sector. In relation to the AV sector, the authors of the Study considered remuneration of principal directors, screenwriters, composers of music for film or television (authors), as well as TV and film actors. Therefore, the "sample" of creators considered is considerable large and should therefore provide a useful data[259].

[258] The current legal framework was analysed through the "eyes" of a mixture of scholars and practising lawyers in each of the ten countries under study (Denmark, France, Germany, Hungary, Italy, Lithuania, Poland, Spain, UK and the US). The countries were chosen to reflect differences in regulatory approaches and existing regional idiosyncrasies and the team prepared a questionnaire focused on legal framework of each country from both a contract law (*lex generalis*) and copyright law (*lex specialis*) perspective. It also focused on the actual contractual practice in each country and whether such practice was aligned or not with the law.
The study looked into the remuneration regulation and practice in the UK and Germany, both jurisdictions under scrutiny of this thesis and thus the outcome appears to be particularly relevant. Czech Republic was not considered, however, Hungarian copyright and contract law and practice formed part of the analysis. Since – as explained later in the national chapter – the legal history and tradition in Hungary is very similar to the one in the Czech Republic, including the fact that Hungary is also one of the few MS adhering to the so-called quasi-dualistic doctrine of author´s rights, the conclusions achieved in relation to Hungary can be applicable to large extent for Czech copyright law and practice as well.

[259] Authors of the Study, however, pointed out (p. 7 of the Study) that in search for primary data on remuneration, contract terms, and characteristics of creators, they developed an online survey in consultation with DG Internal Market which was uploaded onto the EU Survey platform and was distributed to authors and performers in the 9 EU Member States studied via CRMOs and unions which offered to assist in the research. Despite all efforts to obtain useable data, the data was not in the end representative of all authors and performers in the countries covered by this study, there was a significant scope for bias in the responses and it was observed by the Study team that there were missing values and a lack of internal consistency in a number of responses. A similar lack of consistent findings was deemed apparent also in the econometric analysis. As such the team did not rely on the collected data when defining their policy recommendations.

The Study concludes[260] that copyright (author´s rights) and related rights have been relatively well harmonised in European law and that all the Member States considered in the Study grant authors an exclusive, transferable (to various degree) right of reproduction, a right of communication to the public, including the right of making available, and a distribution right; all in conformity with the InfoSoc Directive.[261] The Study also provides some insight into the nature and implications of exclusive rights versus the so-called remuneration rights.

One very important conclusion of the Study is that it "appears that the general provisions of contract law play a very limited role in granting support to authors and performers in the negotiation of exploitation agreements and the determination of the level of remuneration".[262] General contract law in each of the countries may affect the way a contract is interpreted or executed, but it generally does not influence the outcome of the negotiation on the transfer of rights or on the remuneration that is due for such transfer or the uses of the work or fixed performance agreed. But the Study confirms that because authors and performers are traditionally seen as the weaker party to contractual negotiations, some Member States[263] have implemented in their copyright legislation several mandatory provisions on the formation, execution and interpretation of authors' and performers' contracts. Within the Member States, there is a whole scale of variations between such protective solutions and full contractual freedom.

The differences also exist outside the strictly legal framework. Authors and performers often organise themselves into unions or freelance associations where enabled by local regulation. These unions and associations frequently negotiate model exploitation contracts with representatives of the industry. However, these trade unions and associations of authors and performers have not been set up in all Member States. And even where they have been set up, the form and the degree of collective action differ. The unions and associations play different roles in the negotiation as well as enforcement of creators´ contracts.

[260] The 2015 EU Remuneration Study, at p. 4

[261] Some differences in the national implementation of the EU *acquis*, particularly with respect to the existence or the exercise of the rights conferred on authors and performers under the Rental Directive and the Satellite and Cable Directive, as well as with respect to certain performers' rights under the InfoSoc Directive can be tracked, but the variations in legislation can be attributed to the options left in the *acquis* for the implementation of EU law by the MSs. However, some differences are the result of conscious decisions on the part of the national legislator to go beyond the minimum harmonisation in the *acquis*.

[262] The 2015 EU Remuneration Study, at p. 4

[263] France, Germany and Spain to be named out of those addressed in the Study

CRMOs can also – to some extent - play a role in establishing the level of remuneration received by authors and performers, but the importance of this role differs by right holder, sector and Member State.[264] In general though, CRMOs are deemed to operate in the interest of their members, e.g. authors, performers. However, as with any "blended" solution, tariffs or T&Cs arranged by the CRMOs may not always, in specific cases, be as good (and fair) as the arrangement the creator could have secured based on individual licensing.

There is a whole range of mechanisms available in contract or copyright law to provide support to authors and performers, with a various degree of impact on remuneration. for authors and performers. The Study outlines the following principal legal elements to be taken account of: (i) the structure of the rights conferred by the law (i.e. the ownership and the nature of the rights – exclusive or remuneration rights); (ii) the existence of statutory provisions to protect authors and performers as weaker parties to a contract; and (iii) the use of collective bargaining and role of trade unions and associations.[265]

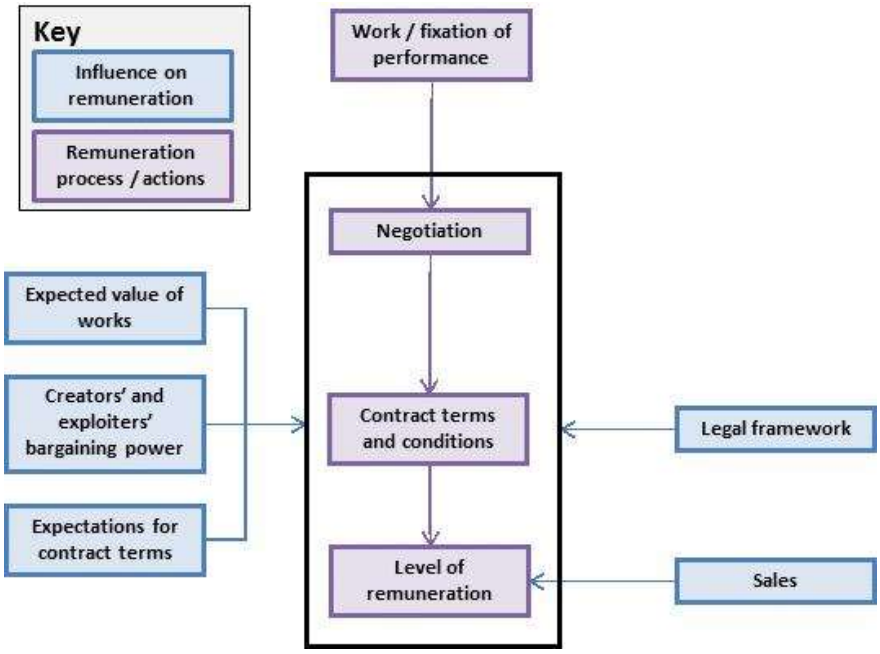
As explained in Chapter 2.3 with regards to stakeholder mapping, supply chains and payment flows in the music and AV sectors involve a number of players. They will, in addition, vary by types of authors and performers and across Member States. Nevertheless, two important insights for the determination of authors' and performers' remuneration have been provided by the Study. Firstly, in most cases the level of remuneration that authors and performers earn depends on the contract negotiated with their "first transferee", i.e. the publisher or producer, in exchange for a transfer of their exclusive rights. The second realisation is that the complexity of supply chains and the associated payment flows is more often than not very difficult for creators to fully understand. It makes it difficult to grasp adequately the sources of and rights associated with the remuneration they receive.[266] This is a common theme mentioned in many of the relevant studies and, more importantly, addressed, to certain extent, in the Proposal. The Commission aims to improve the visibility over the payment flows by introducing the transparency obligation into the draft DSMD[267]. It is, however, argued later in this work that in order to help the creators to get better oriented in the supply chains (or better yet, shift this burden onto the first transferees, who are better equipped to do so), Article 15 of the Proposal (the Contract adjustment mechanism) should be amended in order to

[264] The 2015 EU Remuneration Study, at p. 4
[265] The 2015 EU Remuneration Study, at p. 5
[266] The 2015 EU Remuneration Study, at p. 5
[267] Article 14 of the Proposal, discussed in more detail above.

enable the creators to request (additional) fair remuneration from their first transferees for any uses of their creations exploited through contracts concluded at any point throughout the supply chain.

The level of remuneration of authors and performers will also depend on additional factors. A simplified chart was introduced by the Study, representing an overview of the process by which remuneration received by authors and performers is determined, and which identifies the key influences on their remuneration (expectations for the value of the work, bargaining power, the contractual expectations or norms, and the legal framework in place). Emphasis of each of these influences will always depend on the legal framework of given Member State, such as rules on the form of payment, availability of collective bargaining, exclusive/non-exclusive nature of rights, waivable/non-waivable character of rights, and rules on transfers of rights. Below is the figure reproduced exactly as provided in the Study.

Figure 3.3.3.1: High-level process of securing remuneration[268]



Source: Europe Economics.

[268] The 2015 EU Remuneration Study, at p. 7

Key findings

The following three key findings were presented in the Study (not relying on the primary data obtained through the on-line survey due to its inconsistency).[269]

Transparency

The Study concluded that there is a lack of transparency of the remuneration arrangements in the contracts of authors and performers in relation to the rights transferred. They found the payment flows in the music industry particularly complex and emphasise that the differences in the national implementation of the cable retransmission right, the right of making available and the rental right pose noticeable cross-border transparency problems. According to the Study, the absence of information on which to base an estimate of likely earnings in different Member States undermines the ability of authors and performers to effectively exercise their freedom of movement across jurisdictions and has an adverse effect on the functioning of the Internal Market. There is a clear trace of attempt to tackle this issue with the Draft DSMD, as described below, mainly through its proposed Article 14.

Scope of transfer

It is undisputable that many authors and performers (such as those new to the industry) are in a weaker bargaining position than others. Problems arise if they get locked into long-lasting agreements with unfavourable terms, especially if later on they become successful. The development of new modes of exploitation plays important factor. In order to help creators, prevent these unfavourable situations, some Member States regulate the transfer of rights relating to forms of exploitation that are unknown or unforeseeable at the time the contract was concluded, as well as the transfer of rights relating to future works and performances. This is similarly non-harmonized though as the rest of the topics discussed. It is therefore interesting to see that, despite several indications in the studies available to the Commission, including this Study, that this is one of the reasons why the bargaining positions of creators across the EU differ so much (and as a result their remuneration negotiation options vary), the Commission did not chose to address this area in the Proposal. Whether this was because of the Commission´s conviction that this specific challenge does not impact the free market with creative content, or, because of acknowledgement that opening this issue would have to lead to opening plethora of other connected issues, remains to be discussed later.

[269] The 2015 EU Remuneration Study, at p. 8

Role of trade unions and freelance associations

As will also be demonstrated later in Chapter 4 in the national chapters, in some Member States collective action by trade unions and associations (or CRMOs) play an important role (especially for authors and performers in the audio-visual sector). Unions and associations provide support with negotiation of remuneration agreements (directly or through involvement in preparing and promoting model contracts), and can also help enforcing agreements. The problem is that unions and associations of authors and performers do not exist in all Member States. Or, somewhere they have been set up only for some categories of authors and performers. Yet again, this issue not only has not been addressed in the Proposal by, for example, introducing provisions like those present in German copyright law (discussed below), but there is even a lack of reference to already achieved agreements in the remuneration provision ("Contract adjustment mechanism") of the Draft DSMD, which can make the provision problematic for interpretation even before being adopted.

Policy recommendations

The team preparing the Study developed five principal policy recommendations. They suggested that for some of the issues identified, an EU-wide approach may be needed.[270] This would apply mainly where there is a specific Internal Market issue. For the other recommendations, policy intervention at the national level may also be effective.

The suggested Policy options outlined by the Study are:

- Policy 1: Specify remuneration for individual modes of exploitation in the contracts of authors and performers.
- Policy 2: Improve the cross-border transparency of the national systems.
- Policy 3: Limit the scope for transferring rights for future works and performances and future modes of exploitation.
- Policy 4: Create a more conducive environment to support the role of trade unions, freelance associations and CRMOs when they fulfil similar functions.
- Policy 5: Facilitate the exercise of the right of making available. This policy option effectively represents a fall-back in the event that the other policies fail to protect authors and performers sufficiently and is broken down into three possibilities:
    - Voluntary collective management of the right of making available.

[270] The 2015 EU Remuneration Study, at p. 9

- Unwaivable right to obtain equitable remuneration from the producer/publisher.
- Unwaivable right to equitable remuneration administered by a CRMO.

The Study further suggest that a full impact assessment is conducted on any policies considered (to properly assess the costs and benefits of different options and the potential for unintended consequences that may distort the market). Impact Assessment conducted in relation to the Draft DSMD is discussed in detail below in this Chapter 3.

Based on the initial high-level evaluation, the Study further recommends considering in more detail the Policy options 1 to 3.

Option 1, harmonised requirement for the specification of remuneration for individual modes of exploitation in the contracts of authors and performers, has not been specifically reflected in the Draft DSMD. The Proposal does not envisage a requirement of the provision of written contracts to have remuneration for individual rights broken down by mode of exploitation.

Policy option 2, relating to the ability of authors and performers to understand whether or not they are likely to be better off by working in a different country, has – to some extent – been addressed in the Proposal by way of Article 14 DSMD, addressing the Transparency obligations.

Policy option 3 suggests harmonised limits on the scope for transferring rights for future works and performances and future modes of exploitation. This option relating to the ability of authors and performers to limit the scope of any rights transfer so as to prevent them being locked into less beneficial contracts for long periods has not been addressed either by the Commission in the DSMD proposal. Provisions such as these, however, represent one of the most frequent, and arguably effective, provisions on strengthening the position of creators in their contract negotiations. It is demonstrated later in the German national chapter how these provisions can help creators deflect the producers' and publishers´ attempts to obtain all the possible rights for their benefit (and ideally for a relatively low lump sum).

The Study recommended conducting more detailed research to understand fully the impact of Policy options 4 and 5 would have on the remuneration of authors and performers.

The Study emphasises a remark that also seems to be a common theme throughout the studies conducted on the interplay between copyright law, contract law and remuneration

standards – a need to consider the relevance of any policy proposal for the different types of authors and performers and the different industries. In addition, the conclusion of the Executive Summary of the Study[271] suggests that consideration must be given to countries where similar practices are already in place so that the design of the policy does not entail unnecessary and potentially costly changes.

Arguably, this consideration is given to those practices by way of relatively vague language of the proposed articles of the draft DSMD so that the current laws and practices in Member States where any mechanism is in place do not need to be changed; such MSs will simply notify the Commission of compliance with the said provisions. Still, it is argued later in the concluding chapter that some adjustment of the wording may be advisable.

3.3.4. The 2016 Print Remuneration Study

In September 30, 2016 the Commission made public another "remuneration study", called "Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works"[272], which is a follow-up study to the 2015 EU Remuneration Study on the remuneration of authors in the music and audio-visual sector discussed in detail above (hereafter the "2016 Print Remuneration Study" or the "Study" in this sub-chapter). The Study looks at the remuneration paid to authors in the print sector in ten EU countries[273]. The Commission is looking for evidence on whether, and to what extent, the differences that exist amongst the Member States' legislative frameworks affect levels of remuneration and the functioning of the Internal Market. Equally as the previous study, the 2016 Print Remuneration Study concluded that the issue of authors' remuneration, and more broadly the copyright contracts establishing this remuneration, is largely governed by national laws of the Member States. As the

[271] The 2015 EU Remuneration Study, at p. 9

[272] European Commission DG Communications Networks, Content & Technology by Europe Economics and Lucie Guibault, Olivia Salamanca at the Institute of Information Law (Instituut voor Informatierecht) of the University of Amsterdam, European Union (2016), Internal identification: Contract number MARKT/2014/088/D1/ST/OP; ISBN 978-92-79-54131-5 (the "2016 Print Remuneration Study"), in full available here: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17026, executive summary available here: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17027 (both accessed July 2017)

[273] Denmark, France, Germany, Hungary, Ireland, Italy, Netherlands, Poland, Spain, and United Kingdom

Commission reminds us, fair remuneration of individual creators – authors and performers – is part of the Commission's Digital Single Market Strategy.

The Study, conducted for the Commission by Europe Economics Ltd and the Institute for Information Law at the University of Amsterdam, compares, from legal and economic perspectives, the existing national systems affecting the remuneration for authors and performers and identifies the relative advantages and disadvantages of those systems for them.

Key findings relate to three areas of copyright and contract laws: (i) obligations on the scope of the transfer, (ii) formalities, obligations and corrective measures, and (iii) model contracts and collective bargaining agreements.

Obligations on the scope of transfer

"The protective measure with the greatest positive effect on the contractual position and the remuneration of authors relates to the obligation imposed on those to whom the rights are transferred to specify the scope of the transfer (in geographical scope, duration and modes of exploitation) together with the corresponding remuneration. This requirement would ensure greater transparency, strengthen the position of the author and promote more effective competition."[274]

Formalities, obligations and corrective measures

"An array of other measures exist in the laws of the Member States that relate either to the requirement of formalities at the time of formation of the contract, or to obligations regarding the execution (e.g. "non-usus" or "best-seller" clauses) and the termination of the contract. These measures also contribute to strengthening the position of authors in their contractual relationships."[275]

Model contracts and collective bargaining agreements

"The use of model contracts developed as a result of negotiations between representatives, and collective bargaining agreements (including by CRMOs), was also identified as having a potentially significant impact on remuneration. The study outlines a series of policy options where intervention at EU or national level may be effective. The first policy option is the specification of individual modes of exploitation and the respective remuneration by introducing certain binding, legal requirements such as the requirement for written contracts (dependant on MS contract legislation), specifying

[274] The 2016 Print Remuneration Study, at p. 6
[275] The 2016 Print Remuneration Study, at p. 7

which rights and modes of exploitation are being transferred, specifying the level and type of remuneration attached to each mode of exploitation and a reporting obligation vis-à-vis the author. The focus of this policy option is to increase transparency regarding the scope of transfer of rights, the modes of exploitation and the terms of payment which should in turn help to reduce the information problem faced by authors and could thereby improve their bargaining position. Other policy recommendations include limiting the scope for transferring rights for future modes of exploitation and future works and exploring issues related to potentially allowing economically dependent freelancers to claim employee status and rights."[276]

While the issue of transparency is addressed in the Proposal, the limitation of scope of transfer has not been covered by the text of the DSMD. As explained later in relation to the German chapter, such limitation is one of the very important measures available to creators. At the beginning of their carrier, when they are inclined to accept a "bad deal", at least they would not be able to give away rights which do not even exist yet at the point of the conclusion of the negotiations. In Czech civil law, as surely is the case in most civil law jurisdictions, there is a principle that "one cannot transfer more (rights) than they in fact have". Any such transfer would be null and void from the outset. Adopting similar approach into the copyright contract rules across Europe may help strengthen the creators´ position in their bargaining. Pressure from their first contract partners to transfer "everything" would not be very fruitfully as such transfers would be null and void.

The Study emphasises that the inconsistencies in the laws governing contractual arrangements between authors create the risk of segmenting the Internal Market. Authors who operate in multiple Member States may be at a disadvantage in Member States where the legal framework provides them with less certainty and confidence as to their bargaining position and contractual rights than in others, with authors based in those Member States, and likely to be more familiar with the practical outworking of such rules, having an advantage.

In addition, the Study admits, the presence of different legal frameworks provides publishers with scope for "jurisdiction shopping" when choosing the country's laws under which authors' contracts are to be enforced. The Study than warns that this may tend to create scope for regulatory arbitrage. This is exactly an argument made later in this thesis in relation to German legislation.

[276] The 2016 Print Remuneration Study, at p. 7

It is quite unfortunate that this Study was not available sooner to the Commission; that is, before the Proposal for the DSMD was made public. Clearly, some of the key findings might have impacted the final wording of Articles 14 and 15 in a way that is suggested in the concluding chapter of this thesis. On the other hand, it may be possible that the Commission was already aware of the needs for improvement (after all, the numerous preceding studies providing very similar conclusions were available when the Proposal was being drafted) but for reasons not allowed to be publicly conceded decided not to reflect the findings in the wording of the DSMD Proposal. Reasons can vary from strong lobby of certain interest groups, need of compromise within the European structures, to lack of law-making competence and willingness to interfere with national contract laws, accompanied by the reluctance of national legislators to allow the EU to enter this zone. This, after all has been the reasoning behind many previous attempts to harmonize (copyright) contract law and can be found in the conclusions of studies conducted on this topic in the past.[277]

3.3.5. Conclusion to Chpater 3.3

There are some more studies and reports created in the past 15 years that touch upon some of the issues addressed in this thesis. But the above discussed ones were chosen because they are either most up-to-date, primarily cover the main area of this work – how to improve creators´ bargaining positions so that they achieve fair reward, or were created as part of the DSM Strategy analysis, which makes them particularly relevant for this work.

The conclusions from each of the studies are considered when proposing the amendments of Article 15 DSMD in the final chapter.

[277] See for example the L. Guibault, P.B. Hugenholtz: *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, Study commissioned by European Commission, IVIR, Amsterdam 2002

Chapter 4 – National Chapters

4.1. Germany

4.1.1. Legislation

4.1.1.1.Historical background and justification

Introduction

Germany follows a civil law tradition where law is primarily based on statutes, although academic and judicial opinions are capable of influencing court decisions.[278] Nevertheless, when analysing any legal issue, the starting point is the applicable statutory law. After a brief excursion in the historical development of copyright law and detailed description of the statutory provisions, some recent cases will be discussed to see how courts interpret and apply the legislation.

Historical development

Medieval perceptions of human creations were "mere mediations between god and man, whereby the act of creation emanated from divine forces rather than human ingenuity"[279]. The emergence of wood carving art and similar techniques coincides with the invention of the printing press in the mid fifteenth century, when the necessity of legal protection against reprints became inevitable. Gradually, the Renaissance notion of a free man – creator – with their own personality overtook the medieval perception and, in turn, forced jurists to adapt to the challenge.[280]

Authors started requesting better protection in 1490s. That is when notion of ´author´s right´ started first emerging, although at this stage the concept was still based on privileges – so called ´author´s privileges´, protecting immaterial interests.[281]

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[278] For more details see for example G.Westkamp, J. Cahir, ´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´, (University of London Press, London, 2005), 3

[279] G.Westkamp, J. Cahir, ´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´, (University of London Press, London, 2005), p. 4

[280] At this stage, the development in the territory of what is current Germany was very similar to what was happening in England. The monarchs or guilds were protecting publishers´ economic investment through grant of privileges, such as printing privileges in Germany.

[281] In the sixteenth century, territorial privileges granted to publishers providing general reprint prohibitions for specified time periods became common, giving the publishers and printers the idea of a publishing property arising out of their work without the need for an express grant of privileges. Similar progress was traceable in England, however, unlike in England, in continental Europe development of the notion of ´natural right´ became evident. Despite the differences that later emerged, the English – and first known in the world – statute on copyright, the Statute of

In the eighteenth century, the theory of intellectual property and the deduction of book reprint prohibition from natural law became a widely discussed topic in Germany[282]. Gradually, the notion of an immaterial right surfaced, drawing the distinction between the personality and economic interests embedded in the act of creation. This seems to be the decisive moment of the parting of the two systems, the English copyright and the continental European author´s rights system.[283]

Several philosophers looked into notion of the intellectual property right. In 1793, Fichte stipulated that an incorporeal and separate property right subsisted in creations of mind. Hegel postulated the idea of the intellectual property right in 1821 in his legal philosophy, acknowledging the distinction between an immaterial right separated from the physical property in a book.[284]

In 1837 Prussia, the first ´proper´ German copyright legislation, as indicated above, was adopted, although based on the criminal, rather that civil system. It addition to reprint prohibition it also dealt with a right to perform a musical or dramatic work, lasting for 30 years after the author´s death.[285] An extensive copyright legislation was then adopted in 1870 through the Author´s Rights Act which covered literary and visual works, musical compositions and dramatic works. In 1876 act on protection of author´s rights in artistic work was also implemented.[286]

Anne 1710, influenced the subsequent development of copyright law in Germany. It provided the authors with an exclusive (though time-limited) right of reproduction – a copyright. The underlying assertion being that humans acquire a natural right ("a right immediately emanating from divinity") in the goods and assets they create, as postulated by John Locke in the late seventeenth century.

[282] But also in Austria and Switzerland; see G.Westkamp, J. Cahir, ´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´, (University of London Press, London, 2005), 6

[283] Ibid Westkamp (2005), p. 6. It is important to note, that Germany was, at this time, separated into number of smaller states and, as such, it was difficult to achieve a uniform copyright legislation. It therefore took a petition taken to the Vienna Congress in 1815 by the German book sellers for what eventually led to a general statutory provision against illegitimate book reprints, which was only finished by the Federal Government over 20 years later. The distinction between the physical carrier and the incorporeal right as such started to be recognized though.

[284] Similar ideas were presented by Arthur Schopenhauer in mid nineteenth century; see details in ibid Westkamp (2005), p. 6

[285] Ibid, p. 6

[286] Both these acts were then replaced by the 1901 *Act on Author´s Rights in Relation to Works of Literature and Music (*Gesetz betreffend das Urheberrecht an Werken der Literartur un der Tonkunst (LUG) of 19 June 1901, Reichsgesetzblatt (RGBl.) 1901, p.22) and the 1907 *Act on*

In 1965, the ´current chapter´ of German copyright law begins with the adoption of the German Copyright Act (in German *Urheberrechtsgesetz*, or *´UrhG´* in short)[287]. The Act deals with both author´s rights as well as rights related to author´s rights. The act has undergone many amendments since it adoption with the most prominent being those introducing new subject matters following European directives (and international developments), followed by adjustments to catch up with the hitherto challenges driven by information society requirements. Most recently, there were several developments introduced in three ´baskets´ between 2001 and now[288].

Another significant revision was adopted in 2002 which is particularly significant for the topic of this thesis as it introduced very detailed provisions of copyright contract law with the attempt to improve the bargaining position of authors and performers in their contractual negotiations[289]. This was partially affected by some of the earlier amendments provided by the reform legislation. This is all discussed in detail below under the subchapter on current German legislation.

Author´s Rights in Relation to Works of Art and Photography (Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (KUG) of 9 January 1907, Reichsgesetzblatt (RGBl.) 1907, p.7). Some parts of the law, in particular arts 22-24 covering protection of one´s image (Bildungschutz), are still in force today. See more details in Adolf Dietz, „Chapter 14 - Germany" in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016), 456

[287] Act on Copyright and Neighbouring Rights of September 9, 1965 (Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrecht) vom 9. September 1965),

[288] German copyright law has experienced some dramatic reforms in the past 15 years. The first basket (through the First Act on the Reform of Copyright Law) mainly deals with implementation of the EU Directive 2001/29 on Copyright and Related Rights in the Information Society (so called "InfoSoc" Directive) and as such amends the 1965 Copyright Act in the area of copyright limitations and implements provisions Digital Rights Management. The ´second´ basket of reforms intends to regulate some of the issues not covered by the mandatory provisions of the 2001 InfoSoc Directive and further shapes the regulation of copyright contracts. It was brought through by the Second Act on Copyright Law in the Information Society, effective as of January 1, 2008. The ´third basket´, already envisaged when second basket was being implemented, is most likely to focus on issues such as interface between copyright protection and scientific and educational uses, trade in second-hand software, etc. The draft DSM Directive will surely shuffle the cards to some extent on this topic. More details in G.Westkamp, J. Cahir, Supplement to ´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´, (University of London Press, London, 2005) - ´Recent developments 2012´ (University of London Press, London, 2012) or Arpi Abovyan, *Challenges of Copyright in the Digital Age. Comparison of the Implementation of the EU Legislation in Germany and Armenia* (Herbert Utz Verlag, 2013), 50.

[289] Act on Strengthening the Contractual Position of Authors and Performers of March 22, 2002 (*Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*), for English translation see WIPO LEX at http://www.wipo.int/wipolex/en/details.jsp?id=1048

Justification of protection granted to authors and performers

As already indicated in the previous chapters, the underlying philosophical grounds for author´s rights´ protection in Germany today follows the monistic theory. This was not always the case, however. This concept was first introduced by the Austrian Copyright Act 1936 and the 1965 Germany Copyright Act followed. Until then, the German philosophical background was aligned with the development in France which follows the dualistic doctrine. The monistic theory developed from the notion of intellectual property with its main characteristic lying in perception of the author´s rights as a unity of economic and immaterial (moral) interests of its holder.[290]

Limitations of alienability and waivability of author's and performer´s rights

The idea of unity between the economic and moral aspects of author´s rights has important practical consequences. Both rights are treated equally from the beginning until the end of the granted protection. More details about these consequences are described in the introductory chapter and subchapter related to justification of copyright protection in the Czech Republic. To quickly summarise, in a monistic doctrine both aspects of author's rights last for the same period of time, i.e. in Germany for 70 years *post mortem auctoris*. Author´s rights can be inherited (together as a whole) but cannot be transferred *inter vivos* in any other way except through a "constitutive transfer" (as oppose to ´translative transfer´ - assignment, as described in the Czech chapter), i.e. the author can constitute another person´s right to exploit the work – by granting a license to use the work. The author´s right remains the source for any subsequent rights granted.

As a result of the inseparability of the economic and moral parts of author´s right it also sometimes has to be decided whether a right belongs to the moral or economic ´section´, or, whether it is a hybrid (as may be the case for the rights to withdraw from a contract for non-use etc.).[291]

[290] The notion is often compared to a coin with two sides but forming one, whole, object which cannot be divided. Also, Eugen Ulmer compares this teaching to a tree: the trunk represents the roots of the rights granted and the branches represent both the economic aspects and moral interests emanating from it. They cannot be treated separately. See further details in G.Westkamp, J. Cahir, *´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´*, (University of London Press, London, 2005), 7.

[291] See more detail in Ibid Westkamp (2005), p. 7

Position of an Author and Performer as a Weaker Party to the Contract

The notion of an author as a weaker party of a contractual relationship has been discussed in the introductory chapter as well as in the discussion related to the Czech Republic. In Germany, this notion is very strong and the law on copyright contracts traditionally protects authors to a much higher degree than in common law systems, as will be seen in the analysis of English law. Such protection is not only inherent due to the monistic doctrinal approach but also results from the statutory provisions which have strengthen the bargaining position of authors to even higher degree after the 2002 amendment.

For example, the author may grant a license in relation to a single right or a whole bundle, but the rights transferred must be contractually specified in detail (Sec. 31(5) UrhG) otherwise a statutory assumption on the scope of transfer will apply. Also, licenses to uses which are not know at the time of the conclusion of the contract have to be in writing and the author has a (limited) right of revocation (Sec. 31a UrhG). These are also referred to as the "rules relating to the purpose of transfer". The term ´use´ in this context does not mean the characterisation of an economic right but rather the technical possibilities connected to specific economic rights at given time. Therefore, a license to reproduce a work granted in the 80s does not include the right to reproduce the same work on a compact disc in mid-90s or to share it on the internet further 10 years later. Such uses were not known at the time the license was granted. The decisive criteria, however, is not if such use was known to a mankind but whether the parties would have reasonably expected such mode of exploitation at the given time, i.e. whether it was customary.[292] It is therefore important for licensees to draft their agreements in a very clear and comprehensive language because German courts also tend to interpret licenses narrowly in favour of licensors.[293]

These statutory limitations for dealing in author´s rights means the author is afforded a chance to renegotiate certain aspects of a contract under changed circumstances. This

[292] Ibid Westkamp (2005), p. 39

[293] If specific form of use is not described in the agreement, the court will try to define the ´aim of the agreement as identified by both parties´ and as such will decide which forms the agreement encompasses (Sec. 31(5) UrhG). See more at A. Klett, M. Sonntag, S. Wilske, *German Law Accessible: Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution*, (Verlag C.H.Beck Lexis/Nexis, 2008 Munich)

is an additional front on which an author can fight for an equitable remuneration. The other areas such as the "bestseller clause", common remuneration standards, or - to start with – explanation of the term "equitable remuneration" follows below.

4.1.1.2. Current legislation

Constitutional foundation for author´s and performer´s rights

According to Article 14(1) of the German Constitution ("*Grundgesetz"*), property is "socially bound"[294]. The German federal constitutional court (*Bundesverfassungs-gericht*) has also acknowledged several times, that author´s rights are protected under this fundamental right to property under Article 14 as well as under Articles 1 par. 1 and Article 2 par. 1 regarding the moral rights aspect ("general right to personality") of the Constitution.[295]

General applicable law

The applicable German copyright legislation comprises the 1965 Copyright Act (*Urheberrechtsgesetz ´UrhG´*)[296], the 1907 Act on Authors Rights in Relation to Works of Art and Photography (*´KUG´*)[297], the Act on the Administration of Copyright and Neighbouring Rights of 9 September 1965 *(´UrhWG´)*[298], and to some extent also the Code on Civil Procedure of 30 January 1877 *(Zivilprocessordnung, ´ZPO´*[299]*).*

From the beginning of the adoption of the German Copyright Act of 1965, there was already a demand for provisions regulating copyright contracts in some detail, as

[294] Some claim that this is the reason for multiple restrictions on copyright when it comes to guaranteeing communication in a modern society. See Arpi Abovyan, *Challenges of Copyright in the Digital Age. Comparison of the Implementation of the EU Legislation in Germany and Armenia* (Herbert Utz Verlag, 2013), 49.

[295] BT-Drs.10/837, p. 1, 32, 36 et seqq.; BT-Drs. 14/6433, p. 10; BT-Drs. 16/1828, p. 15 ff., 49. See details in A.Peukert, N.Hesse, ALAI Congress 2017 in Copenhagen: Copyright, to be or not to be - Questionnaire (Justification for copyright and related rights): Country Report Germany, accessible at the Congress website www.alai2017.org

[296] Act on Copyright and Neighbouring Rights of September 9, 1965 (*Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrecht*) vom 9. September 1965),

[297] Act on Authors Rights in Relation to Works of Art and Photography *(Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie – „Kunsturhebergesetz" (KUG))* of 9 January 1907, Reichsgesetzblatt (RGBl.) 1907, p.7

[298] Act on the Administration of Copyright and Neighbouring Rights of 9 Septemebr 1965 (*Urheberrechts- wahrnehmungsgesetz vom 9. September 1965, "UrhWG*")

[299] Code on Civil Procedure of 30 January 1877 *(Zivilprocessordnung, ´ZPO´)*

contract law for authors was considered inadequate.[300] In the end, it took more than three decades to get the Federal Ministry of Justice finally to attempt to tackle the issue in 1998. During a public hearing in February 2000, both the pressure groups of authors' associations as well as the media industries' were heard. In reaction to that, the Ministry commissioned a group of copyright experts to draft an amendment introducing contract law provisions into the copyright legislation. The main task for them was to grant authors equitable remuneration and to make the involved interest groups agree on what may constitute "equitable" for each specific sector or means of exploitation.[301]

The draft that was presented by the experts stirred a lot of debate and comments from both sides of the lobbying camps. It took the Federal Government until summer 2001 to present its draft piece of legislation. While some provisions (e.g. permission for authors to terminate copyright agreements after a period of 30 years[302]) did not ultimately make it to the final draft, some managed to survive the whole legislative process. The statutory claim to equitable remuneration or an obligation for the authors´ (performers´) and users´ associations to agree on "equitable" remuneration within their sectors by establishing common standards were among them. However, the provisions did not, at first, contain a clear definition of the term "equitable" in this context, which made the industries´ representatives very nervous, anticipating countless disputes. It took some time to come up with and implement such clarification, but the Federal Government was clearly determined to deliver the regulation during their term. As such, the legislative work continued all the way until the last session of the legal committee in charge on January 2002 and it was successful. Further compromise was introduced (e.g. claim to equitable remuneration could only be asserted against the author's contracting partners, not just any user) but the definition of "equitable" was

[300] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* IV/270 of March 23, 1962, p.56. More details in K. M. Gutsche, ´New copyright contract legislation in Germany: rules on equitable remuneration provide "just rewards" to authors and performers´, E.I.P.R. 2003, 25(8), 366-372, 366.
cf Gerhard Schricker, ´Efforts for a better law on copyright contracts in Germany - a never ending story´, IIC 2004, 35(7), 850-858, fn 6.

[301] For more details see K. M. Gutsche, ´New copyright contract legislation in Germany: rules on equitable remuneration provide "just rewards" to authors and performers´, E.I.P.R. 2003, 25(8), 366-372, 366

[302] For more details see Martin Schippan, ´Codification of contract rules for copyright owners - the recent amendment of the German Copyright Act´, E.I.P.R. 2002, 24(4), 171-174, 173

added.[303] In this shape, the draft passed the Lower Chamber ("*Deutscher Bundestag*") of the Federal Parliament in January 2002 and (without any comments) the Upper Chamber ("*Deutscher Bundesrat*") in March 2002, becoming effective as of July 1, 2002.

Finally, therefore, in July 2002, the German Copyright Act was amended by the Act on Strengthening the Contractual Position of Authors and Performers[304], implementing the long-awaited copyright contract law in Germany. As indicated, the amendment was drafted with the aim to balance the contractual relationship between authors and performers on the one hand and their licensees on the other, in a way favourable to the former. It is based on the principle that they should receive an equitable remuneration for exploitation of their works and performances and should be protected from unfair licensing conditions.

Act on Strengthening the Contractual Position of Authors and Performers

Until this 2002 amendment to the German Copyright Act, mandatory provisions related to copyright contracts were rather scarce[305]. By adding the new provisions, the reform aimed to strengthen the legal position of the weaker contracting party, i.e. of authors and performers, *vis-à-vis* their licensees to whom they grant right of exploitation of their works. While at first sight authors and performers can seem to have independent status, in reality their standing is more akin to employees when it comes to dependence on their source of income. And as such, similarly as is the case with employees, the legislator now provides certain "checks and balances". Unlike other independent professions, authors and performers are not protected by a statutory remuneration regime and thus need other form of support.[306] Otherwise the imbalance of bargaining powers often led to agreements for lump-sum payments with a full buy-out. This could lead (and often did) to extreme disproportion between the payment received and the

[303] For more details see Ibid K. M. Gutsche, (2003), 366

[304] Federal Law Gazette *(Bundesgesetzblatt)* of March 28, 2002, Part I, p.1155 *et seq.*, also available in English at http://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/

[305] These would be (i) rule that the grant of exploitation rights for unknown types of use is invalid (Sec. 31(4) UrhG), (ii) the unwaivable right to additional remuneration when the agreed rate was grossly disproportionate to the income from use of the work (Sec. 36(3) UrhG, as applicable before the discussed amendment, currently contained in an adjusted version in Sec. 32a UrhG), (iii) the revocation right in case of non-exercise (Sec. 41(4) UrhG), (iv) the revocation right by reason of changed conviction (Sec. 42(2) UrhG).

[306] For more details see Ibid K. M. Gutsche, (2003), 367

endless exploitation opportunities afforded by "new channels" of digitalization, multimedia and the internet.[307]

The main goal of the amendment was to secure that authors and performers financially sufficiently participated on the proceeds from the exploitation of their works, and thus implementing the principle embedded in Article14(1) of the German Constitution ("*Grundgesetz"*). Based on the principle of creator participating on exploitation of their creation, the creator is entitled to "equitable remuneration" for every single use of their work, irrespective of the actual yields resulting from such use.[308]

Also, it is difficult to predict whether work will be commercially successful. The legislator thus aimed at making sure that authors and performers participate equitably in the proceeds and benefits deriving from exploitation of their works and performances[309]. In addition, the aim was to secure that common standards on remuneration between authors and their licensees for a specific use or category can be determined for the future[310] so that in similar cases and for similar uses once fairness is achieved, this can be the basis for future cases. The driving force for the copyright contract legislation was to provide a statutory and thus enforceable claim to equitable remuneration for all creators. The new articles focus on contractual relations between authors and performers on one side, and the users of works on the other; it is not aimed at collective rights management agreements[311], or to agreements entered into by two exploiting enterprises.[312]

It is important to realize that the new legislation also extends the general wording of Section 11 UrhG, which now states that "copyright protects the author in his intellectual and personal relationships to the work and in respect of the use of the work. It shall also serve to ensure equitable remuneration for the exploitation of the work". The

[307] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/6433, p.9, No.3(a). See more details in Ibid K. M. Gutsche, (2003), 367

[308] More in Ibid Gutsche, (2003), 367 and Adolf Dietz, ´Amendment of German Copyright Law in order to strengthen the contractual position of authors and performers´, IIC 2002, 33(7), 828-842, 831

[309] Sec. 32 UrhG

[310] Sec. 36 UrhG

[311] See Sec(s). 32(4) and 32a(4) UrhG

[312] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/6433, p.8, No.2(a). See more details in K. M. Gutsche, ´New copyright contract legislation in Germany: rules on equitable remuneration provide "just rewards" to authors and performers´, E.I.P.R. 2003, 25(8), 366-372, 367

second sentence was added by the Act on Strengthening the Contractual Position of Authors and Performers. [313] The principle of participation became key when standard terms and conditions in copyright contracts are revised and it must be followed as an elementary notion in German copyright law and always be reflected when contracts are interpreted.[314]

In 2008, further modification of exploitation provisions were introduced with the ´second basket´ of reform as described above, aiming to allow even smoother operation of copyright licenses. One of the main changes brought by this amendment is introduction of Section 31a - Contracts concerning unknown types of exploitation (*Verträge über unbekannte Nutzungsrechten*) and corresponding Section 32c - Remuneration for types of exploitation which subsequently become known (*Vergütung für später bekannte Nutzungsrechten*). The author is now able to grant rights to uses unknown at the time the agreement is concluded and be remunerated adequately for such grants. In exchange, provisions on revocation of such grants are now more limited, e.g. in time.[315] In the past, the strong rights enjoyed by the authors as regards unknown uses had constantly led to difficulties and were harming proper commercial exploitation of copyrighted works; these changes attempt to rectify this.[316]

Whilst the main focus of this thesis is the "best-seller" clause (i.e. Section 32a UrhG after the amendment), the provision does not stand alone. In fact, it is so interconnected with the rest of the copyright contract law provisions of the German Copyright Act that, in order to understand all the particularities in application of the provision, it is crucial to explore and explain also the notion of "equitable remuneration" under Section 32 UrhG and "common remuneration standards" under Section 36 UrhG (and some other

[313] Section 11 UrhG is a general provision of Chapter IV – Scope of copyright of the German Copyright Act (UrhG), which after subchapter 1 consisting of merely Section 11, provides in subchapters 2-4 lists of individual moral rights, economic rights, and other rights of authors. Seeing the affirmation of importance of author´s equitable remuneration by giving this principle such prominent position within the Copyright Act explains how deep this notion is embedded in the German copyright law and why attempts are constantly made to improve this regulation.

[314] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058 p.18 IV 1; see also Ibid K. M. Gutsche, (2003), 367, or Dietz (2002), 834.

[315] For more details see above the note on protection of author as a weaker party to the contract and also Ibid G.Westkamp (2012), 16

[316] Details in Ibid G.Westkamp (2012), 16

"accompanying" provisions). The following text will deal with these concepts in turn as they are covered by the German Copyright Law.

The texts of the individual statutory provisions assessed - as well as other important provisions securing a stronger position of an author or performer - are rather long and their verbatim insertion in the text may disrupt the flow of the text. Reference therefore will be made to **Figure 4.2.1. - Provisions of German copyright law related to exploitation rights**, which contain full text of Subchapter 2 – Exploitation rights of the Chapter 5 of Part One of the Copyright Act – Dealing in author´s rights.

The first section in this subchapter (Section 31 UrhG – see Figure 4.2.1.), heavily affected by the 2002 amendment, deals with grant of exploitation rights in general, specifically how the grant of a license can be divided, including but not limited to, into separate uses, territories, time periods. It also stipulates what happens if the description of the designated uses is not specific enough (see also above reference to Position of an Author and Performer as a Weaker Party to the Contract).

Section 31a UrhG covers contracts concerning unknown types of exploitation. It is relatively detailed and among other author´s protection (also see above) gives the author a right of revocation if an equitable remuneration for the unknown type of use is not duly agreed. Such revocation right is time-limited and always ends with the author´s death (unlike other true ´author´s rights´), nevertheless, it does strengthen the author´s bargaining power. Such right cannot be waived. In order to maintain dealings with copyright works in the case of collective works (typically films), the revocation right is limited for such works[317].

'Equitable Remuneration'

Section 32 UrhG, fully redrafted through the 2002 amendment, captures the definition of an equitable remuneration, provides for situations when assumption of an equitable remuneration is invoked, clarifies that no by-passing is permissible, and determines the relationship between equitable remuneration, collective bargaining agreements and common remuneration standards, explaining which calculation takes precedence.

[317] Sec. 31a (3) UrhG

There are three different scenarios considered in Section 32(1) of the German Copyright Act for the author´s claim to equitable remuneration. Ideally, the remuneration is stipulated in the contract and it is equitable. Alternatively, for whatever reason, the remuneration amount may not be agreed specifically in the agreement. In such cases an equitable remuneration is "deemed to have been agreed"[318]. The third possibility is that the rate agreed in the licence contract does not provide for equitable remuneration. In such case authors have a corrective claim for amendment of such agreement by way of requirement for their licensee to conclude an amendment to the contract changing the remuneration to an equitable level[319]. In the two latter scenarios, it is crucial to be able to ascertain what an equitable remuneration is.

´Corrective claim´

The claim to contractual amendment stipulated in Sec. 32(1), third sentence UrhG provides authors with a contractual claim to equitable remuneration directed exclusively towards the contracting partner, not a third party licensees. The goal is to close the gap between the rate as agreed and an equitable remuneration. Lack of equitable remuneration does not make the licence agreement invalid, it only provides basis for the author´s additional claim (for assent to the contractual amendment to ensure equitable compensation). Such ´corrective claim´ should cover the difference between the contractual reward and equitable remuneration. Once such additional recompense makes the overall remuneration equitable, the claim ceases to exist.[320]

The above described corrective claim is mainly of assistance to securing just reward for medium or long-term uses by guaranteeing equitable remuneration to authors and performers for the entire term of their contract. Authors and performers can sue for payment of the equitable remuneration straight away once the claim for payment becomes due based on inappropriate reward.[321] As the date of execution of the contract is essential for the revision of the equity of remuneration, during the term of a given contract the corrective claim can only be asserted once.

[318] Sec. 32 (1), second sentence UrhG
[319] Sec. 32 (1), third sentence UrhG
[320] Ibid Gutsche, (2003), 368
[321] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.18., more in Ibid Gutsche, (2003), 368

The right to the corrective claim cannot be circumvented. A contractual term which restricts this claim to the detriment of the author is considered null and void.[322] One also cannot rely on any agreement evading the application of the corrective claim to the detriment of the author through a transaction undermining the licence deal in question as the deal as such remains valid.[323]

The law states clearly though that the corrective claim is not applicable to remuneration agreed on in collective bargaining agreements as their parties have adequate negotiating power to ascertain fairly negotiated terms. [324]

The corrective claim is applicable to all acts of utilization which took place after March 28, 2002 if they were based on contracts dated June 1, 2001 or thereafter.[325]

This right to an equitable remuneration is praised by authors' representatives as it helps to balance the contractual relationship with exploiters by significantly increasing the authors´ bargaining power. On the other hand, the exploiters' representatives detest the legal provision, claiming that the provisions create unnecessary legal uncertainty, rendering calculations in the long-term more difficult.[326] Since the 2002 amendment, litigations regarding the definition of an equitable remuneration and its practical application have arisen. In particular translators have been claiming the revision of contracts on the basis of Section 32.[327]

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[322] Sec. 32 (3) UrhG

[323] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.19., more in Ibid Gutsche, (2003), 368

[324] Sec. 32 (4) UrhG, and Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.19

[325] Sec. 132 (3), third sentence, and Sec. 132 (4) UrhG. This is the date on which the draft legislation of the Federal Government reached the Upper House of the Parliament. That is when heated public discussion about the revision of copyright contract law commenced and after which any further retroactive effect was not justifiable.

[326] 2014 Creators´ Contract Study, p.38, referring to interviews conducted during compilation of the study.

[327] "*Talking to Addison*" (BGH, Judgement from October 7, 2009 – I ZR 38/07 (OLG Munich) and „*Destructive Emotions*" (BGH, Judgement from January 20, 2011 – I ZR 19/09 (OLG Munich): In both these two case the OLG Munich held that, under certain circumstances, translators who transferred their unlimited exploitation rights to their translations to a publisher can demand additional payment. In both cases the translator in question was paid a lump sum per page of translation and in addition to that were agreed to get a share in profit if certain amount of texts were sold. The translator would get additional payment of less than 1% of the book´s net price. Under the new legislation, he translators sued for higher remuneration, claiming that the initial contractual remuneration was not equitable. The court held in both cases that the translator could claim an additional payment of 0,8% (hard cover) and 0,4% (paperback) of the net price, starting from the 5.000th book sold. In addition, the court claimed that this amount could be increased or

Equity of remuneration – assumption and legal definition

In order to ascertain what "equitable" means for the purposes of the present legislation, the German legislator works with two sets of tools. Sec.32(2), first sentence UrhG provides an irrefutable *assumption* that compensation determined by the common remuneration standards as further defined in Section 36 UrhG is equitable. Any compensation within the defined scope will be deemed equitable. Whether the specific author and/or their licensee took part in the negotiation (were members of any of the associations involved) about the provision on remuneration in given sector or for given use is irrelevant. In order to prevent any breach of freedom of contract where one of the contracting parties is not a member of an association or where there are competing remuneration standard provisions laid down by several associations considering themselves responsible for certain types of works, the parties have to expressly agree or imply an existing remuneration standard.[328]

If the parties do not agree on the common remuneration clause or such standard has not been drawn up yet, remuneration will be determined by *application of the legal definition* set out in Sec. 32(2), second sentence UrhG. The reward will be equitable "if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the nature and extent of the possibility of exploitation granted, in particular the duration and time of exploitation, and considering all circumstances", i.e. viewed objectively *ex ante*.[329] As such, equity should no longer represent an abstract term – it corresponds to a usual market price and becomes a provable fact.[330]

One must establish the amount of remuneration ´customary´ in the relevant area of business at the time the contract was concluded without using common practices as the sole determining factor (as they may reflect the financial superiority of the exploiting

reduced under certain circumstances, e.g. if the fee was unreasonably high in the first place. Also, according to the first judgement, translators could claim half of the net revenue gained by the publisher from transferring his right to third parties. This was later reduced by the second judgement to 20% of the foreign language author´s interest in the net revenue and limited to the publisher's revenue. -- The summary of the two cases taken from the 2014 Creators´ Contract Study, p.39

[328]Ibid Gutsche, (2003), ft. 33

[329] Ibid Gutsche, (2003), 368

[330] Ibid Dietz (2002), 837

enterprises). Should insufficient compensation be common, it will not be deemed equitable. Therefore, the ´fairness´ factor assists in correcting bad practices. In such cases the court would have to correct the value of the ordinary fees paid. If there is no customary use in the area of business or the practice is not fair, equitable remuneration will be determined by reasonably exercising the abovementioned criteria, and using remuneration and notion of fairness applied in other fields as comparative standards.[331]

Right to Additional Participation ("Best-seller" clause)

The previous version of the "best-seller clause" only anticipated claims to contractual amendment if author´s remuneration was ´grossly disproportionate´ to the income actually generated by their work. Given this provisions very narrow interpretation, successfully claimed contractual amendments were very rare. One can see the parallel between the previous version of the German legislation and the current Czech regulation on the topic.

The relative toothless-ness of the provision was corrected by Section 32a UrhG, implementing the ´principle of participation´ enshrined in German copyright law. The wording of the new provision is very similar to its former version so reliance on the previous case law regarding the component prerequisites is possible.[332] But now it is irrelevant whether the contracting parties foresaw or could have foreseen the commercial success of the work.[333] Therefore when referring to the case law rendered by the Federal Supreme Court only this change has to be taken into account.

The claim to additional compensation does not apply if the reward was determined either by a common remuneration standard or a collective bargaining agreement.[334]

Only a ´conspicuous´ imbalance between the agreed remuneration and the proceeds and benefits from use of the work will qualify. Merely ´perceivable´ (or even ´ordinary´) gap will not entitle the author to any compensation. Still the threshold is

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[331] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.18., more in Ibid Gutsche, (2003), 368

[331] Sec. 32 (3) UrhG

[332] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.19; *cf.* Bundesgerichtshof [Federal Supreme Court] (2002) 104 G.R.U.R. 153 at 155

[333] Sec. 32a (1), second sentence UrhG, Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.19., more in Ibid Gutsche, (2003), 369

[334] Sec. 32a (4) UrhG

lower than in the previous regulation. When assessing what constitutes a ´conspicuous´ difference, the reward granted has to be compared with the proceeds and benefits derived from exploitation of the work.[335] "Proceeds" does not mean profits, but gross income is considered. Other benefits, such as advertising, must also be taken into account to reflect uses which are not directly aimed at turnover.[336]

First, one must compare the reward to the proceeds and then benchmark it against equitable remuneration for the use discussed. That will depend on common remuneration standards[337] (if established for given use) or on what is regarded as customary and fair in the relevant sphere of business[338]. It is, after all, the object of the principle of participation to ensure that authors receive equitable remuneration, something that can only be achieved by applying uniform concepts.[339]

From the preparatory Parliamentary debate, it can be concluded that ´conspicuous´ disproportion between the remuneration and the proceeds and benefits of exploitation will be found to exist when there is a 100 per cent difference between the agreed reward and what would be equitable remuneration[340], but one may expect that also smaller percentages would be considered conspicuously disproportionate and give rise to a claim to additional participation.[341]

The claim to further participation will only apply to insufficient reward received in exchange for exploitation right to use of works which became highly profitable after conclusion of the relevant contract. It will primarily concern lump-sum remuneration payments as a royalty rate (if the royalty is set as equitable in the first place) does not change the ratio between remuneration and proceeds as a result of increasingly successful exploitation of the work. It is therefore always ´safer´ to negotiate royalty rates to avoid such claims.[342] It may be safer for the exploiters, for sure. Nevertheless, there are situations when they do not wish to provide such form of remuneration and the author or performer does not have the sufficient bargaining power to change this

[335] Sec. 32a (1), first sentence UrhG
[336] *cf.* Bundesgerichtshof [Federal Supreme Court] (2002) 104 G.R.U.R. 153 at 154
[337] Sec. 36(1) UrhG
[338] Sec. 32(2) UrhG
[339] Sec. 11, second sentence; Sec. 32(1) UrhG
[340] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/8058, p.19
[341] Ibid Dietz (2002), 838
[342] Ibid Gutsche, (2003), 369

during the contract negotiations. This brings us back to the need for such provision in the first place.

The claim for amendment of the licence agreement, as introduced in the first paragraph of Section 32a, can only be directed against the author's contracting partner.[343] But the commercial success of the author's work often happens not to be of primary benefit to the initial licensee, but to another person in the chain of rights. In such a case, the author has claim for equitable remuneration directly against such third party according to Sec.32a (2) of the German Copyright Act.

The question whether such claim arises against the third party depends on the contractual relations within the licence chain, including payments made throughout such chain. Did the author receive from his contracting partner a fee which is conspicuously disproportionate to the licensee's proceeds? Is the consideration paid by the licensee to its licensor (the original licensee) disproportionate in the same manner? How to make sure that the third party licensee does not pay twice (first to the licensor under the licence agreement and subsequently to the author according to the said statutory rule)? The entire chain of licenses has to be examined in order to direct the claim in the right direction. The only party that should be liable for the creator's equitable remuneration is the licensee who gains disproportionate proceeds and benefits as compared with the original remuneration obligations of the author´s original contracting partner, and only to the extent that such returns are obtained.[344]

The prerequisites of ´taking into account the contractual relationships within the licensing chain´ and that ´other party shall then not be liable´ proved rather problematic in practice.[345] The licensing chain (or, web more like) and corresponding stream of revenue is a complex ´organism´. In many sectors the substantial revenues and profits generated through the exploitation of works are not generated by the actual contracting party of the author or performer. In film industry, the director, screenwriter, cameraman, leading actors (and a few other creators) probably manage to negotiate their deals but with the film producer. However, the film producer further grants

[343] And that also used to be the case with the pre-2002 version of the best-seller clause (section 36 UrhG as applicable until June 30, 2002.
[344] in Ibid Gutsche, (2003), 370
[345] Nikolaus Reber, ´The "further fair participation" provision in Art. 32 a (2) German Copyright Act - Claims against a third-party exploiter of a work´, JIPL&P 2016, 11(5), 382-385, 383

exploitation rights to other users. Typically, the film is further exploited by a film distributor for theatrical release, TV broadcasting organizations, video/DVD distributors, internet platforms such as Netflix, etc.[346] The revenues are generated separately by separate entities for specific uses for which the creators previously granted their licenses to a single contracting partner. Therefore, if the creator wants to claim additional fair participation, they may need to go the "third parties" as stipulated in Sec. 32a (2) UrhG. But there more likely than not will be multiple third parties adding to the pile of revenues generated by the exploitation of the film. And the claim would have to be aimed separately at each of them, proportionally to the their participation of the overall proceeds and benefits that became conspicuously disproportionate to what the creator received from their contracting partner at the very beginning.

Also, there is no guarantee whatsoever, that the author´s contractual partner will also participate in the success as often such partner will transfer respective rights even before the production begins in order to finance the film.[347] It is a common practice that a film producer ´portions´ the rights according to uses and territories and ´sells´ the rights to various distributors and broadcasters at film festivals (or otherwise) based for example only on a screenplay and the lead actor´s or director´s name, without having a single shot taken.[348]

It was confirmed by the German highest civil court, the BGH, in the Das Boot case and re-affirmed in the Pirates of the Caribbean case (both discussed below) that:

"To assess if there is a conspicuous disproportion between the contractual remuneration of the author for granting exploitation rights and the revenues and benefits of the third party, the court first has to determine the author´s contractual remuneration and the proceeds and benefits of the third party from the use of the work. Thereafter, one has to determine the remuneration which – in retrospect – would have been equitable

[346] Ibid Reber (2016), 383

[347] Ibid

[348] It will be interesting to see how this practice changes (if it does) in relation to the internet uses after the DSM Directive is adopted. This also opens a whole new can of worms (questions): How to determine if success was achieved prior to the new rules or before, when principle of territoriality still governed the rights? Who will be the third party for the creator to claim the additional participation against? If choice of law rule designates other jurisdiction than Germany as the governing law, how to determine what portion of the proceeds from internet uses is attributable to the exploitation in Germany? And so on...

considering the third parties´ revenues and benefits. Finally, one has to assess whether the contractual remuneration is conspicuously disproportionate in relation to such equitable compensation.“[349]

Both cases are discussed in detail below together with some more practical points on the issue, addressing the issue of reflecting the ´licensing chain´ in any calculations.

Unlike with the ´corrective claim´, it is irrelevant when the contract was concluded (assuming they were concluded after January 1, 1966). The claim to additional participation is applicable to all matters that arise as of March 28, 2002.[350] The only important issue is when the conspicuous disparity between remuneration and proceeds arises.[351]

Common remuneration standards

The provisions on common remuneration standards pursuant to Section 36 UrhG aim to help substitute the negotiations that were previously done individually with a kind of collective copyright for freelance authors and performers to strengthen their financial position. The goal is to help develop remuneration standards through self-regulation in the respective areas of the media industries by way of urging associations of authors and associations of those exploiting copyrighted works to conclude their own, mutually agreed, terms of remuneration. Such terms would subsequently serve the parties to licence agreements as guidelines for equitable remuneration.[352] The encouragement made to stakeholders to agree on common rules, through collective agreements or common remuneration standards, is that stakeholders are deemed to know better the practices and the adequate remuneration that should apply in contractual relationships.[353]

The common remuneration standards are deemed equitable within Section 32(2), first sentence UrhG for all authors, performers, and exploiting enterprises affected. They do not have direct legal effect like collective bargaining agreements, but their application

[349] BGH GRUR 2012, 496 – Das Boot (The Boat) and BGH GRUR 2012, 1248 – Fluch der Karibik (Pirates of the Caribbean); the translation taken from Ibid Reber (2016), 384
[350] Sec. 132(3), second sentence UrhG
[351] in Ibid Gutsche, (2003), 370
[352]Ibid Dietz (2002), 835; or Gutsche, (2003), 370
[353] The 2014 Creators´ Contract Study, p. 63

protects the users of works against creator´s demands for additional remuneration. As such, they provide legal certainty for authors´ and performers'´ contracting partners and thus represent an incentive to reach an agreement. [354]

Some restrictions apply, however, to the common remuneration standards. Collective bargaining agreements, if in place, will always prevail[355] when determining the fees payable to employees and persons similar to employees[356]. But that does not prevent such standards also being set up in such areas for situations when the priority of the collective bargaining agreement ceases to exist, as collective bargaining will not prevail where one party is bound by it, but where the collective agreement lacks a provision on remuneration for the specific use involved, or does not extend to the relevant licence agreement.[357]

Common remuneration standards specify the type and the amount of remuneration, due date, advance payments and accounts, etc. The circumstances of the relevant sphere of regulation, especially the structure and the dimensions of the exploiting enterprise, are to be taken into account.[358] The assessment of the equity of remuneration will, after all, vary depending if a small publishing house or a major enterprise is involved.[359] The actual remuneration rates are set by the mutual agreement of both ´sides´: associations of creators, and associations of users or individual users. Parties setting the rates have to be representative, independent and authorized for this task.[360] If more than one set of standards is set for the same subject-matter by different associations, contracting parties have to decide and stipulate in their license agreement which ´equity standards´ they will follow.[361]

Despite these provisions being seemingly an excellent opportunity for everyone involved to improve the business efficacy in the sector, only few agreements have been signed on the basis of these provisions. The first agreement relates to the publishing

[354] in Ibid Gutsche, (2003), 370
[355] Sec. 36(1), third sentence UrhG; see Ibid Gutsche, (2003), 370
[356] in the sense of Section12a of the Act on Collective Labour Agreements
[357] See Dietz (2002), or Gutsche, (2003), 370
[358] Sec. 36(1), second sentence UrhG
[359] Drucksache Deutscher Bundestag *(printed report of the German Federal Assembly)* 14/6433 p.16, No.6.
[360] Sec. 36(2) UrhG
[361] Ibid Gutsche, (2003), 371

sector and, in particular, the conditions of remuneration of authors of fictional works in Germany[362]. The document stipulates that remuneration rates that would be below the ones approved in the agreement shall not be considered as adequate under Section 32 of the UrhG. This agreement only applies to works of fiction and provides precise ranges of percentage of remuneration according to the number of copies sold (at the net retail price); it also stipulates the conditions of exploitation applicable to neighbouring rights, the terms of the advances paid to the author, the rightful use of new modes of exploitation of fictional works, etc. In fact, the agreement is a copy of previous agreements that already existed in this sector prior to adoption of the new legislation.

In the AV sector the German Director's Guild (BVR) also concluded an agreement with broadcaster Pro Sieben/Sat1 Deutschland, establishing minimum fees and the participation of the author on the proceeds though success related fees. In November 2012, the German public broadcaster ZDF was obliged by the Court of Munich to negotiate with the German Director's Guild (BVR) in order to agree on common rules for adequate remuneration on the basis of Section 32.[363]

Competition law issue

Question arises whether common remuneration standards are in line with European competition law. And party in focus here would not be the enterprises exploiting the works. Article 81(1) of the EC Treaty prohibits also authors in their capacity as independent businessmen, and even the Member States, from taking measures which facilitate or prescribe cartel agreements. But that is exactly the aim of Section 36(1) of the German Copyright Act: authors´ associations as well as associations of the copyright industry are encouraged to form common remuneration standards. These ´price cartels´ should only get away with it if the Court of Justice of the European Union was to incline to a restrictive interpretation of Article 81, applying ´rule of reason´, or

[362] *Gemeinsame Vergütungsregeln für Autoren belletristischer Werke in deutscher Sprache* (Common remuneration standards on the remuneration of authors for works of fiction in German) The agreement was signed by the German Association of Authors (*Verband deutscher Schriftsteller*, part of the *Ver-einigten Dienstleistungsgewerkschaft Ver.Di*) on the one hand, and the German Publishers Association (*Börsen-verein des Deutschen Buchhandels e.V.*) on the other. Reference made in the 2014 Creators´ Contract Study, p. 63

[363] The 2014 Creators´ Contract Study, p. 63

if the European Commission exempted the common remuneration standards under Article 81(3) of the Treaty.[364]

Arbitration body and mediation

The German Copyright Act also stipulates for situations when associations of creators and exploiters fail to agree on terms of remuneration within a reasonable period of time. Detailed provisions of Sections 36 (3) and (4) and Section 36a provide for a necessary guidance (see details in *Figure 4.2.1.*). These provisions also explain how the Arbitration board (*Schlichtungsstelle*) is formed and how it is set up. The formation of the board by equal amount of appointments by each side with addition of one independent, mutually agreed chairman of the board is very much aligned with most existing arbitration models. Such board suggests a reasoned arrangement proposal for remuneration standards to the parties. If there are no objections against such proposal within three months after it was submitted by the panel, it is deemed to have been accepted.

Additional features of mandatory contract law provision

Mandatory application

The claims to equitable remuneration and to additional participation are mandatory. They cannot be waived, contracted out or otherwise evaded through circumventing transactions.[365] This has still proven to be difficult to achieve, as irrespective of what the law stipulates, even after 15 years of application of these provision is still not common practice in Germany to provide creators with ´residual compensation´ for successful exploitation of a work, especially in the fields of television and film. As Reber[366] explains, "*in the wake of a growing "total buy-out" practice in the private television industry, even public TV broadcasting organizations (ARD, ZDF) tend to bypass the residual compensation regulation in their own collective bargaining agreements by outsourcing TV movie productions to private affiliates. German entertainment guilds and unions attempted for many years to negotiate such residual compensation clauses with television and film producers but without any appreciable*

[364] See in Ibid Gutsche, (2003), 370
[365] Sec(s). 32(3) and 32a(3) UrhG
[366] Ibid Reber (2016), 383

result." Recently a collective bargaining agreement was concluded with the film producers´ association but a rather problematic one. Also, only a few common remuneration standards (Sec. 36 UrhG) have been set up for directors, screenplay writers and cameramen so far.[367] It also becomes clear that the principle of adequate participation is not properly reflected in such agreements. These collective bargaining agreements focus on ´bestsellers´ rather than looking into ´fair compensation' from the outset, reflecting that authors should participate in any revenue generated by their work.[368]

The law also provides a protection from ´jurisdiction shopping´ by effectively ruling out choice of law for specific circumstances. Due to prevalence of mandatory provisions of national law, where normally through freedom to contract under international private law parties could chose applicable law, restrictions apply. In order to avoid a situation where the equitable remuneration provisions are avoided by application of foreign laws, Section 32b of the German Copyright Act was adopted (see details in *Figure 4.2.1.*).[369]

Section 32b.(2) UrhG[370] is of practical importance as it stipulates that the statutory provisions on reward have mandatory application as long as the subject-matter of the contract is of significant use within Germany. It does not matter if the exploiting entity has its registered seat abroad; what matters is if the uses take place in Germany.[371] Therefore remuneration rules are obligatory for acts of use in Germany even if foreign law was agreed on. Authors are thus protected irrespective of the choice of law and even if they enter into a licence agreement with a foreign entity.[372] It is important to note though in the cases described above, that where worldwide rights are granted by

[367] Ibid Reber (2016), 383
[368] Ibid. One may contemplate whether a viable solution would be to eliminate lump-sum compensation as such. In cases where, at the beginning it is not certain if the work or performance will generate any proceeds at all (and the licensee carries financial risk) such mode of compensation would not be helpful in promoting creativity.
[369] Ibid Gutsche, (2003), 371
[370] Stating that "application of Sections 32 and 32a is compulsory to the extent that the agreement covers significant acts of exploitation within the territory to which this Act applies"
[371] See Drucksache Deutscher Bundestag (*printed report of the German Federal Assembly)* 14/8058 p.20. and Ibid Gutsche, (2003), 371
[372] Ibid Gutsche, (2003), 371

the author, the statutory claims to remuneration are restricted to exploitation returns within Germany and do not expand to worldwide income.[373]

Amendment of German copyright law effective as of March 2017

In addition to the above described regulation aiming at strengthening the bargaining position of authors, the German Parliament has recently adopted amendments to the UrhG which came into effect as of March 1, 2017[374]. The objective of the new law is to further strengthen the rights of authors of copyright protected works against the industries.

None of these changes is reflected in the studies introduced and discussed in Chapter 3, although they may have affected the findings. The changes represent even further improvement of creators´ positions in contract negotiations. They also introduce an "information right", very similar to the transparency obligations introduced in Article 14 of the Draft DSMD, however, much more detailed and taking into account differences in "importance" of individual contributions to collective works. Something the Commission did not take into account (and, to be fair, to the knowledge of the author of this work so far none of the national legislators did). The new provisions are evidently coming as a reflection of market practice and inadequacy of the current legislation to differentiate between various "scenarios" occurring in the complex market with copyright protected subject matters. The most important new regulations relate to the following provisions of UrhG.

Reasonable Compensation (Section 32 (2) UrhG)

According to the previously existing legislation, as described above, authors of copyright protected works are legally entitled to ask for an equitable remuneration for their work. Up until now, for the determination of "equitable remuneration" time and duration of use were taken into account. From March 2017, it is also frequency and extent of use that have to be considered. This seems to be reflecting the need to address digital uses and remuneration for them coming to authors. As such, it seems that remuneration will not be considered equitable if it does not take onto account frequency

[373] Ibid Gutsche, (2003), 371

[374] See more at Christoph Kolonko, New Copyright Law in Germany, published 25 May 2017 at http://www.adlawinternational.com/news/new-copyright-law-in-germany.html

of use. In such case, due to lack of equitability of the remuneration, author should be able to claim additional fair participation according to Section 32a UrhG if the remuneration originally received is conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work.

Right to Information on the Extent of Usage (Sections 32d and 32e UrhG)

The newly added Section 32d UrhG is of special importance to the creators. An author can now request information from his contractual partners on the extent of the usage of the work and the economic benefits obtained from the exploitation of the transferred rights. What is more important, the author's right to request such information does not only work against his direct contractual partner, but - according to Sec. 32e UrhG - also towards third parties who have a significant commercial influence on the licence chain and parties who profit directly from any clear disproportionality in revenue distribution according to Sec. 32a (2) UrhG.

The right to information shall be excluded if the author only made secondary contribution to a work, product or service. This will happen in cases in which the contribution of the author has only little influence on the overall impression of the work. This is a very important limitation of the right to information (and secondarily remuneration) because in complex collective works such as films not everyone contributes to an extent that deserves additional remuneration and this has been the concerns of the creative industries. One can only hope that by this forthcoming the legislator made the new law a little more acceptable for the producers, publishers etc.

An agreement in which an author waives the above-mentioned rights is not allowed and will be regarded as invalid except for collective agreements or wage agreements in which a fair negotiation between authors and industry can be assumed.

Limitation of Exclusivity to 10 years

The amendment added new Section 40 to the UrhG which applies to the so-called "buy-out contracts" under which exclusive exploitation rights are granted for a lump-sum fee with no obligation to pay revenue-based royalties. These licences will now be considered "non-exclusive" after an initial 10-year-period. After such time lapses, the author is free to use the work originally licensed exclusively and to licence it to other parties. The original transferee may still use the work, but not on an exclusive basis.

However, the law gives the parties of an exclusive license agreement after an initial 5-year period to extend the period of exclusivity beyond the 10-year limitation. But no sooner than those 5 years. This seems a very sensible provision. In such given time, the author will know how successful the work is and if the lump sum initially paid was inappropriately low, the transferee can either pay additional remuneration or loose exclusivity. This gives the creator a chance to seek other opportunities for revenue. In practice, however, it is more likely that the initial licensees will agree on additional payments. It is hard to imagine they would let go of a certain revenue stream just because they are not willing to pay some extra for a well selling product.

Exemptions for Computer Software

It was however decided (sensibly) that computer programs are not affected by the changes (Sec. 69a (5) UrhG). Because of the high demand in the software sector, the legislator believed that authors in the software business do not need the same level of protection against the industry as authors in the creative business. It may also be attributed to the very different nature of computer programs as copyright protected works and other differences this industry represents compared to the "traditional" creative industries.

Overall impact of the new legislation

It seems that the newly introduced changes to the German copyright law will have considerable impact on the creative business in Germany. Total-buy-out agreements on a flat-fee basis (still considerably frequent in Germany) now must be renegotiated after 5 years or there will be no more exclusivity after 10 years. Alternatively, the author must be given a fair share of profit made by exploiters. This should support the practice of splitting remuneration into a flat-fee and a recurring royalty payment. Such behaviour would, however, carve such contract out of the claws of the newly introduced Section 40 (which is to be expected). It will therefore put another burden on the creators when negotiation their original transfer contract to make sure that the revenue-based royalty is sufficiently high (equitable).

The new reporting regulations can mean considerable efforts not only for the transferees, but now also for third parties. They will face a demand to provide annual reports by authors once a year. It remains to be seen whether the new regulations will

lead to additional fairness in the copyright industry and how the courts will interpret and enforce these provisions. Nevertheless, it is to be expected that the cunning industry lawyers will come up with ways how to play around the new provisions. As they always did. They are more resourceful than the creators. That is why creators are in a weaker bargaining position in the first place. In addition, contracts that have been concluded before March 2017 are not affected. Therefore, for example, practical implications of Section 40 will not be easily assessable until 2022.

Beneficiaries of protection

It goes without saying that German authors and performers are beneficiaries of the rights described herein.[375] However, the circle of beneficiaries extends this group: the treatment is also afforded to stateless persons and foreign refugees living in Germany[376]; to nationals of the Member States of the European Union and the European Economic Area[377]; works published for the first time in Germany are also protected.[378] Authors from any other country can to invoke the remuneration provisions if they publish their work first in Germany based on a license agreement. It would be interesting to see if this could incite a ´publication country shopping´ on the side of international authors, potentially promoting German publishing sector, bringing authors from various language areas to Germany, should the EU harmonization fail to level up the standards to German level. What happens after the UK exits the EU and the *acquis communautaire* ceases to apply (if that happens – current EU law, as effective as of the day of UK leaving the EU, will probably be proclaimed part of the UK law through the European Union (Withdrawal) Bill) while the DSM Directive strengthens the position of European authors (if ever)? Could this lead to a portion of the numerous authors currently published in the UK flee to the continent and seek stronger protection here, especially if German publishers are capable of editing and publishing in English and other languages? Same rules apply to foreign performers whose performances take place in Germany. Otherwise foreign authors and performers

[375] Sec(s) 120(1), first sentence; 125(1), first sentence; 75(4) UrhG
[376] Sec(s) 122; 123; 125(5), second sentence UrhG
[377] This is on the basis of the prohibition of discrimination pursuant to Article12 EC Treaty; their equality with German creators also extends to the rules on copyright contract law - the EC Treaty does not differentiate between various versions of subjective rights for nationals and foreigners. See also J. A. L. Sterling, *World Copyright Law*, (3rd edn., Sweet & Maxwell 2008), para 26-04.
[378] Sec.121(1) and (2) UrhG

cannot rely on the provisions on remuneration. As regards international treaties on copyright, Germany has not created new exploitation rights to which the principle of national treatment would apply and as such besides the situations described above; foreigners are afforded the rights and protection of the German copyright contract law.[379]

Employee works

In German copyright Law, the basic principle is that the author´s rights are vested in the author[380] and according to Section 43 UrhG, the general copyright regime as described above applies exactly the same with regards to exploitation rights of employees, "unless otherwise provided in accordance with the terms or nature of the employment or service relationship".

But the application and interpretation of this provision is not as simple as it may seem at first sight. German case law has proclaimed, for example, implied grants when the work was created within the specific exercise of the duties of the employee and where the employee was aware of the fact that the work is used by the employer and the employer compensated the employee for this transfer[381]. This, as reasoned by the court, was required by the very purpose of the contract. One can see resemblance with the implied license as known in English law.

Section 43 UrhG does not apply to freelancers or independent workers, since they do not work under employment agreement.[382] As regards commissioned works, Section 44 (1) UrhG[383] stipulates that "if the author sells the original of a work he shall, in cases of doubt, not be deemed to have granted a right of use to the buyer". In addition, the owner of the original of an artistic work or of a photographic work is authorised to exhibit the work in public even if it has not yet been published, unless the author has explicitly ruled this out at the time of the sale of the original (Section 44(2) UrhG).

[379] Ibid Gutsche, (2003), 372
[380] Section 7 UrhG
[381] Regional Court Cologne (LG), file number 12 O 416/06; reference provided in the 2014 Creators´ Contract Study, p.132
[382] The 2002 EU IP Contracts Study, p. 75
[383] Section 44 UrhG is called „Sale of the original of the work", and would thus be applied to the original "physical copies" of artistic works.

Moral rights always remain with the employee, same way they remain with the author in case of a "regular" grant of exploitation right.

Performers

When application of the exploitation provisions to performers is concerned, Section 79(2), second sentence UrhG stipulates that Sections 31, 32 to 32b, 33 to 42 and 43 shall apply *mutatis mutandis*. Therefore, from the provisions discussed above, only provisions related to Contracts concerning unknown types of exploitation[384] and Remuneration for types of exploitation which subsequently become known[385] are not applicable to performers.

[384] Sec. 31a UrhG
[385] Sec. 32c UrhG

Figure 4.1 – provisions of German copyright law related to exploitation rights

Act on Copyright and Neighboring Rights [386]

of September 9, 1965

(Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrecht)

Vom 9. September 1965)

Part 1 – The copyright (Urheberrecht)

Chapter 5 – Legal relations in copyright law *(Rechteverkehr im Urheberrecht)*

Subchapter 2 – Exploitation rights *(Nutzungsrechte)*

Section 31 Grant of exploitation rights *(Einräumung von Nutzungsrechten)*

(1) An author may grant another party the right to exploit a work in individual or all forms of exploitation (exploitation right). An exploitation right may be granted as a non-exclusive right or as an exclusive right, and may be limited in respect of place, time or content.

(2) The non-exclusive exploitation right entitles the rightholder to use the work in the permitted way without a use by others being ruled out.

(3) An exclusive exploitation right shall entitle the rightholder to use the work in the manner permitted to him, to the exclusion of all other persons, and to grant exploitation rights. It may be agreed that utilisation by the author is reserved. Section 35 remains unaffected.

(4) *(repealed)*

(5) If the types of exploitation have not been specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract. A corresponding rule shall apply to the questions of whether an exploitation right has in fact been granted, whether it shall be a non-exclusive or an exclusive exploitation right, how far the exploitation right and the right to forbid extent, and to what limitations the exploitation right shall be subject.

Section 31a Contracts concerning unknown types of exploitation *(Verträge über unbekannte Nutzungsrechten)*

[386] The translation of the statutory provisions is taken from the www.juris.de (accessed April 2017) provided by the Federal Ministry of Justice in cooperation with juris GmbH and combined with translation from German to English language provided in A. Klett, M. Sonntag, S. Wilske, *German Law Accessible: Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution,* (Verlag C.H.Beck Lexis/ Nexis, 2008 Münich), as the author of this thesis saw best fit for the terminology used in this work.
Provisions in English language of the latest amendment of the German Copyright Act, effective as of March 1, 2017 are taken from:
https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0177 (accessed July 2017).
Provisions newly added to the text of the UrhG as of March 2017 are indicated in blue colour of text in this Figure 4.1.

(1) A contract where the author grants rights in respect of unknown types of exploitation, or where he undertakes the obligation to do so, shall be in writing. Written form is not required if the author grants an exploitation right to everyone free of charge. The author can revoke the granting of such right or the obligation to do so. The right of revocation shall expire after three months after the other person sent the author, at the address last known to the sender, the information concerning intended commencement of the new type of exploitation of the author's work.

(2) The right of revocation shall not apply where the parties, upon becoming aware of the new type of exploitation, have agreed on remuneration pursuant to Section 32c (1). The right of revocation shall also not apply where the parties have arranged for remuneration according to common remuneration standards. The right of revocation shall expire upon the author's death.

(3) If more than one work or contribution to the work have been combined to form one collection that can only be exploited in an appropriate way in the new form of exploitation using all the works or contributions to the work, the author may not exercise the right of revocation in bad faith.

(4) The rights arising from subsections (1) to (3) cannot be waived in advance.

Section 32 Equitable remuneration *(Angemessene Vergütung)*

(1) The author shall have a right to the contractually agreed remuneration for the granting of exploitation rights and permission for exploitation of the work. If the amount of the remuneration has not been determined, equitable remuneration shall be deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration.

(2) Remuneration shall be equitable if determined in accordance with common remuneration standards (Section 36). Any other remuneration shall be equitable if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the nature and extent of the possibility of exploitation granted, in particular the duration, frequency, extent and time of exploitation, and considering all circumstances.

(3) The other contracting party may not rely on any agreement deviating from subsections (1) and (2) to the detriment of the author. The provisions referred to in sentence 1 shall also apply if they are by-passed by other arrangements. However, the author may grant a non-exclusive exploitation right to everyone free of charge.

(4) The author shall have no claim under subsection (1) sentence 3 if the remuneration that has to be paid for the exploitation of his work is specified in a collective bargaining agreement.

Section 32a Author's further participation (*Weitere Beteiligung des Urhebers*)

(1) Where the author has granted an exploitation right to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the

author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained.

(2) If the other party has transferred the exploitation right or granted further exploitation rights and if the conspicuous disproportion results from proceeds or benefits enjoyed by a third party, the latter shall be directly liable to the author in accordance with subsection (1), taking into account the contractual relationships within the licensing chain. The other party shall then not be liable.

(3) The rights under subsections (1) and (2) cannot be waived in advance. An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective. However, the author may grant a non-exclusive exploitation right to everyone free of charge.

(4) The author shall have no claim under subsection (1) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement and if further appropriate participation is expressly stipulated for the case referred to in subsection (1).

Section 32b Compulsory application *(Zwingende Anwendung*)

The application of Sections 32 and 32a shall be compulsory

1. if German law would be applicable to the exploitation agreement in the absence of a choice of law, or

2. to the extent that the agreement covers significant acts of exploitation within the territory to which this Act applies.

Section 32c Remuneration for types of exploitation which subsequently become known (*Vergütung für später bekannte Nutzungsrechten*)

(1) The author shall be entitled to separate equitable remuneration where the other contracting party commences a new type of exploitation of the author's work, pursuant to Section 31a, which was agreed upon, but still unknown, at the time the contract was concluded. Section 32 (2) and (4) shall apply *mutatis mutandis*. The other contracting party shall, without delay, inform the author about the commencement of the new type of exploitation of his work.

(2) Where the other contracting party has transferred the right of exploitation to a third party, the third party shall be liable to provide the remuneration pursuant to subsection (1) upon commencement of the new type of exploitation of the author's work. The other contracting party shall cease to be liable.

(3) The rights under subsections (1) and (2) cannot be waived in advance. However, the author may grant a non-exclusive exploitation right to everyone free of charge.

Section 32d Right to information and accountability *(Anspruch auf Auskunft und Rechenschaft)*

(1) Where an exploitation right has been granted or transferred in return for payment, the author may once a year request from his contracting party information and

accountability in respect of the extent of the use of the work and the proceeds and benefits derived there from on the basis of information which is generally available in the ordinary course of business activities.

(2) The entitlement under subsection (1) is ruled out if

1. the author has made only a secondary contribution to a work, product or service; a contribution is, in particular, secondary where it has little influence on the overall impression created by a work or the nature of a product or service, for example because it does not belong to the typical content of a work, product or service or

2. the claim on the contracting party is disproportionate for other reasons.

(3) The author shall have no claim under subsection (1) and (2) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement.

Section 32e Right to information and accountability in a licence chain *(Anspruch auf Auskunft und Rechenschaft in der Lizenzkette)*

(1) Where the author's contracting partner has transferred the exploitation right or granted further exploitation right, the author may also demand information and accountability pursuant to section 32d (1) and (2) from those third parties

1. which essentially economically determine the use processes in the licence chain or

2. from whose profits or benefits the conspicuous disproportion pursuant to section 32a (2) results.

(2) In order to be able to assert the entitlements under subsection (1) it shall be sufficient that there are clear indications based on verifiable facts that their conditions are met.

(3) The author shall have no claim under subsection (1) and (2) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement.

Section 33 Continuing effect of exploitation rights (*Weiterwirkung von Nutzungsrechten*)

Exclusive and non-exclusive exploitation rights shall retain their effect vis-à-vis exploitations rights that are granted a later point in time. The same shall apply if the right holder who granted the exploitation right changes or if he waives his right.

Section 34 Transfer of exploitation rights (*Übertragung von Nutzungsrechten*)

(1) An exploitation right may only be transferred with the consent of the author. The author may not refuse his consent contrary to good faith.

(2) If, together with an exploitation right in a collective work (Section 4), exploitation rights in the individual works included in the collective work are transferred, the consent of the author of the collective work shall be sufficient.

(3) An exploitation right may be transferred without the consent of the author if the assignment takes place within the course of the sale of a company as a whole or of parts thereof. The author may revoke the exploitation right if he cannot be reasonably

expected in good faith to accept the exercise of the exploitation right by the transferee. Sentence 2 shall also apply if there are material changes to the shareholdings in the right holder´s business.

(4) The transferee shall be jointly and severally liable for the fulfilment of the transferor's obligations arising from the contract with the author if the author did not expressly agree with the transfer of the exploitation right in the individual case.

(5) The author may not waive the right of revocation and the liability of the transferee in advance. Otherwise, the holder of the exploitation right and the author may agree on different terms.

Section 35 Grant of further exploitation rights (*Einräumung weiterer Nutzungsrechten*)

(1) The holder of an exclusive exploitation right may grant further exploitation rights only with the consent of the author. The author's consent shall not be required where the exclusive exploitation right is granted only to ensure that the author's interests are served.

(2) The provisions under Section 34 (1), second sentence, subsections (2) and (5), second sentence, shall apply *mutatis mutandis*.

Section 36 Common remuneration standards (*Gemeinsame Vergütungsregeln*)

(1) In order to determine whether remuneration is equitable pursuant to Section 32, authors' associations together with associations of users of works or individual users of works shall establish common remuneration standards. Common remuneration standards shall take account of the circumstances of the respective area of regulation, especially the structure and size of the users. Regulations contained in collective bargaining agreements shall take precedence over common remuneration standards.

(2) Associations as referred to under subsection (1) shall be representative, independent and empowered to establish common remuneration standards. An association which represents a significant proportion of the respective authors or users of a work shall be deemed to be empowered within the meaning of the first sentence, unless the members of the association reach a decision to the contrary.

(3) If the parties have so agreed, proceedings for the establishment of common remuneration standards shall be conducted before the arbitration board (Section 36a). Proceedings shall be conducted upon the written request of one of the parties, if

1. the other party does not commence negotiations on common remuneration standards within three months of the written request of one of the parties to initiate such negotiations,

2. negotiations on common remuneration standards do result in an outcome one year after the written request to initiate such negotiations, or

3. one of the parties declares that the negotiations have irretrievably failed.

(4) The arbitration board shall submit to the parties a settlement proposal giving reasons and containing the contents of the common remuneration standard. The proposal shall

be deemed to have been accepted if the arbitration board does not receive any written objection thereto within six weeks of the receipt of such proposal.

Section 36a Arbitration board (*Schlichtungsstelle)*

(1) In order to establish common remuneration standards, authors' associations together with associations of users of works or individual users of works shall set up an arbitration board, if the parties have agreed this or one of the parties has requested that arbitration proceedings be conducted.

(2) The arbitration board shall consist of an equal number of assessors appointed by each of the respective parties, and an impartial chairperson, the appointment of whom both parties should agree upon.

(3) ...

Section 40 Agreements as to future works *(Verträge über künftige Werke)*

(1) A contract in which the author undertakes to grant rights of use in future works which are not specified in any way or are only referred to by type shall be made in writing. The contract may be terminated by either party after a period of five years following its conclusion. The term of notice shall be six months, unless a shorter term is agreed.

(2) The right of termination may not be waived in advance. Other contractual or statutory rights of termination shall remain unaffected.

(3) Where rights of use in future works have been granted in the performance of the contract, upon the termination of the contract the provision concerning the works which have not yet been supplied shall become ineffective.

Section 40a Right to other exploitation after ten years in the case of flat-rate remuneration *(Recht zur anderweitigen Verwertung nach zehn Jahren bei pauschaler Vergütung)*

(1) Where the author has granted an exclusive exploitation right against payment of flat-rate remuneration he shall nevertheless be entitled to exploit the work in another manner after the expiry of ten years. The first owner’s exploitation right shall continue as a simple exploitation right for the remainder of the period for which it was granted. The period referred to in the first sentence shall begin to run upon the granting of the exploitation right or, if the work is delivered at a later stage, upon delivery. Section 38 (4), second sentence, shall apply mutatis mutandis.

(2) The contracting parties may extend the exclusivity of the right to cover the entire duration for which the exploitation right was granted at the earliest five years after the point in time referred to in subsection (1), third sentence.

(3) Contrary to subsection (1), the author may, when concluding the contract, grant an exclusive exploitation right without any limitation of time if

1. he makes only a secondary contribution to a work, product or service; a contribution is, in particular, secondary where it has little influence on the overall impression created

by a work or the nature of a product or service, for example because it does not belong to the typical content of a work, product or service,

2. the work is a work of architecture or the draft of such a work,

3. the work is, with the author's consent, intended for use in a trade mark or other distinctive sign, in a design or Community design or

4. the work is not intended for publication.

(4) The author shall have no claim under subsection (1) to (3) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement.

Section 41 Right of revocation for non-exercise *(Rückrufsrecht wegen Nichtausübung)*

(1) Where the holder of an exclusive exploitation right does not exercise the right or only does so insufficiently and this significantly impairs the author's legitimate interests, the author may revoke the exploitation right. This shall not apply if the non-exercise or the insufficient exercise of the exploitation right is predominantly due to circumstances which the author can be reasonably expected to remedy.

(2) The right of revocation may not be exercised before the expiry of two years following the grant or transfer of the exploitation right or, if the work is delivered at a later date, since its delivery. In the case of a contribution to a newspaper the period shall be three months, in the case of a contribution to a periodical published monthly or at shorter intervals six months, and in the case of a contribution to other periodicals one year.

(3) The revocation may not be declared until after the author has, upon notification of the revocation, granted the holder of the exploitation right an appropriate extension to sufficiently exploit the exploitation right. It shall not be necessary to determine an extension if it is impossible for the rightholder to exercise the exploitation right or he refuses to do so or if granting an extension would prejudice the author's overriding interests.

(4) The author shall have no claim under subsection (1) to (3) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement.

(5) The exploitation right shall terminate when revocation becomes effective.

(6) The author shall compensate the person affected if and insofar as this is fair and equitable.

(7) The rights and claims of the persons involved according to other statutory provisions shall remain unaffected.

4.1.2. Case law and Market Practice

During the arguably short period since the enactment of the amendments strengthening author´s and performer´s position there have been already several cases brought before court and decided. Although some voices indicate that the expectation was much higher. A brief contemplation over what may be the reason follows in the analytical chapters.

Below are outlined three cases on the application of Section 32a UrhG tried by German courts of different instances. Some have been finalized, while the first one discussed (Das Boot) is still moving back and forth between appeals. But the debate presented in the hitherto stages of the Das Boot case is a valuable input into the discussion whether the changes brought about by the Act to Strengthen the Contractual Position of Authors and Performing Artists has met its objective.

In addition to these three cases, the previous jurisprudence on application of (former) Section 36 UrhG[387] on the best-seller clause remain applicable as long as it is not in contradiction to what was changed with the new legislation, specifically the shift from requirement of ´gross´ disproportion to ´conspicuous´.

4.1.2.1. Das Boot

In the "Das Boot" case, a famous German cameraman, Jost Vacano, sought fair remuneration for his contribution to a successful German movie. Das Boot is a story about a submarine during World War II. It was made into a full-length movie, theatrically released in 1982[388], as well as a six-part TV series released in 1985[389]. Mr. Vacano´s work on the cinematography of the movie was quite remarkable, contributing to the movie´s inclusive atmosphere with "the unforgettable pictures and feeling of claustrophobia, panic and hope, giving viewers the impression to be right among the movie's protagonists"[390]. In fact, Vacano was recognized for his work on the movie by

[387] GRUR 2002, 602 - Musikfragmente (§ 36 a.F.), GRUR 2002, 149 - Wetterführungspläne II (§ 36 a.F.), GRUR 2002, 153 - Kinderhörspiele (§ 36 a.F.), GRUR 1998, 390 - Comis-Übersetzungen I (§ 36 a.F.), GRUR 1991, 901 - Horoskop-Kalender (§ 36 a.F.), GRUR 1990, 1005 - Salome (§ 36 a.F.)

[388] http://www.imdb.com/title/tt0082096/?ref_=nv_sr_1

[389] http://www.imdb.com/title/tt0081834/?ref_=nv_sr_2

[390] http://ipkitten.blogspot.cz/2009/02/will-german-cameramans-compensation.html

nominations and wins of several awards, including a 1982 Oscar nomination for Best Cinematography[391].

In 1981, when the movie was being made, the technology advancement was not at such a high level to be able to accommodate for the demanding conditions of the shooting. Mr. Vacano, originally an electrical engineer, had done a lot of innovative development on his camera and lighting equipment[392] in order to make his work as striking as possible.

While the numbers differ slightly depending on sources[393], the overall ratio between the movie´s budget and its worldwide gross revenue is approximately 15 million USD budget against 85 million worldwide gross sales in 2013 (therefore including the movie´s director´s cut re-release in 1997). However, its high production costs also rank it among some of the most expensive films in the history of German cinema.

After the amendment of the German copyright law attempting to strengthen author´s contractual position it does not seem to come as a surprise that artists of Mr. Vacano´s calibre come forward with their claims.

Mr. Vacano brought his claim before the Munich District Court *(Landgericht München I*) in 2009, trying to receive additional compensation (fair additional participation) from the licensee who achieved such a (not only) monetary success with the film.

Mr. Vacano was – in compliance with the German copyright law – recognized as a joint author of the audiovisual work and as such together with the other co-authors he conceded a limited exploitation rights to the film´s production company – Bavaria Films. However, he argued under Sec. 32a of the UrhG that the lump-sum remuneration agreed and paid for such concession was "strikingly disproportionate to the proceeds

[391] Vacano won the 1982 Bavarian Film Award for Best Cinematography (*Kamerapreis*), the 2007 German Golden Camera Award for "25th Anniversary Camera", the 2011 Historical Shot by the Society of Camera Operators for the "running in the hallway of the submarine" shot. He was also nominated for the 1983 Oscar for Best Cinematography. More details at: http://www.imdb.com/title/tt0082096/awards?ref_=tt_awd

[392] For example, he developed a "Gyroscope" which enabled him to rush through the narrow boat, steady camera in hand, while armored like an American Football player. He also oversaw the putting together of a purpose-built camera which was required specifically for the making of the movie. See more at http://ipkitten.blogspot.cz/2009/02/will-german-cameramans-compensation.html

[393] http://www.imdb.com/title/tt0082096/business?ref_=tt_dt_bus; https://en.wikipedia.org/wiki/Das_Boot

and benefits derived from the commercial exploits" by Bavaria Film and demanded that his contracts with Bavaria of 1980 and 1981 be adjusted in light of the global success of the film by way of a retroactive share of the revenue. The argument put forward was that a clear correlation between Mr. Vacano´s input and the remuneration should be made. Mr. Vacano was paid approximately £20 an hour which amounted in circa £9.000 total. He brought his claim not only against Bavaria Films, but also against the West German Broadcasting Station (WDR) in respect of TV broadcasting rights´ exploitation (both for the movie and the series), and against Euro-Video Ltd, a subsidiary of Bavaria and distributor of videos and DVDs. He sought access to the relevant licensing documentation between Bavaria and this broadcaster and distributor respectively in order to be able to determine an exact amount of compensation to request. In response to Mr. Vacano´s claim Bavaria declared that his claim was not justified as not only did Mr. Vacano receive remuneration that was 40% above the usual tariff applicable at the time of the film making but also that the film have not even gotten to the point of "breaking even"[394].

This case was the first one brought forward to the Federal Court of Justice (BGH)[395] to test whether the adjustment of the "best-seller" clause introduced through Section 32a UrhG by the Act to Strengthen the Contractual Position of Authors and Performing Artists[396] in fact represents any improvement.

Due to so-called action by stages (*Stufenklage*), meaning that issues arising at various stages of action are tried separately, Mr Vacano, demanding that his 1980 and 1981 contracts with Bavaria are adjusted in light of the global success of the film, first has to claim access to information about the respective (theatrical and DVD) user licensing and related agreements which would then enable him to calculate the exact amount of additional participation.

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[394] Mr. Vacano´s lawyer allegedly rebutted this response by accusing Bavaria of employing "creative accountancy methods", saying that Bavaria will find it difficult to convince the court that "Das Boot" has not made a profit yet. Seeing the numbers in public records as outlined above, his suspicion seems justifiable. More in http://ipkitten.blogspot.cz/2009/02/will-german-cameramans-compensation.html

[395] The other two cases analysed later –the "Tatort" and "The Pirates of the Caribbean" cases were decided by a lower court and by BGH at a later date, respectively.

[396] Bundesgesetzblatt [Federal Law Gazette] of March 28, 2002, Part I, p.1155 *et seq.*, also available in English at http://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/

After decisions by the Regional Court of Munich I *(Landgericht München I*) and the court of appeal, the Higher Regional Court of Munich (*OLG München)*, the Federal Court of Justice (*the Bundesgerichtshof*) had to assess whether Mr. Vacano had the right to claim information (somewhat akin to disclosure) as co-author of the work, and whether the defendant had the duty to provide this information to the extent claimed.

The Higher Regional Court of Munich initially had granted Mr Vacano's claim to information for the time after 28 March 2002, as there had been concrete evidence for an indication that he had a claim to additional participation. For the time before 28 March 2002, however, the Munich court denied the claim to information since the transitional provision of Sec.132 (3), second sentence UrhG only allowed the consideration of proceeds and benefits that the exploiter of the work obtained after 28 March 2002.

In its decision of September 22, 2011[397] the BGH confirmed that an author will have a claim to information (*Auskunft*) if there are clear indications that he had a claim based on Sec.32a UrhG. Since the claimant was a co-author of the work "Das Boot" he could bring such claim himself and demand this type of information himself and for himself.

The defendant film producing company also appealed, arguing that the court's assumption that there was tangible evidence of a conspicuous disproportion in the sense of Section 32a UrhG was based on insufficient facts. The court's decision that Mr. Vacano had a claim to information for the time after 28 March 2002 could thus not be upheld. The court of appeal, the Higher Regional Court of Munich (*OLG München*), therefore undertook a renewed assessment as to whether there had been tangible evidence based on verifiable facts that in light of the overall relationship between the claimant and defendant there was a conspicuous disproportion between the agreed payment for the claimant and the defendant's respective proceeds and benefits.

Upon subsequent claimant's appeal, the BGH disagreed with the court of appeal and concluded that the claimant could also have a claim to information for the time before 28 March 2002. The Federal appellate court stated that for the assessment of a

[397] I ZR 127/10, in German available here: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=0eec396206a41d5e4590bddd213385e0&nr=59538&pos=0&anz=1

conspicuous disproportion within the meaning of Section 32a UrhG, all revenue that had been accrued before 28 March 2002 had to be considered.

The court assessed interpretation of the ambiguous term "facts/circumstances" (*Sachverhalt*) in Sec. 132(3), second sentence UrhG[398] and interpreted it as encompassing the conspicuous disproportion mentioned in Sec. 32a UrhG as well as the actual facts, which had led to the disproportion. However, on the claimant's appeal, the Federal Court of Justice (*Bundesgerichtshof*) interpreted the term differently and included only exploitation actions (*Verwertungshandlungen*). Sec. 132(3), second sentence UrhG in BGH´s opinion only meant that in cases were all prerequisites of Sec.32a UrhG were given, a further equitable participation was owed only of the proceeds and benefits of exploitation actions which had happened after 28 March 2002. For the assessment of acceptability of the claim based on Sec.32a UrhG, the BGH held that it was immaterial in the light of Sec. 132(3), second sentence UrhG whether the conspicuous disproportion had only existed after 28 March 2002 or whether it had already existed on that day and had further existed after 28 March 2002.

After this assessment, the BGH sent the case back to the court of appeal, the Higher Regional Court of Munich, for a further hearing and decision.

Since, so far, the case has only been at the stage of obtaining information rather than deciding on specific compensation, and also seeing that it is doubtful whether any compensation will be awarded given the BGH´s assertion that only proceeds taking place after 2002 will be considered (which is likely to be very limited given the respective release dates of the work)[399], one probably should not hold their breath for the final outcome. Nevertheless, the decision is important help in interpreting the transitional provision of Section 132 UrhG.

By way of a concluding comment one might add that even if eventually Mr. Vacano does not receive any additional compensation (which – irrespective of whether one

[398] Sec. 132 (3): "The provisions of this Act as amended on 28 March 2002 shall continue to apply to contracts concluded, or other facts which occurred, before 1 July 2002, subject to the second and third sentences. Article 32a shall apply to facts which occurred after 28 March 2002. Article 32 shall apply to contracts concluded between 1 June 2001 and 30 June 2002, if the right granted or the permission is used after 30 June 2002."

[399] As of the creation of this thesis, the case has gone only through the first stage of obtaining information (although through all instances), rather than getting to the decision on the merit of the case.

would wish Mr. Vacano some sort of justice – would be arguably the correct outcome of the case, given the public interest to limit retroactive claims), surely his efforts did not end up in vein. The acclaim he achieved through his work on Das Boot allowed him to work with world renowned directors and on American blockbusters such as Robocop or Total Recall. For comparison, the latter´s budget in 1990 was 65 million USD while it grossed at 260 million USD worldwide as of 2013. One may wonder whether Mr. Vacano would attempt to get some extra participation also for this movie. But realizing that it was a US production and that, leaving aside the relatively strong guilds in the United States, the environment is not exactly protectionist of the "weaker parties", the evident answer is that there would not be a legislation to back it up with. The analytical chapters below provide some discussion on which environment and legislative approach seems to provide a better incentive for creativity and/or fairness.

4.1.2.2. Pirates of the Caribbean

The Pirates of the Caribbean[400] case is an excellent opportunity to demonstrate that the mandatory copyright contract law provisions apply to performers same way as to authors.[401] The case concerns claim for additional fair participation under Sec. 32a UrhG brought forward by a German "dubbing actor", Marcus Off. In Germany, (similarly as in many other European countries) films (particularly with young target audience) are dubbed (or, "voiced-over") for TV and sometimes even initial cinema release.

Mr. Off is the person normally dubbing Johnny Depp in Germany[402]. The Higher

[400] See details here http://ipkitten.blogspot.cz/2011/08/court-as-film-critic-no-fairness.html

[401] Section 32a UrhG refers to 'authors' but Section 79(2) UrhG guarantees the provision´s application also to performers.

[402] It is a common practice that local distributors tend to use the same local person for dubbing specific actor (normally even more than one) so that the audience is used to the same tone, similarly as viewers enjoying the original language vision can recognize their favourite stars by their voice. Some national dubbing actors even enhance their career (or at least income) by becoming „the voice" of an international star. Dubbing can be conducted in such a professional way that it becomes an artistic performance discipline of its own. This was the case in the Czech Republic, for example, when Vladimír Dlouhý brilliantly voiced over Tom Hanks in Forrest Gump. Mr. Off is this way also the German voice of Ralph Fiennes, Sean Penn and Michael Sheen.

Regional Court in Berlin[403] initially decided Mr. Off's claim against the actor. Given the success of this film franchise at the German box office, the related DVD releases and TV licensing of the films Mr Off felt that the fee of approximately €18.000 paid to him was not a fair consideration for his contribution and requested additional fair participation of €180,000.

The Berlin court thought that, while theoretically there could be cases where a fee received by a dubbing actor was disproportionate to the success of a film and an artist could thus demand such an additional fee, his was not such case. The court argued that a dubbing artist who lends his voice to a lead actor has no claim for a supplemental fee as ´fair additional participation' where the dubbing actor's actual contribution is of ´merely ancillary importance to the film´, which will apply "where the film consists mostly of technical effects, has numerous supporting actors and where the lead actor appears only infrequently". The Berlin court found that this was exactly the case of the Pirates of the Caribbean film, which mostly consisted of technical effects and had numerous extras and supporting actors with the actual contribution of the main actor (and his German voice) being comparatively small. Overall, the court held that while Mr. Off's contribution to the films was not insignificant, it was already covered by the fee paid by the film production company.

Mr. Off appealed to the Federal Court of Justice (*Bundesgerichthof*, ´BGH´), pointing out that he was already the second dubbing actor to give voice to Jack Sparrow because the first one´s efforts were not considered sufficient. He felt that he truly has given the character his own personality[404].

On appeal the BGH[405] decided in Mr Off´s favour. The BGH held that Mr Off was entitled to additional payment because the contribution of a dubbing actor who lends his voice to one of the main characters of a film was ´not of mere ancillary importance to the overall film´ and the fee paid was not a fair remuneration for the contribution.

[403] (*Berliner Kammergericht*) 24 U 2/10 of 29 June 2011
[404] Mr. Off´s take on Jack Sparrow, the lead character in the Pirates of the Caribbean, can be watched here: https://www.youtube.com/watch?v=4yeNzU8epeo
[405] I ZR 145/11 of 10 May 2012

The court found that there was a disproportion between the fee paid and the enormous success of the work.

Referring to cases related to the old version of Section 36 UrhG, the court clarified that Sec. 32a UrhG may indeed be applicable to the work of dubbing actors who lend their voice to main characters of a film if their contribution is not purely "marginal". The BGH expressly disagreed with the Higher Regional Court and found that Jack Sparrow's part and his appearance was more than just of marginal importance.

The court also clarified that a dubbing actor may be regarded as a "co-author" of a work and provided a detailed guidance as to when one may assume a disproportion in the sense of Section 32a UrhG and confirms that financial gains based on distribution of the (dubbed) film abroad can be relevant if the parties have agreed on German law as governing law.

Due to the German judicial system, the case was remitted back to the Higher Regional Court (*Kammersgeright*) in Berlin to take account of the BGH´s findings.

Several comments come to mind when assessing the case. Firstly, one may wonder where did the notion of assessment of the "proportion of special effects compared to acting" used by the lower court came from? How does it help evaluate the contribution of the said work or performance to the works success? And, how does one measure it? In addition, anyone who is familiar with the movies knows that Jack Sparrow is a role famous for Johnny Depp´s acting and that it is of much more than ´mere ancillary importance´. In fact, Johnny Depp was nominated for several acting awards[406] for his work, which – given genre of the films – is an important acknowledgement of his work. Some argue that the character of Jack Sparrow as depicted by Johnny Depp is indeed the main driver for the series´ worldwide success. Therefore, the finding of the BGH seems more relatable. As such, however, it is very difficult to give the dubbing of such character one´s own personality when they have to focus on truthfully copying the

[406] To name a few, Mr. Depp was nominated for the 2004 best actor Oscar, Golden Globe and BAFTA award for the Pirates of the Caribbean: the Curse of the Black Pearl and for the 2007 Golden Globe for the Pirates of the Caribbean: Dead Man´s Chest. List of Johnny Depp´s award is available here: http://www.imdb.com/name/nm0000136/awards?ref_=nm_awd

personality that Johnny Depp gave the role in the first place (in order to maintain the crucial factor of the film´s success).

Also, as noble as the intentions of the legislator may be, the reality is different. After Mr. Off brought his claim for additional fair participation, the German distributor hired someone else to voice over Johnny Depp in the fourth instalment of Pirates of the Caribbean in 2011. If for no other reason, for this one may find the additional €180.000 a fair remedy.[407]

If one accepts that the contribution of the (co)author or performer to the overall success of the (collective) work is the decisive factor for entitlement for additional fair participation, still with the dubbing actors one may ask: Would the movie achieve the same box office success in the given country if the lead (and most popular character) was voiced-over by a different dubbing actor? It seems like the answer would be yes in this given case and that as such Mr. Offs performance did not really contribute to the overall financial success of the work.

4.1.2.3. Tatort

In the "Tatort" case[408] the Higher Regional Court of Munich had to decide a claim for additional fair participation brought by the co-creator of the intro to one of Germany's most famous TV crime series: Tatort (in English: "Crime scene"). Tatort[409] is a 90 minute crime story initially shown on Sunday nights and produced by different local stations of German broadcasting station ARD. Different police investigators solving fictitious crimes in various parts of Germany were depicted (with famous detective Schimanski played by Götz George being one of them). Irrespective of which detective

[407] It may be interesting to make a survey to see what is considered an ´equitable remuneration´ for dubbing of a blockbuster movie´s lead character´ in the first place and how does the market practice differ country by country. For comparison, a Czech dubbing actor would get, depending on their local fame, a fee in the realm between 2,500 to 5,000 CZK (€95 – 190) for dubbing a DVD release and around 15,000 CZK (€555) for theatrical release (to clarify: the rate is a lump-sum for the whole movie, not an hourly rate or so). That is only 3% of the fee Mr. Off received. To compare the markets, here are a few numbers: Czech Republic has 10,5 million people, average cost of a cinema ticket is €4,50 (2015) and the Pirates of the Caribbean: the Curse of the Black Pearl grossed in the cinema box office between its release on 28/8/2003and year end at $1,16 mil. The numbers for Germany are 81 million /€8,1 / $44 mil.

[408] 29 U 2749/10 of 10 February 2011

[409] http://www.imdb.com/title/tt0806910/?ref_=nv_sr_3

was investigating or where the respective episode of the series took place, one part of the series never changed: the series' iconic intro. The show has been airing for over 40 years now and the intro remains the same.[410]

The co-creator (a graphic designer and filmmaker) of this intro (consisting of distinct visual and audio elements) had been paid a lump-sum fee of 2,500 Deutsch Marks (which converted but not considering inflation makes up to roughly £1200) when the series was first aired in 1970. She claimed that she was the sole author of the underlying storyboard and a co-creator of the intro scene. Having seen the success of the series over the years, the claimant thought that 2,500 Deutsch Marks was not a fair remuneration for her contribution and decided to claim an additional fair participation from the ARD under Section 32a UrhG.

Initially, the Regional Court of Munich I (*LG München I*) had (surprisingly) decided in her favour. On appeal, the Higher Regional Court of Munich (*OLG München*) found in favour of the defendant, ARD. The Regional Court had found that the payment of a flat fee had been in conspicuous disproportion to the time of exploitation and held that the claimant should be entitled to a claim under Section 32a UrhG.[411]

On February 10, 2011 the appellate court agreed with the defendant and dismissed the claim. The court held that the intro was not a separate work in its own right. It had no direct impact or influence on the commercial success of the Tatort series and as such Section 32a UrhG did not apply. The court further explained that viewers did not watch the series in order to see and hear of the intro. The intro was well-known to viewers because it had been shown regularly on television for over 40 years unchanged. Since the wording of Section 32a UrhG does not expressly list who is entitled to claim under the provision, the court assessed this question by referring to the expected intent of the legislator. The Higher Regional Court of Munich took the view that the application of Section 32a UrhG had to be reserved for such cases where the claimant's 'contribution to overall work was not only of merely subordinate importance'.

The Higher Regional Court of Munich also dismissed the claim to be named as an author in the intro stating that the claimant's right to be named as one of the creators

[410] https://www.youtube.com/watch?v=veOJYxHlgW8
[411] See more at http://ipkitten.blogspot.cz/2011/03/tatort-no-fairness-compensation-for-co.html

had been forfeited since over four decades had passed since the intro's creation. It was also held that not every contributor to the series could be named and that it was customary in the sector for the given use to only list the main contributors.

The judges, however, confirmed that the claimant had a right to prevent others from being named as sole authors of the intro. It turned out that ARD had named one of its employees as the sole creator and the court found that this infringed the claimant´s rights as the sole and true author. Further appeal has been not allowed. This is unfortunate as it seems that a strong moral right case was dismissed.

It would have been nice to see if contribution of the co-author of the work (the cameraman) in the "Das Boot" case to the overall success of the film was also considered. It that case it might be much easier to argue and establish.

Reber[412] comments in his article that he finds it astonishing that the BGH in both the cases testing the application of Sec. 32s UrhG[413] did not address the part of Sec. 32a (2) UrhG mentioning "taking into account the contractual relationships within the licensing chain", which may lead to conclusion that the court did not consider the wording to be relevant. He argues that this issue should not be ignored. It is important to note that there is no subsidiarity between claims against the author´s contractual partner[414] and claims against a third party exploiter.[415] But some link between these two claims has to be acknowledged if a portion of the proceeds obtained by such third party is to be paid to the author´s contractual partner. It may be reasonable to view a portion of the proceeds payable by such third party to the author´s contractual partner as a license fee (despite the fact that proceeds considered for the additional participation claim are to be taken as gross) because the author should not be able to participate twice in one and the same part of revenues – claiming further participation against his contracting partner first and the third party exploiter next. Reber believes that the third party should be able to deduct the license fee payable to the contractual partner from

[412] Nikolaus Reber, ´The "further fair participation" provision in Art. 32 a (2) German Copyright Act - Claims against a third-party exploiter of a work´, JIPL&P 2016, 11(5), 382-385, 384
[413] BGH GRUR 2012, 496 – Das Boot (The Boat) and BGH GRUR 2012, 1248 – Fluch der Karibik (Pirates of the Caribbean)
[414] Under Sec. 32a (1) UrhG
[415] Under Sec. 32a (2) UrhG

the gross revenues.[416] Only the remaining revenue should then be considered for the assessment of whether there is a ´conspicuous disproportion´, and this should be the case for all ´third party exploiters´ who have license fee payable to the author´s contracting partner and against which the author could have a claim under Sec. 32a (2) UrhG.

While this may seem like a ´common sense´ approach, there are also competing interpretations of this rather unclear part of the provision which believe that all revenues of the third party (licensee) have to be taken into account and it must be the task of the licensee to subrogate against the licensor on a contractual basis if an author succeeds with his claim.[417] Reber therefore confirms his view that a license fee paid by the third party exploiter to the author´s contracting partner should be deductible from the third party´s proceeds considered for the purpose of assessing ´conspicuous disproportion´.[418] Reber gives a calculation example which, for the easier demonstration, is provided in verbatim here:

> "Let us assume that the author only received € 1 from his contractual partner for the video rights. The author´s contractual partner then transfers the video rights to a third-party user for € 1000. Let us pretend that this payment is adequate for the transfer of the video rights. The third party subsequently exploits the film on video and gains revenue of €10 000. In order to receive adequate compensation, the author should have received 10% of the revenues. Therefore, we would find conspicuous disproportion in both relationships. In my [Reber] view the author should now be able to claim 10% of € 1000 from his contractual partner, i.e. € 100 pursuant to Sec. 32a (1) UrhG. Further, the author should be entitled to claim

[416] Ibid Reber (2016), 384

[417] Reber mentions for example Nordemann, ´Das neue Urhebervertragsrecht´ (The New Copyright Contract Law´)´, 2002. Another opinion (of Professors Schultze and Dreier in their 5th edition of the Commentary to the German Copyright Act (2015)) is also considered, although it has no foundation in the wording of the law or its legislative history: They believe it is important to assess whether the third party paid a reasonable license fee to the author´s contractual partner or its licensor and if that is the case they think it unjustified to claim further participation against the third party user if the latter had already paid the reasonable fee to their contracting partner. Reber disagree with such approach pointing out for example that it would be very difficult for the author to assess what a reasonable license fee is in a contractual relationship in which he in no way participates.

[418] Ibid Reber (2016), 385

> another 10% of the revenues against the third party/licensee after deduction of the license fee, i.e. 10% of € 9000 which is € 900. All in all, the author would receive ´further equitable participation' of € 1000."[419]

Reber also mentions that if the other interpretation was adopted, the author would have received only € 100 from his contractual partner because the license fee paid by the licensor (his contracting partner) to the licensee (the third party) was equitable. That would be unfair to the author and against the law and the intention of the German legislator.

The disunity of the German commentators on the interpretation and application of the discussed provisions shows how difficult it is to draft a legislation in a precise enough manner that it meets its objectives, is fair to all the participants and is easy to interpret and apply. Considering how long it has taken Germany to draft it and the problems emerging despite the otherwise famed German precision, one becomes sceptical how can this be done on a European level in a short time frame and reflecting often competing interests of national legislators, numerous stakeholders and also diverse legal systems and doctrines.

As far as market practice is concerned, at least for film industry, even after those 15 years, producers and TV companies tend to preserve their ´buy-out´ practice and insist on the grant of all possible rights from the author for a non-recurrent lump-sum payment as low as possible. They are also reluctant to accept provisions guaranteeing additional payment for repeated use of film (as can be seen in major US Guild Agreements concerning film production).[420] It seems like the legislator did not anticipate the difficulties the 2002 reform will experience when enforcing the law. The authors are still in a very unfortunate position of having to sue their contracting partners which – as seen on the example of Mr. Off – gets them ´blacklisted´. So, while they may get some additional participation, it will deprive them from a long-term source of income and secures them a label of a troublemaker. Many may therefore still hesitate to enforce their statutory right.

[419] Ibid Reber (2016), 385
[420] Ibid Reber (2016), 383

4.1.3. Conclusion to Chapter 4.1.

It is clear from the hitherto addressed national regulation that Germany has already dedicated a considerable amount of time and effort to address the question how to achieve fair reward for authors and performers paid for exploitation of their work *vis-à-vis* the strength of their licensees. Such efforts are a result of combination of factors with the monist doctrine being one of the strongest drivers. The bond between the author and his work or the performer and his performance and corresponding (constitutional) right to obtain what is a fair participation on all the proceeds resulting from utilization of such work or performance is evident. It is hard to imagine same being afforded to an author or performer under UK law with the different justification for copyright protection as briefly outlined in the opening chapter and followed by more analysis in Chapter 4.3. In the Czech Republic, some attempts have been made but the results are rather ineffective (the question remains whether the intent was genuine and as such the attempt is a failure, or if the aim was that the proverbial wolf has been fed[421] - a result of a political compromise). The UK and Czech approach will be discussed in the next chapters. But it is without a doubt that Germany has so far gone the furthest when it comes to introducing a fair contract adjustment mechanism as stipulated in Article 15 of the draft DSM Directive. As such, it is likely that in order to succeed with their attempts, the Commission should take example from the current German approach and try to learn from German successes and fails.

But even in Germany it will not be easy to determine if the reforms brought by the described legislation were indeed effective and achieved the designated goal. After certain period during which authors and performers will claim both equitable remuneration and further participation, and the courts will indicate in their interpretation and application of the said provisions how to read the rules (and also possibly a considerable amount of common remuneration standards will be developed), it will be difficult to determine if the frequency with which claims are made goes down (if that is the case) because they are simply difficult and expensive to enforce or because

[421] There is a Czech proverb stating in literal translation "The wolf has eaten and the goat remained whole", meaning coming up with a solution that seemingly is a solution to a problem (hungry wolf) but the party that would have been hurt should the problem truly be resolved remains intact by such solution.

the regulation in fact has been succeeding. One could assume that after a few successful claims made, the licensees of exploitation rights will be willing to provide additional compensation, after this is claimed by their licensor, rather than undergoing an expensive court proceeding which may ultimately award the claimant with higher amount than what would have been agreed through the requested amendment of the contract or the further participation request.

Arguably, any assessment on the success of the German legislator´s endeavour can be done only through an (empirical) economic study comparing the state of contractual remuneration in 2002 and now, trying to track if the position of authors and performers indeed improved. Also, possibly a cross border study would be helpful in order to see if – within the examined time - the German protectionist legislation improved the position of authors and performers in Germany compared to other markets (with similar size of entertainment industry) where any such regulation does not exist. Does this kind of interference of the state into contractual freedom actually bring any fruits or should the markets be left to regulate themselves spontaneously? This kind of outcome would be something the Commission should like to seek.

4.2. Czech Republic

4.2.1. Legislation

4.2.1.1. Historical background and justification

Introduction

Czech copyright law (and previously Czechoslovak law - interrupted by the dissolution of the federation in 1993) follows the continental civil law system and the Central European sub-system (influenced by German scholarship) in which author´s rights were mainly promoted to protect an expression of personality ("child of a mind") rather than a property right, emanating from the right to copy as is the case in common law system of the United Kingdom.

Until early 2000, the German-like monistic *author´s rights* system (as oppose to "copyright" system) was followed. However, in 2000 - by way of the CZCA - Czech Republic introduced a blend between the German monistic[422] and the French dualistic[423] system. As in the dualistic systems, the law deals with moral rights and the economic rights of the author and performers separately, but in the same way as in monistic systems, the economic rights are inalienable and can be only licensed (not assigned) while the author always formally retains such economic rights. More details on this so called *quasi-dualistic* system[424] follow below. This differentiation will be shown as important due to the emphasis it places on transferability of rights and the potential corresponding limitations on options for remuneration of authors and performers.

In 2004, Czech Republic joined the European Union and, as such, gradually implemented the constantly growing EU copyright law, harmonizing the copyright

[422] In addition to Germany, the following EU Member States follow the monistic approach to author´s rights in their copyright doctrines: Austria, Bulgaria, Latvia, and Slovenia. (This is based on a research made in 2010 by the author of this work for her LL.M. thesis *"Can an Exclusive Licensee Ever be the Owner? An Examination of the Non-Assignability of Author´s Economic Rights in the Czech Republic*" submitted at the Center for Commercial Law Studies, Queen Mary University of London.

[423] In addition to France, the following EU Member States follow the dualistic approach to author´s rights in their copyright doctrines: Belgium, Denmark, Estonia, Finland, Greece, Italy, Luxemburg, Netherlands, Poland, Portugal, Romania, Spain, and Sweden.

[424] Such system being – in minor variations – applied also in Hungary and Slovakia.

legislation with the rest of the Member States, and curtailing the differences in those areas of copyright law already affected by such work of the Commission[425].

Historical development

After the formation of the Czechoslovak state in 1918, the countries of the current Czech Republic and Slovakia adopted the Austrian and Hungarian laws, respectively, of the former Austro-Hungarian Empire: the Austrian Copyright Act of 1895 was accepted in the western (Czech) part of the country (Bohemia, Moravia and a portion of Silesia) and the Hungarian Copyright Act of 1884 in the eastern (Slovak) part of Czechoslovakia (Slovakia and Subcarpathian Ruthenia). Only in 1926 was the Czechoslovak copyright law unified.[426]

The Act of 1926 was replaced by a 1953 Copyright Act adopted after the 1948 communist takeover and was shaped by the political doctrines of the State. Whilst formally resembling many provisions of the 1926 Act, in reality it sought to embed communist ideology, such as to "provide incentive to works serving the interests of the people", to ensure that "the broadest masses of the working people will benefit from the creative work of the authors", so that "their works become an effective instrument in the progress of the socialist society".[427] As with many property rights and possessions, the communist copyright law deprived the authors of any property rights. As per communist ideology, it was the State who decided what the remuneration tariffs would be and the use any copyright works in state owned media, leisure and

[425] At that time they were Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights; the 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; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

[426] The preceding step in such unification was achieved for publishing contracts in the 1923 Law on Publishing Contracts. More details on the historical development of copyright law in the Czech Republic see Rudolf Leška, Kateřina Štechová, „Chapter 12 - Czech Republic and Slovakia“ in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016), 374

[427] Rudolf Leška, Kateřina Štechová, „Chapter 12 - Czech Republic and Slovakia“ in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016), 374

entertainment. Interestingly, the law was in fact dualistic, with alienable economic rights and inalienable moral rights.

The 1965 Copyright Act[428] followed the 1953 Act but provided for purely monistic approach to remuneration, very similar to the German 1965 Copyright Act (applicable, as amended, until today). To some extent, it also reflects development of so called socialist laws, including adoption of the socialist constitution[429] and the new (socialist) civil code[430], but it was not so politically driven as those two acts.[431] In addition to author´s rights, the 1965 Copyright Act also extended protection to performer´s rights, rights of producers of sound recordings, and rights of broadcasting and television organisations. The Act survived intact for25 years before being amended with the change of political regime in the country. Since the collapse of the former Soviet Union, until its replacement in 2000, it was amended six times; for example in order to reflect Czech Republic´s successful negotiations on EU accession, or in order to comply with international obligations resulting from the TRIPS agreement or the business agreement with the United States.[432] These amendments also introduced into Czech copyright law the notion of computer program and extended the list of compulsory licenses to free licenses for educational establishments and libraries.

The 2000 Copyright Act (the ´CZCA´), as a new modern act, abandoning the rigid, monopolistic approach of the state to copyright law, brought Czech copyright law into conformity with European Union legislation and with international copyright legislation[433] adopted in late 90s. Details of the new regulation are provided below with the text on current applicable law.

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[428] Act No. 35/1965 Coll.

[429] Constitutional Act No. 100/1960 Coll.

[430] Act No. 40/1964 Coll.

[431] More details in Ivo Telec, *Autorský zákon a předpisy související -Texty s předmluvou* [„Copyright Act and Related Regulation – Texts with Introductions"] (2nd edn., C.H.Beck, Prague 1996), X

[432] More details in Ivo Telec, *Autorský zákon a předpisy související -Texty s předmluvou* [„Copyright Act and Related Regulation – Texts with Introductions"] (2nd edn., C.H.Beck, Prague 1996), XXII

[433] Despite the political influences on copyright law and the doctrinal approach during the communist era, Czechoslovakia was always proactive in the development of international copyright laws; Czech Republic, as its successor state, is bound by all of the international conventions to which Czechoslovakia was a party. These are (as of June 2017) all the major copyright-related treaties: *the Berne Convention* (entry into force for Czechoslovakia as of February 22, 1921 (Berlin Act and the Berne Additional Protocol), November 30, 1936 (Rome Act) and April 11, 1980 (Brussels Act and Paris Act)), *the Rome Convention, Convention establishing the World Intellectual*

Justification of protection granted to authors and performers

As shown in Chapter 2.8., the philosophical reasons (justification) for provision of protection to allow authors to benefit from their creative endeavours (or investment of various kinds, and not just monetary) are reflected in a way rights to works and performances can be managed (transferred - by way of a licence or an assignment, or waived). That is in turn connected to the way such grants can be monetised.

As indicated in the introductory chapters, the three jurisdictions under observation were partially chosen in the given composition because they each represent one of the different systems, or its variation. Czech Republic being a continental – civil – law jurisdiction, but mixing a monistic and dualistic doctrinal approach to author´s rights, gives a great insight into how such theoretical consideration can affect the practical issues of dealing with author´s and performer´s rights.

Limitations of alienability and waivability of author's and performer´s rights

Before describing and analysing the current applicable law it is necessary to understand the historical and philosophical background, and to realise that some options for remuneration of authors and performers may be restricted by the doctrinal approach embedded in the text of a regulation.

As already indicated, Czech legal theory adheres to the *quasi-dualistic* approach to relationship between the economic and moral rights of authors and performers. The nature of the hybrid system lies in the fact that there is a different approach to both the duration

Property Organization, Universal Copyright Convention, Geneva Convention for the Protection of Producers of Phonograms, International Covenant on Economic, Social and Cultural Rights, Treaty on the International Registration of Audiovisual Works, Agreement on Trade Related Aspects of Intellectual Property Rights, WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, Beijing Treaty on Audiovisual Performances (signed but not yet ratified), *Marrakesh Treaty* (signed but not yet ratified).
More details on Czech Republic´s memberships in regional and international conventions and treaties related to copyright law see K.Garnett, G.Davies, G.Hardbottle, *Copinger and Skone James on Copyright. Volume 1* (16th edn., Sweet & Maxwell, 2011) as amended by First (2012) and Second (2013) Supplements, Tables to Chapters 23, 24, and 25.

of and inalienability of separate moral and economic rights. In comparison to the 1965 Copyright Act, the CZCA introduces some dualistic elements but does not introduce the dualism in its full form, with similar approach to economic rights as in the common law copyright approach[434].

The *dualistic elements* are represented by clear separation of author's rights into exclusive moral rights (listed in Sec. 11 CZCA) and exclusive economic rights (listed in Arts. 12 to 27 CZCA). On the other hand, author´s and performer´s rights are considered personality rights[435] in the wider sense. Telec[436] explains that "*The reason for exclusion of these 'ideal objects' from assignability lies in the fact, that this property has a personal substance. This substance is of a spiritual character. The very substance of these creations, no matter if artistic, scientific or technical, prevents them from alienability. The creations are ontologically bound to the spiritual personality of the creator (*creation de l´esprit*) because they lie in the creator's specific personal skills and endowment. The doctrine of incorporeal property thus speaks about an ontological union of creator's personality and his creation."*

It is expressly provided for in Section 26 (1) and (2) CZCA that *economic rights* to author's works and performances[437] can be alienated exclusively in case of death (*mortis causa*) not by assignment among living persons (*inter vivos*); they cannot be waived. Nevertheless, they can be licensed. To sum it up, the maintenance of the personal nature

[434]In addition to the United Kingdom, the following EU Member States are "copyright" jurisdictions: Cyprus, Ireland and Malta. On the 'quasi-dualistic' concept in Czech law see I. Telec, P. Tůma, *Autorský zákon – komentář* ["Author's Act – Commentary"], (1st edn., C.H.Beck, Praha 2007), at p. 311; and J.Kříž, I.Holcová, J.Kordač, V. Křesťanová - *Autorský zákon – komentář a předpisy související* ["Author's Act – Commentary and Related Regulations"], (2nd edition, Linde Praha, 2005), at p. 80

[435] For further details see R. Leška, K. Štechová, „Chapter 12 - Czech Republic and Slovakia" in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016), 400 or I. Telec*, Přehled práva duševního vlastnictví: Lidskoprávní základy, Licenční smlouva* ["Summary of Intellectual Property Rights: Basis of Human Rights, License Agreement"], (2nd edn., Doplněk, Brno 2007), 101.
Telec in his work divides intellectual property that is out of transferability or assignability into five categories: (i) features of personality (such as life, name, health, honour, privacy); (ii) manifestations of a personal nature (personal diary, letter or e-mail) which belong to general personality rights; (iii) artistic or scientific works, (iv) performances; and (v) technical creations such as an invention or design.

[436]I. Telec*, Přehled práva duševního vlastnictví: Lidskoprávní základy, Licenční smlouva* ["Summary of Intellectual Property Rights: Basis of Human Rights, License Agreement"], (2nd edn., Doplněk, Brno 2007), 101

[437] Regulation of transferability of performer´s economic rights is equal to that of author´s economic rights by way of reference from Section 74 CZCA to Section 26.

of the economic rights is reflected in ´four limitations´. Author´s and performer´s economic rights cannot be (i) waived, (ii) assigned *inter vivos*, (iii) subject of execution/enforcement procedure, and (iv) included as an asset in an insolvency settlements.[438]

Through these prohibitions the state does not only protect the ´personal interest of a creator and the essence of the fruits of his creation´, but also protects the author from himself, e.g. from an imprudent alienation of his economic rights *inter vivos*.[439] This protectionism is further discussed in relation to the protection of the weaker party to copyright contractual relations.

The CZCA still follows the personal basis of author's and performer's rights which lie in the natural character of a creation as an activity of the human mind. In contrast with the previous 1965 legislation, where author's rights were subject to law of succession as an inseparable and non-appraisable personal-economic unit, according to the CZCA, however, *moral rights* cease to exist at the time of death of the author because they are connected to the author or creator by their very essence. Although general elements of moral rights end with author´s or performer's death, paternity and integrity rights remain protected. That is because the law clearly stipulates that "after the death of the author no one may arrogate to himself authorship of the work; the work may only be used in a way which shall not detract from its value and, unless the work is an anonymous work, the name of the author must be indicated where this is a normal practice".[440] For the above mentioned naturalistic reason an author or performer cannot waive his exclusive moral rights neither can he transfer them, either during his lifetime or in the event of death[441] *(inter vivos* or *mortis causa)*.[442] It also means that they cannot be

[438] Sec. 26 (1) CZCA and its application; for further details see also I. Telec, *Některé základní a obecné otázky nového českého autorského práva – část* 2 ["Some Fundamental and General Issues of New Czech Author's Rights Act – part 2"], Buletin Advokacie, 2001, č. 3, at p. 40

[439] I. Telec, *Některé základní a obecné otázky nového českého autorského práva – část* 2 ["Some Fundamental and General Issues of New Czech Author's Rights Act – part 2"], Buletin Advokacie, 2001, č. 3, at p. 40

[440] Section 11 (5) CZCA

[441] Section 11 (4) CZCA

[442] Ibid Telec (2001/2), 40

subject to execution or insolvency procedures.[443] No one but the author or performer can ever exercise their moral rights, even if the economic rights change hands.[444]

In comparison, the dualistic aspect of the concept is reflected in the fact that, on the death of the author, economic rights are inherited by his heirs and last for another 70 years whereas moral rights come to an end.[445]

Types of transfer under Czech doctrine and their application

As Tůma explains, under the Czech legal theory, two kinds of transfer of intellectual property can be made: a 'constitutive (improper) transfer' (*konstitutivní (nepravý) převod)* - equalling a license; and so called 'translative (real) transfer' (*translativní (pravý) převod)* which means alienation of the right and transfer of ownership of the right - in the common law sense an 'assignment'. While in case of *translative transfer*, absolute rights and obligations of one person to the object of the transfer cease to exist and corresponding rights and obligations are derivatively acquired by another person, the substance of a constitutive transfer does not lie in alienation of the rights but rather in the constitution of an authorization to use.[446] In case of constitutive transfer, a transferee keeps the right but is obliged to refrain from such actions as would preclude the transferee from exercising the rights acquired.[447]

Complete non-transferability of an author's economic rights, as is the case with author's moral rights[448], would lack any general legal-theoretical basis. Since economic rights do not form part of human personality under Czech law certain forms of transfer of an author's economic rights are granted recognition under various national copyright laws, even in civil law jurisdiction with a monistic doctrine of author´s rights. Failing to do so

[443]Ibid

[444] For more details on exception for employee and commissioned works, moral rights of performers performing as part of an anasamble, and the heir´s right to object to an infringement of author´s paternity and integrity right on behalf of the author or performer after their death see Rudolf Leška, Kateřina Štechová, „Chapter 12 - Czech Republic and Slovakia" in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016)

[445]Ibid Telec (2001/2), 40

[446] P. Tůma, *Smluvní licence v autorském právu* ["Contractual License in Copyright Law"], (1st edn., C.H.Beck, Praha 2007), 11

[447] ibid

[448] Section 11(4) CZCA ("author may not waive his moral rights; these rights are non-transferable and shall become extinct on the death of the author")

would lead to a factual preclusion of the economical evaluation of an author's rights and to a denial of their property character.[449] Due to the doctrinal reasons explained above, Czech legislators decided to prohibit assignment of an author's economic rights during his lifetime.[450] This is established in particular by virtue of Section 26 (1) CZCA which stipulates that an author's economic rights may not be waived by the author; such rights are not assignable and are not subject to the enforcement of a decision.[451] Section 26 (2) CZCA sets out that economic rights are inheritable, however, once these rights are inherited, they are not further assignable by the successor; the inheritor himself is also limited in dealing with the inherited economic rights *inter vivos* to the same extent as the author, no matter that the work does not emanate from his personality whatsoever. It is doubtful whether such a restriction on the freedom to contract is still justifiable by the doctrine of a bond between an author's personality and the work. There are even voices (including the author of this work) claiming that this approach should be abandoned and purely dualistic approach to author´s rights should be adopted. Esteemed scholars such as Telec[452] or Tůma[453] advocated such an option, and Kříž[454] was contemplating such possibility already shortly after the adoption of the 2000 CZCA, although did not see the time ripe for such change at that point.

The principle of non-assignability of author's economic rights (with only constitutive transfer being allowed) also gives rise to other prohibited transactions, in particular it is

[449]Ibid Tůma (2007), 13

[450]It is worth noting here that as non-creative related rights (the right of a producer of a phonogram to his recording; the right of a producer of an audiovisual fixation to his fixation; the right of a radio or television broadcaster to his broadcast; the rights enjoyed, in respect of a previously unpublished work, by the person who, after the expiry of copyright protection, for the first time lawfully made the work public; the right of a publisher to remuneration in connection with the making for personal use of a copy of the work published by him) lack any personal element they are assignable under Czech law and this is, in fact, common practice. Such assignability is stipulated under Sections 76 (5), 80 (4), 84 (3) CZCA. A performer's rights, on the other hand, contain a personal element and, unlike other related rights, are not assignable according to Section 74 CZCA, referring to applicable provisions on author's rights.

[451]The same applies to a performer's economic rights. Prohibition of their assignment is stipulated in Section 74 CZCA

[452] Seminar of ALAI Czech Republic held May 21st, 2013 in Prague on the Effect of the new Czech Civil Code on copyright legislation in the country.

[453] Pavel Tůma, ´K problematice převoditelnosti majetkových autorských práv´ ["On the Issue of Transferability of Economic Rights"], Buletin Advokacie, 2012, Issue no. 4, 64. He even goes as far as claiming that "the reasons for application of the current concept of author´s rights are not of dogmatic nature but of legal policy; it is up to the legislator which position on the topic will be chosen, while options are multiple (*author´s translation)*"

[454] J.Kříž, I.Holcová, J.Kordač, V. Křesťanová - *Autorský zákon – komentář a předpisy související* ["Author's Act – Commentary and Related Regulations"], (2nd edition, Linde Praha, 2005), 17

prohibited to make recourse to author's rights by execution, to secure receivables (claims) by author's rights and, especially, to use author's rights (or even work) as a pledge[455]. In addition, and for the reasons explained, economic rights cannot be appraised for any such purpose[456]. This unnecessarily limits the economic utilisation of one´s creativity. In civil law dualistic systems and in common law jurisdictions, securitisation of investment through existing and even future rights is a common and effective way how to raise funds. It forms, for example, a considerable part of film industry financing.

These bans of transfer distinguish author's and performer´s rights from other intellectual property rights and also from non-creative related (entrepreneurial) rights[457]. In addition, author's economic rights are non-waivable and do not become time-barred. Any attempt to assign an author's right would be null and void by conflict with applicable law.[458] Therefore, according to current applicable Czech copyright law a license is the only legally permitted form of transfer of author's rights *inter vivos* and only in relation to economic rights. Therefore, licensing remains a key instrument in the exploitation of works protected under Czech copyright law.

[455] Ibid Tůma (2007), 15

[456] Another aspect of non-assignability of author's economic rights *inter vivos* follows from the provisions of the Act on Evaluation of Property that sets out that author's and performer's economic rights are not evaluated because these are rights that are not assignable during author's life (Section 17 (5) Act No. 151/1997 Coll. on Evaluation of Property (*Zákon č. 151/1997 Sb., o oceňování majetku*)). This act is, however, also used for the evaluation of assets for the purposes of inheritance proceedings. Since author's economic rights may be subject to inheritance proceedings, their evaluation would therefore be helpful for these purposes. Under current Czech legislation, an author's economic rights are kept in books as non-appraisable assets during inheritance proceedings. This results in the fact that, as non-appraisable assets, they are not subject to succession tax because no basis of assessment exists for them. They also do not form part of matrimonial ownership, cannot be sold in bankruptcy proceedings and cannot be seized by the authorities in administrative or criminal proceedings.

[457] Rights of a producer to their sound recording or audiovisual recording, rights of a broadcaster to their broadcast, publishers right to private copying levy, database producer´s right to their database.

[458] Ibid Tůma (2007), 15

Position of an Author and Performer as a Weaker Party to the Contract

The CZCA also incorporates legal principles already existing in other Czech private law statutes, principally the Civil Code[459] and formerly the Commercial Code[460]. These principles include most importantly contractual freedom of parties (further emphasised in the new Civil Code), but also protection of the weaker party, and protection of investment.

Protection of the weaker party to the contract is, similarly to German copyright law after the amendment in 2002, an important feature of the CZCA. The weaker party in this context is deemed the author. For example, in relation to a license agreement, while respecting contractual freedom (*"unless agreed otherwise"*) certain provisions in doubt would be interpreted in author's favour[461]. If, for example, an agreement remains silent on the scope of the license it is assumed that the license has been only granted for a 1 year period, for the territory of the Czech Republic only, and is non-exclusive. Following this principle, authors, as well as performers, are treated by the law in a similar way as, for instance, consumers, employees, tenants and, to a certain extent, minority shareholders[462]. The new Civil Code in some instances shifts the preference from the protection of a weaker party to enforcement of contractual freedom, as one of the main principles governing the new law (e.g. in case of tenants), but since the civil code only applies to the CZCA as a subsidiary regulation, the protection of ´weaker´ authors and performers remains intact.

Protection of investment is reflected in the CZCA in the provisions on 'entrepreneurial rights' (non-creative related rights, i.e. related rights excluding performer's rights) and rights related to employees' works.

[459] Act No. 89/2012 Coll., Civil Code (*Zákon č. 89/2012 Sb., Občanský zákoník)* and its predecessor Act No. 40/1964 Coll., Civil Code, as amended (*Zákon č. 40/1964 Sb., Občanský zákoník)*

[460] Act No. 513/1991 Coll., Commercial Code, as amended (*Zákon č.513/1993 Sb., Obchodní zákoník)*, superseded in the relevant parts by the 2012 Civil Code as listed above.

[461] Ibid Telec (2001/1), 40

[462] Ibid

4.2.1.2. Current legislation

Constitutional foundation for author´s and performer´s rights

The 1991 Czechoslovak Declaration of Fundamental Rights and Freedoms (the "Declaration")[463] which forms an integral part of the current constitutional order of the Czech Republic was adopted (as the name suggests) during the time of still joint state of the Czechs and Slovaks. The Declaration stipulates in Article 34 paragraph 1 that the outcome of creative intellectual activity must be protected by the law (as such, this provision arguably covers only authors and not performers and related rights holders). The *moral right* to the author´s creation is granted to every person, including foreigners, irrespective of reciprocity.[464]

Author´s *economic rights* are also protected by Article 11 paragraph 1 of the Declaration, covering the protection of property: "Everyone has the right to own property. Each owner's property right shall have the same content and enjoy the same protection." This right is afforded to both material and intangible property, irrespective of the person´s nationality and whether such right is reciprocated by such person´s country of origin.

General applicable law

The Czech Copyright Act of 2000[465] (the "CZCA"), as amended, is the current main national law applicable to copyright issues. The word "main" is used because with the Czech civil law[466] reform, effective as of January 1st 2014, the contractual law applying to copyright was carved out of the CZCA by the "new" Civil Code of 2012[467] (the "NCZCC"). Any regulation related to a licence agreement in general, as a contractual type, is now covered by the part on obligations of the NCZCC. First, in Sections 2358 and following, general provisions on licence (irrespective of the subject of such licence agreement and thus providing common grounds for licensing of industrial property as

[463] Act No. 2/1993 Coll., on Proclaiming the Declaration of Fundamental Rights and Freedoms as Part of the Constitutional Order of the Czech Republic (the "Declaration")
[464] For more details see Telec (2001/1), 25
[465] Act No. 121/2000 Coll., On Author's Rights, Related Rights, and on Change of Several Acts as Amended ('Copyright Act) (*Zákon č. 121/2000 Sb. o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon))*
[466] in the sense of area of national law rather than an adherence to a legal system in international context
[467] Act no. 89/2012 Coll., Civil Code (*Zákon č. 89/2012 Sb., Občanský zákoník)*

well as "personal" intellectual property) are covered. Section 2371 et seq. of the NCZCC then deals with licensing of *copyright works* specifically.

The CZCA is a *lex specialis* to a civil code. Therefore, where the CZCA stipulates regulation different from the NCZCC, this special provision of the CZCA will prevail. However, a civil code is a subsidiary regulation to the CZCA and as such if the CZCA is tacit about an issue, the provisions of the NCZCC shall apply. For example, where copyright law does not accommodate a specific type of paternity right (e.g. a right akin to the right to object to false attribution as known in the UK law), one must rely on the provisions of the NCZCC on personality rights[468].

Best-seller clause in the Czech copyright law

Given the above-mentioned protectionism of the Czech legislator over authors and performers, their right to additional fair compensation has been enacted in Czech copyright law since the beginning of application of the CZCA in 2000.

Section 49 paragraphs 4 to 6 CZCA stipulated that where the amount of the royalty has been agreed to depend on the proceeds from the utilisation of the licence, the licensee has the obligation to allow the author to audit the licensee's accountant documents in order to be able to determine what the correct amount of royalty is payable. And, where the amount of the royalty agreed has been determined by a lump sum, where such an amount is obviously disproportionately low compared to the profit made from the utilisation of the licence and to the importance of the work for the achievement of such profit, the author is entitled to an additional appropriate royalty.[469] It is worth noting

[468] Section 81 et seq. NCZCC

[469] Section 49 paragraph 4 to 6 stipulated as follows (as applicable until the NCZCC became effective as of 1st January 2014):

(4) Where the amount of the royalty has been agreed in dependence on the proceeds from the utilisation of the licence, the licensee shall be obliged to make it possible for the author to audit the relevant accounting documents or other documentation in order to establish the real amount of the royalty. Where the licensee thus provides the author with information designated by the licensee as confidential, the author may not divulge such information to any third party, nor use it according to his needs in contravention of the purpose for which it has been made available to him.

(5) The licensee shall submit to the author, at agreed time intervals, regular financial statements of the royalty referred to in Paragraph (4) above; unless otherwise agreed, he shall do so at least once a year.

(6) Where the amount of the royalty has not been derived from the proceeds from the utilization of the licence and where such an amount is so low that it is in obvious disproportion to the profit from the utilisation of the licence and to the importance of the work for the achievement of such profit,

here that the law only expected a license to be granted (not any different type of transfer), which is a manifestation of previously discussed doctrinal approach.

Until May 2006, this right to additional appropriate royalty was, however, waivable. The provision stipulated that "the author is entitled to an additional appropriate royalty, *unless agreed otherwise*". This made the protection provided to the authors *de facto* ineffective. Most license agreements concluded at the time contained a clause providing that the author undertakes not to trigger application of Section 49 paragraph 6, i.e. in effect waiving the right. While less experienced (frequent) parties to such transactions may not have been aware of the way out from the provision, license agreement drafted by the major licensees (publishing houses, record producers, etc.), who would be the most likely persons requested to provide an additional appropriate royalty based on the disproportion of the proceeds, almost without an exception incorporated the "waiver" clause into the license agreement. They were also the parties with the stronger bargaining power and as such the licensor (author, performer) did not usually have an opportunity to request an amendment of the said clause. With the major amendment of the CZCA in 2006[470], this problematic postscript in paragraph 6 was therefore deleted from the law in order to secure a stronger protection to authors and performers.

The same amendment also introduced paragraph 7 to Section 49 of the CZCA, stipulating that when a royalty is being negotiated, purpose of the licence, the manner and circumstances of the use of the work and the scope of the licence in terms of territory, time and quantity shall be taken into account. The initial goal of introduction of this provision was wider than what eventually made it to the text. The provision aimed at embodiment of fair (adequate) remuneration into Czech copyright law, strengthening thus the economic position of an author or other person granting a licence or a sub-licence to a licensee. Such concept was influenced by the German legislative changes made in 2002 (see further above the concept of *angemessene Vergütung*). The

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the author shall be entitled to an equitable supplementary royalty, *unless otherwise agreed* (text in italics applicable only until 21.5.2006).

(7) During negotiations on the royalty, heed shall be taken of the purpose of the licence and the manner and circumstances of the use of the work and the scope of the licence in terms of territory, time and quantity (*para. 7) only added as of 22.5.2006*).

[470] Through Act. No. 216/2006 Coll.

provision was not to provide for an absolute author´s right to a royalty but a stipulation of a royalty was a mandatory provision of a license agreement, lack of which made the agreement null and void for non-compliance with statutory requirement.[471] Ultimately the imposition of a fair royalty was deleted from the draft amendment and the additional provision of paragraph 7 "only" stipulates obligation of the parties to take into account the prescribed criteria when negotiating the royalty; such royalty does not, however, have to be fair. It is nevertheless questionable, how potent such provision is as non-compliance will not result in nullity of the license agreement; only liability for damages can be claimed, with the actual damage being very difficult to establish.

With further reference to former Section 49 CZCA, specifically to paragraph 4[472], from the order in which prospective provisions on setting up a royalty are listed one can deduct the legislator´s preference. It is preferred to have the royalty based on the proceeds from the licence granted. Lump sum royalty is considered only a secondary means of establishment of the remuneration. Where the proceeds are indeed the basis for the licensor´s remuneration, the law stipulates what rights and obligations the author and the licensee have in order to secure controlling mechanism for the author.[473] While the licensee has to provide the licensor with an access to the accounts (on a regular basis as agreed or at least once a year[474]), for the protection of the licensee, such information cannot be disclosed and/or used by the licensor for any other purpose than control of adequacy of the remuneration obtained. Failure of the licensor to comply with this provision would result in a liability for any damage caused to the licensee by such licensor´s behaviour.[475]

[471] For further details see I. Telec, P. Tůma, *Autorský zákon – komentář ["Author's Act – Commentary"]*, (1st edn., C.H.Beck, Praha 2007), 515

[472] Sec. 49 (4) CZCA (see above)

[473] The obligation of the licence to disclose any accounts related to the utilisation of the work is given for the benefit of the author (or other licensor); the right can be exercised by the author personally or through a proxy or a specialist such as an accountant. Further details on this topic can be found in I. Telec, P. Tůma, *Autorský zákon – komentář ["Author's Act – Commentary"]*, (1st edn., C.H.Beck, Praha 2007), 514 or J.Kříž, I.Holcová, J.Kordač, V. Křesťanová - *Autorský zákon – komentář a předpisy související* ["Author's Act – Commentary and Related Regulations"], (2nd edition, Linde Praha, 2005), 160.

[474] Section 49 (5) CZCA, as applicable until 31st December 2013

[475] For further details see I. Telec, P. Tůma, *Autorský zákon – komentář ["Author's Act – Commentary"]*, (1st edn., C.H.Beck, Praha 2007), 514

Section 49 paragraph 4 was partially akin to what is proposed in Article 14 of the draft DSM Directive – Transparency obligation. A comparison of how these two wordings differ and what common grounds they have is discussed in Chapter 5.

As the so called "*bestseller clause*" of former Section 49 (6) CZCA stipulates, if parties agree on other form of remuneration than proceed-based, the licensor has a relative[476] right to "adequate additional royalty", should the royalty obtained be disproportionately low compared to the revenues made by the licensee through utilisation of the licence and to the importance of the work for achieving such revenues. While the adequacy of the additional compensation will be a question of law, determined by the court (unless parties agree between themselves), the importance of the work (performance) for the level of revenues resulting from utilisation of the licence is a matter of factual assessment which will always be very difficult and subjective.

Delay with payment of the additional royalty can trigger a right of the licensor requesting such additional royalty to withdraw from the license agreement.[477] In theory, it is possible to request the additional royalty repeatedly as long as the royalty paid up to date becomes proportionate to the proceeds made. Whether this is a market practice is discussed further below.

Formal, not material changes by the civil law reform

With the adoption of the NCZCC, as of 1st January 2014, provision of Section 49 of the CZCA (together with the whole Volume 6 of Title I. of the CZCA – Contractual Types, regulated in Sections 46 to 57) were moved to the NCZCC, Part IV – Obligations. The content of those provisions remains the same (with marginal textual corrections), however, they have been divided and seemingly unsystematically moved to different places of Part IV of the NCZCC.

Sec. 49 (4) and (5) CZCA were moved to Section 2366 (2) and (3) NCZCC (under the general provisions on a license-based royalty, without any change in the wording. Sec. 49 (6) and (7) CZCA were subsumed under the heading of *Special provisions for the*

[476] „relative" right meaning that the right has to be claimed by its holder in order for it to be enforced and claim it against a specific infringer; it is not an absolute right effective *erga omnes*

[477] For further details, incl. how difficult it may be to determine when the due date for such payment is and when it becomes barred by the statute of limitations, see I. Telec, P. Tůma, *Autorský zákon – komentář ["Author's Act – Commentary"]*, (1st edn., C.H.Beck, Praha 2007), 514.

licence to the subjects protected by copyright law (Section 2371 et seq.). Specifically, they became Section 2374 (1) and (2), with minor changes to the text. Now Section 2374 (1) explicitly states the right to adequate additional remuneration is non-waivable and Section 2374 (2) gives the authority to determine such additional remuneration explicitly to a court, while also extending the factors to be taken into account.[478]

Other provisions strengthening position of an author or performer under applicable Czech copyright law

Czech copyright law provides some further safeguards to authors and performers, giving them a chance to affect the use of their work, even after the work or performances has been transferred (even through an unlimited exclusive license). A creator can withdraw from their exploitation contract (license agreement) in two cases.

Withdrawal from a license agreement due to inactivity of a licensee

According to Section 2378 NCCC[479], an author has the right to withdraw from a license agreement due to the inactivity of licensee, that is where the licensee of an exclusive licence does not utilise the licence at all or utilises it insufficiently, and where this has a considerable adverse effect on the legitimate interests of the author[480]. This may be viewed as comparable, to some extent, to the English doctrine of restraint of trade and to the Germany provisions to the same effect contained in Section 41 UrhG.

The Act then goes into further details and stipulates that the right of withdrawal from the agreement due the licensee's inactivity may not be asserted by the author before the expiry of two years from the granting of the licence or, where applicable, from the delivery of the copyright work if it was delivered to the licensee only after the licence was granted; the time limit is three months for contributions to daily periodicals and

[478] Section 2374 (2) NCZCC: "The amount of additional royalty shall be determined by the court which shall have particular regard to the amount of the original remuneration, the proceeds from utilization of such license, the importance of the work for such proceeds, and the usual amount of remuneration in comparable cases where the amount of the royalty is derived from the proceeds; this does not preclude an out of court agreement on the amount of additional compensation."

[479] Formerly Sec. 53 CZCA

[480] An author may withdraw from the agreement for such reason only after urging the licensee to utilise the licence adequately within a reasonable period after being so urged, and after the licensee's failure to utilise the licence sufficiently in spite of being so urged (Section 2378 (2) NCZCC, formerly Sec. 53 (2) CZCA).

one year for contributions to other periodicals.[481] This mirrors the provisions of the German UrhG.[482]

The author needs to compensate the transferee for any damage incurred by the transferee because of the withdrawal if that is justified by reasons deserving special consideration. In this context, the reasons for which the transferee failed to sufficiently use the licence will be considered.[483]

If the transferee does not utilise the licence at all, upon the withdrawal, the author must return to the transferee the remuneration received; if the licence has only been used insufficiently, the author will return the remuneration reduced by the part corresponding to the actual use.[484] If a licensee is obliged to use the licence and breaches this duty, the author's right to remuneration remains unaffected by the withdrawal from the agreement due to the licensee´s inactivity. Where remuneration based on yields from the copyrighted work has been agreed, the author is presumed to have become entitled to remuneration in an amount equivalent to that to which the author would have become entitled had the licensee sufficiently used the licence before the withdrawal from the agreement.[485]

Withdrawal from a license agreement due to a change of author's conviction

An author can also withdraw from a license agreement due to a change of his conviction. Where the work has not yet been made public and no longer corresponds with his conviction, and where the making public of the work would have a significant adverse effect on his legitimate personal interests, an author can withdraw from such agreement[486]. Traditionally, this would be subject to reimbursing the licensee of the costs already involved in preparation of publication of the work, such as translation costs and cost of graphical layout. This right can only be exercised until such time as the work is made public and is therefore very limited.

[481] Section 2379 (1) NCZCC,
[482] Section 41(2) UrhG; see Figure 4.1. above
[483] Section 2380 NCZCC
[484] Section 2381(1) NCZCC
[485] Section 2381(2) NCZCC
[486] Section 2382 NCZCC, formerly Sec. 54 (1) CZCA

Czech authors, however, do not make a significant use of these two options. Also, despite the statutory provisions being mandatory, withdrawal due to inactivity of a licensee is often avoided contractually by stipulating the earliest moment when such right can be exercised by the author. Such a contractual term ensures that the author's right guaranteed by law is preserved while the licensee has plenty of time to 'not to utilise' the work. In everyday practice the two abovementioned safeguards provided to authors are rather toothless.

To sum up, there exist certain safeguards for authors in the Czech copyright law giving them the opportunity to affect their relationship with a licensee after a contract has been concluded. This concedes to the protectionist attitude of Czech legislators in favour of the author, but to the detriment of contractual freedom. However, these safeguards are either not very helpful, as in the case of withdrawals, or, as regards fair additional royalty, have not yet proved to be helpful. In the meantime, they create legal uncertainty on the part of licensees.

Employee and commissioned works

Exercise of an Author's Economic Rights by an Employer

The Czech Copyright Act stipulates that an author's economic rights to a work created by the author when fulfilling his duties arising from an employment[487] (employee work), unless otherwise agreed, shall be exercised by the employer in his own name and on his own account.[488] Similarly as in other jurisdictions, including the UK, such work has to be created "in due course of his employment", or "as part of his duties", it does not apply to activity that is not a normal part of an employee's duties[489]. However, it is not required that the employment or similar contract explicitly contains a provision that the employee creates or will create author's works as part of his duties.

[487]The same applies for civil service contract with the employer or for an employment relationship between a cooperative and its member under Sec. 58 (1) CZCA. Employment contracts include all contracts stipulated by labour law, including casual workers, etc.

[488]Sec. 58 (1) CZCA

[489]For UK, applicable law on determining whether the work was "made by an employee in the course of his employment" (S.11(2) CDPA 1988) see for example, *Noah v. Shuba [1991] FSR 14* and *Stevenson Jordan v. MacDonell & Evans (1952) 69 RPC 10*. It is also worth noting that in the UK, under S.11 (2) CDPA 1988, the employer is the first owner. According to Czech law, the first (and only) owner is the author, but the employer exercises the economic rights. In both jurisdictions, this is subject to agreement to the contrary.

A particular natural person who created the work, in this case an employee, remains the author of the work but the employer exercises the employee's economic rights and is entitled to resulting benefits. An employer exercises the right to utilize the work and a right to royalty. This even includes royalties resulting from rights subject to compulsory collective rights management. This differentiates it from a situation when an exclusive unlimited license is granted by an author as is further evaluated below.

The employer may only transfer the exercise of the right pursuant to this paragraph to a third party with the author's consent, unless this occurs when an undertaking or any part thereof is being sold.[490] Therefore when the undertaking of the employer is being assigned, author's consent is not needed.

As a matter of fact, one way to arrive at a situation in which a person different from the author is freely exercising economic rights (and, as will be explained later, also moral rights to a certain extent) is to intentionally have the work created in the course of employment. Exercise of economic rights to such work can then be assigned to another entity by way of transfer of the undertaking. This may seem to be a complicated construction, but, for example, in the case of extensive projects, it can be helpful to set up a company for the purpose of creating specified work(s) and then manage the rights to the work by dealing with the company as a whole. Use of such construction may be very limited but it de facto achieves an outright transfer of author's economic rights.

In the event of the death or dissolution of an employer who has been authorised to exercise the economic rights over an employee work and who has no successor in title, the authorisation to exercise these rights shall go back to the author[491]. This is similar to the consolidation principle seen in the case of licences, where, after the termination of the licence, rights to utilize the work return to the author.

The CZCA deals with the situation of withdrawal due to inactivity of an employer in case of works deriving from employment in similar way to withdrawal due to inactivity of the licensee. Where the employer does not exercise the economic rights to an employee work at all, or exercises them inadequately, the author may request the employer to grant him a licence under normal conditions, unless there is a serious

[490]Sec. 58 (1) CZCA
[491] Sec. 58 (2) CZCA

reason on the part of the employer to decline such a request.[492] Comparing this to the mandatory provision of Section 53 CZCA, in the case of employee works there are circumstances under which the employer is not obliged to exercise the rights.

Employee's Moral Rights

An employee's moral rights to his work remain unaffected under the CZCA. However, if an employer exercises author's economic rights to an employee's work, it is deemed that the author has given his consent to certain uses and adaptations of the work. In particular, it is deemed that the author has given his consent to the work's being made public, altered, adapted (including translation), combined with another work, included into a collection of works and, unless agreed otherwise, also presented to the public under the employer's name[493]. The last legal fiction, in particular, seems to be a strong intrusion into the author's paternity right. It is however quite logical and justifiable with reference to the principle of protection of investment enshrined in the CZCA. This provision is nevertheless optional. Hence the parties can agree otherwise, for instance, where the author-employee is well known for certain expertise. It is also deemed that the author has given the employer his consent to complete his unfinished work in the case that his employment contract expires sooner than the work is completed[494].

Provisions on employee works give the employer, as a person who has made an investment into the creation of a work, quite a strong position in terms of the exercise of rights originally vested in the author. It is not, however, the same position an assignee would have. Exercise of author's economic rights by an employer is a kind of 'middle ground' between an exclusive unlimited license and an assignment of author's economic rights. It *de facto* deprives an author of certain rights and transfers them to an employer. The employer's position is in fact stronger than that of an exclusive licensee. However, there is a difference between 'ownership' of rights and a "right to exercise the rights under one's own name and on one's own account". In everyday practice, however, it is a sufficient protection if it gives the employer secure enough authorization to further utilize the work without unnecessary worry.

[492]Sec. 58 (3) CZCA
[493]Sec. 58 (4) CZCA
[494]Sec. 58 (5) CZCA

These provisions are, as in other jurisdictions, used with appreciation by employers in the entertainment industry. It has become a common trend, for instance, that TV companies use employment contracts for most of their productions.

What about the author´s claim to additional adequate remuneration per Sec. 2374 CZCA in case of employee works? Section 58 (6) CZCA stipulates that:

"Unless agreed otherwise, the author of an employee work is entitled to an equitable additional remuneration from the employer if the salary or any other compensation paid to the author by the employer is in evident disproportion to the profit from the utilisation of the rights to the employee work and to the importance of such work for the achievement of this profit; this provision shall not apply to works referred to in Paragraph (7)[495], irrespective of whether they are actual employee works or are as such just considered[496], unless otherwise agreed."

It must be noted here, that the "best-seller" provision for employee works contains an additional condition. It stipulates that compensation paid has to be in evident disproportion to the profit from the utilisation of the work *and to the importance of such work for the achievement of this profit* (emphasis added). Such test does not apply to "normal" works. If one makes the comparison to somewhat similar provision in English patent law[497], where compensation for utilisation of employee inventions is also stipulated by law, it is highly unlikely that any employee will ever be able to claim any such compensation. Through the case law on compensation for employee inventions it has been demonstrated that is extremely difficult to establish that a wok (invention) is of outstanding benefit to the employer. How does an employed author prove that his salary is disproportionate to proceeds of the employer made by the utilisation of the work AND that the work is important for the achievement of the profit to an extent that goes beyond usual importance? This is a very subjective assessment, which will have to be made by the court based on the facts of each case, and does one establish such disproportion? How does one evaluate importance?

[495] i.e. computer program and databases, and cartographic works which are not collective works created as employee works
[496] i.e. works to order (commissioned works)
[497] Section 40 (1) Patent Act 1977

And, even if such assessment can be made, the provision contains the "opt-out" option. As such, most well informed employers will put the commitment of the author not to invoke this provision in their standard employment contracts.

Performers

By way Section 2387[498] of the NCZCC, the above written applies mutatis mutandis to performers. Before January 1st, 2014 the same reference for performer´s rights to provisions on author´s rights was stipulated in Section 74 of the CZCA.

4.2.2. Case law and Market Practice

Even after the deletion of the postscript of Section 49 paragraph 6 CZCA, allowing for the ´agreement to the contrary´, the situation did not improve between the amendment of 2006 and the civil law reform of 2014. The provider of the license could not contractually agree not to claim the additional adequate remuneration but this did not stop the market from effectively neutering its force. Prospective licensees with sufficiently strong bargaining power would impose provisions stipulating, for example, that the licensor will not trigger the said provision sooner than 10 years after the license commences to be utilized. Licensees would also agree to provide a proceed-based royalty but setting such royalty disproportionately low.

Also, it may not come as a surprise that there is virtually no case law related to additional royalty (court orders to access to accounts of the licensee by the licensor in order to determine correctness of the royalty paid). There may be several reasons for this; firstly, in general, Czech copyright law is not the most frequent subject of civil law proceedings. Partially this is given by the fact that Czech Republic is a statute based jurisdiction where case law is very limited in general (one might suspect that – among other reasons – unbearable length of judicial proceedings is to be blamed). In addition, Czech judges are not most famous for their expertise in copyright (or intellectual property). The market with copyright works and performances is quite small due to the size of the country and thus the number of players involved in the business is somewhat limited. With adversaries knowing the limitations of Czech judicial system, more often

[498] Section 2387: "Artistic performances are governed by Sections 2371 to 2383 by analogy; however, a performing artist does not have the right under Section 2377 (*i.e. right to authorial copies of the work – author´s note*)."

than not parties settle before even getting to the court. This may be a positive notion for advocates of agreements achieved through mediation and/or pre-trial negotiations, lifting the burden from the overloaded courts on what is ultimately a very subjective issue. But it is not very positive for those seeking legal certainty and interpretation of vague statutory provisions. Given the limited chances for judicial clarification, parties involved in copyright licensing have to rely mainly on their own or scholarly interpretation and their respective bargaining positions and resources.

Such interpretation made by practicing copyright lawyers will always be biased by composition of such lawyer´s clientele. Those representing major licensees will always find a way around any protective provisions, hoping that if any questionable clause is challenged by the licensor, they can attempt to hold the grounds by relying on their client´s position of power and also the reluctance of the counterparty to participate in an expensive and lengthy proceeding. It is speculated that more often than not the licensor challenging the amount of a royalty will settle for less than what would (arguably) be awarded by the court.

Rights owners with little or no bargaining power standing on the other side of the scale (e.g. artists closer to the beginning of their career than to its peek) will, on the other hand, often have no notion of the measures the law provides to them. They are normally not educated in legal matters related to their activities and often cannot afford a lawyer to draft and negotiate license agreements for them.

This is, after all, the main reason why there is an attempt by various legislators (national and European) to provide a mechanism preventing such imbalance.

The question why is it, that despite the relevant statutory provisions being in place, fairness is not necessarily achieved in the Czech Republic is answered further in Chapter 6, following a review of applicable law (and its application) in the other two jurisdictions and into the Commission´s proposal for the DSM Directive.

An additional reason why “under-paid” licensors are reluctant to claim additional fair remuneration is that they would not want to go to court for one more important reason: they do not want to lose or antagonize their “customer base”. With the above mentioned limited amount of potential “buyers” of content, authors or performers do not want to close the doors for their future deals by litigating or being known for aggressively

pursuing additional royalty. They seem to rather overlook the disproportion and hope for a better deal next time, even by pointing out the success of their previous work – increasing the demand for their creations.

From the perspective of, licensees, given the limited size of the market and revenues thus achieved, works which are so successful that any royalty - agreed on a lump sum basis – could become close to disproportionate, taking into account the importance of the specific work or performance for the achievement of the success, come by very scarcely. The opportunity to claim additional adequate compensation according to Section 2374 (1) of the NCZCC is very limited in the Czech Republic.

4.2.3. Conclusion to Chapter 4.2.

To sum up, to limited extent, Czech law already provides for measures potentially capable of securing additional appropriate compensation for authors and performers. However, unlike the case of the draft DSM Directive (as discussed in Chapter 6), these are only limited to cases where the royalty has been agreed on a lumps sum basis. Where the royalty is agreed as calculated from the proceeds received through utilization of the licence granted, it is assumed that such royalty is properly negotiated and thus proportionate and additional remuneration is already intrinsically provided. The author or performer does have the right to audit the licensee's books to see if the royalty is calculated correctly (a trend the Commission seems to be following in the Draft DSM Directive) but even if the royalty is calculated correctly according to the provision of the contract, the unfairness still remains in cases where the remuneration was not negotiated as appropriate from the beginning. While this should normally be the case, it may be argued that such approach does not take into account the disproportion between bargaining powers of the parties to such agreement. And in case of the Czech Republic, the market does not regulate itself towards a more balanced environment. On a contrary, contracts are drafted in a way that even the limited protection provided to the weaker parties of the contract seems to be further stripped down by evasive clauses.

It will, therefore, be discussed below whether and how the draft DSM Directive´s Article 15 could improve the situation in the Czech market and provide the level of fairness sought to be achieved.

4.3. United Kingdom

Given the relatively narrow focus of this work, i.e. measures allowing the creators to adjust their individual contracts and results of transfers of their rights if the remuneration thus agreed and received becomes disproportionate to the proceeds made; measures which are almost non-existent under English copyright law, there is naturally much less commentary available on this topic in relation to English law. The below overview and analysis therefore focuses on alternative ways how to improve creator´s bargaining position and discusses whether some of them may provide sufficient substitute for the statutory provisions as introduced in relation to the German and Czech laws.

4.3.1. Legislation and case law

4.3.1.1. Historical background and justification

Introduction

A lot has been written on the historical development of copyright law in what now represents the United Kingdom.[499] A quote from Torreman´s textbook to summarise it is convenient:

> "Copyright has two types of root. On the one hand, it started as an exclusive right to make copies- that is, to reproduce the work of an author. This entrepreneurial side of copyright is linked in tightly with the invention of the printing press […]. On the other hand, it became vital to protect the author now that his or her work could be copied much more easily and in much higher numbers. It was felt that that the author should share in the profits of this new exploitation of the work, although this feeling was much stronger in Continental Europe than it was in the UK."[500]

The above summary of the roots of copyright nicely demonstrates the approach of English law to purpose of copyright rules. First aim is to protect investment and only

[499] See for example J.A.L. Sterling, *World Copyright Law*, (3rd Edition) Sweet & Maxwell 2008, Chapter 1, para 1.02 – 1.23; K. Garnett, G. Davies, G. Hardbottle, *Copinger and Skone James on Copyright. Volume 1* (16th edn., Sweet & Maxwell, 2011), Chapter 2, para 2.08 – 2.43; L. Bentley, U.Suthersanen, P. Torremans, *Global Copyright. Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (1st edn., Edward Elgar, 2010).

[500] P. Torremans, *Holyoake & Torremans Intellectual Property* Law (7th edn, OUP, 2013),195

as secondary goal is to reward authors. This is a common thread that will be visible throughout the exploration of English regulation of authors´ remuneration.

English law is a typical example of common law jurisdiction in that it relies heavily on common law co-shaping the regulation through interpretation provided in precedents. Copyright law is relatively statute-driven but still a lot of issues are resolved through case law.

Historical development

Literary, dramatic, musical and artistic works have been created since as long as we can trace back history. But even in such developed systems as of Rome, ancient laws did not provide any protection to authors of such creations. Such situation continued until the middle of the 15th Century in Europe. As already mentioned in the previous two national chapters, things started to change with the development of printing press when it became much easier to replicate books (previously "copied" by way of hand "rewriting" them, usually by monks and others who at the time were – quite unusually – able to read and write).[501]

Throughout Europe, on the one hand, states began to adopt rules or decrees to protect the local printing industry. On the other hand, censorship of such printed materials was secured through new procedures adopted.[502] In England, these industry "protection measures" had the same underlying foundation but would be processed through guilds. The King claimed the right to print as a Royal prerogative and in pursuance of this prerogative, the Stationers Company[503] was granted a Royal Charter in 1556[504]. The

[501] The fact that it became possible to print and disseminate quite quickly hundreds, or even thousands of copies resulted in the advance of the new industries devoted to printing which became important for the local economy (Particularly in Germany, England, Venice, Rome, etc. See more for example in A. Sterling, ´UK, EU & US Copyright Law – Unit 1 Historical Background, International Context and General Principles´, (2010-2011, King´s College London), 1-035).
In addition, as a result of this development, state and religious authorities realized they will need to control what was being disseminated. Mainly in order to prevent heretical and/or rebellious material to get in the hands of the public but one can also argue that control over the monetary factor would be a good by-product.

[502] The pattern was very similar in all the areas where book print advanced. The state would claim – as a sovereign – sole authority over the right to print or authorise print and anyone who wished to print had to apply for the grant of some form of "privilege" form the state authorities. The authorisation would normally be provided only for a limited amount of time and for specific uses.

[503] Composed of persons who printed and sold books and based in London.

[504] This is over a century later after Johannes Gutenberg „invented" the book print in 1444; the „regulation" at that time took even longer to get up to speed with "technology development".

system worked in a way that books could lawfully be printed only by members of the Stationery Company.[505] In addition, public performance of work had to be obtained from the State authorities.

Due to constitutional changes at the end of the 17th Century, the Stationers Company system lost its effectiveness[506]. The printing and publishing industry learned that they have to rely on the common-law protection.

The issue had been debated in length in the Parliament and studies were consulted. In the end the famous Statute of Anne was finally passed, effective as of 1710.[507] With its adoption, a question arose whether the Act replaced the preceding common law right to authorise publication, or, if the two streams of protection ran in parallel. In *Millar v Talor*[508], it was held that the common law right would continue, but in *Donaldson v Beckett*[509] it was overruled by the House of Lords.[510]

By the Copyright Act 1842, the period of protection was extended to life plus 7 years, or 42 years from publication, whichever terminated longer. In addition, other statutes were passed in the 19th Century, providing the authors with protection against unauthorised public performance of their works and adding new categories of works, such as statues, drawings, photographs. By the end of the 19th Century there were numerous statutes providing protection to variety of authorial works, such as books,

[505] To obtain a membership in the Stationers Company was difficult; it was a very closed group and the State authorities were very well aware of any of their activities. Normally, an author would take a manuscript to a member of the Stationers Company and sell it for an agreed one of sum. The member of the Company became the "owner of the copy in the work", meaning that he had the right to print it. These members´ rights were registered in Company´s records (Adrian Sterling, ´UK, EU & US Copyright Law – Unit 1 Historical Background, International Context and General Principles´ (2010-2011, King´s College London), 1-037).

[506] As Professor Sterling records (Adrian Sterling, ´UK, EU & US Copyright Law – Unit 1 Historical Background, International Context and General Principles´ (2010-2011, King´s College London), 1-037) points out, this is „because of uncertainty in various areas and the complexity of legal procedures, not an effective means of protection against unauthorised printing or import of books reproducing manuscripts for which the publishers had paid the authors." (ibid at para 1-048)

[507] The statute (as mentioned in previous national chapters, the "first Copyright Act") granted authors the exclusive right to print their works for a period of 14 years, with the possibility of further 14-years extension if the author was still alive at the time of the lapse of the first term of protection. In practice, author´s right was assigned to a publisher who then controlled the printing of the book.

[508] (1769) 4 Burr 2303; 98 ER 201

[509] (1774) II PC 129, 1 ER 837; 4 Burr 2408, 98 ER 257

[510] It was held that while the common law right to authorise publication of an unpublished work continued indefinitely, once the author or the person to whom the author assigned their "copyright" had authorised the publication of the work, the common law right ceased to exist and only the statutory right was available for the period of protection set out in the Statute.

paintings, photographs, etc., and in 1886 Berne Convention was adopted. After the Berne Convention´s revision in 1908 in Berlin, the English Parliament realised it was time to revise and consolidate copyright law. The aim was to introduce one statute for all the law related to this area and also comply with "Berne" after the Berlin Act. The result was the 1911 Copyright Act, coming into force July 1, 1912. The significance of this Act is that by repealing all the previous piecemeal legislation, as of that moment protection was given generally to "original literary, dramatic, musical and artistic works" ("LDMA works"). In addition, this became law (or basis for a law) across the British Empire.

After the World War II, as a result of outcomes from several studies into the need of revision of the 1911 Copyright Act, a new act was adopted. The Copyright Act 1956, effective as of June 1, 1957 repealed the previous Act but kept the main principle of protecting original LDMA works but added protection of additional materials, such as films, broadcasts, sound recordings (under the 1911 Act protected as musical works), called "other subject matter", which, however, did not have to be "original".

Further technological developments and adoption of international copyright treaties led to need of further revision which materialised in the Copyright, Designs and Patents Act 1988 ("CDPA"). Together with its amendment and Orders made there under, the 1988 CDPA represents current law in copyright area.

Justification of protection granted to authors and performers

As shown in Chapter 2 and in the previous national chapters, there are differences in how the protection granted to authors over their works and to performers over their performances is justified in each country. Despite the harmonising effects of the international instruments (such as the Berne Convention), there are still two major distinct conceptualisations of the functions of copyright.[511] The so-called Anglo-American, or common law, tradition stresses the economic role of copyright protection. Protection against unauthorised acts of exploitation enables the right holder to decide if they want to deal in the work or fixed performance themselves or through a transferee (assignee or licensee), and for what price. If there were no granted rights, anyone could

[511] Ch. Waelde, A. Brown, S. Kheira, J. Cornwell, *Contemporary Intellectual Property. Law and Policy* (4th edn., OUP, 2016), 41

free-ride on the creators' efforts and the creators would not have much incentive to further create. As such, copyright is a response to market failure. Through copyright protection, socially beneficial activities can be made financially meaningful for the creators. "It rests ultimately upon the general or public interest in having works containing ideas, information, instruction, and entertainment made available, and in rewarding those – publishers as well as creators of the works – who perform this function in society in accordance with the public demand for their efforts."[512] When contrasting this notion with the continental conception of justification of protection of authors (referring to the author´s connection to the work), it may seem that the common law approach of guarantee of appropriate reward for creative effort in public interest of access to content is more aligned with the rationale behind the concept of fair remuneration as currently being enforced by the Commission´s proposal. It would seem that assurance of appropriate remuneration for any "digital uses" should be easier in common law jurisdictions. The reality, however, is somewhat different.

Position of an Author and Performer as a Weaker Party to the Contract

Basically, unlike in the two previously examined civil law jurisdictions, there are no provisions in the English copyright statutory law that would help strengthen creators´ position of their transfer agreement negotiations. There may be, arguably, some routes to explore in common law. But they still would be difficult to apply to copyright transfer related scenarios. See more details below in this chapter with regards to general contract law.

4.3.1.2. Current legislation and case law

The basic copyright law is contained in a statute, specifically the CDPA 1988, and in the Orders made under the Act. In addition, decided cases are of importance when the need to interpret and apply the statutory provisions arises. In the United Kingdom, being a common-law system and thus relying of precedence, the decisions in cases before the courts play an important part of regulation.

[512] Ch. Waelde, A. Brown, S. Kheira, J. Cornwell, *Contemporary Intellectual Property. Law and Policy* (4th edn., OUP, 2016), 41, referring to resources on economics of copyright.

General applicable law - copyright transfers

Chapter V – Dealing with rights in copyright work of the CDPA 1988 is quite short, it only contains 7 Sections, out which last three deal with presumption of transfer of rental right in case of film production agreement (Section 93A CDPA), right to equitable remuneration where rental right transferred (Section 93B CDPA) and equitable remuneration: reference of amount to Copyright Tribunal (Section 93C CDPA) and therefore are out of scope of this work.[513] Provision of section 93: Copyright to pass under will with unpublished work also is not within the scope of this study.

Ultimately, the statutory provisions on dealing with rights in copyright works relevant for our purposes shrink to Section 90 dealing with assignment and licences, Section 91 providing guidance prospective ownership of copyright, and exclusive licences in Section 92.

According to CDPA, copyright can be transferred by way of assignment, by a grant of a licence, by waiver of rights, by testamentary disposition or by operation of law, as *personal or moveable property*. [514] A mere sale of the work (the physical carrier) does not mean that the copyright in it is also transferred.

Any transfer of copyright may be total or partial. Partial assignments apply to one or more, but not all the things the copyright owner has the exclusive right to do; or may apply to part, but not the whole, of the period for which the copyright is to subsist.[515] The "bundle" of rights comprised within a copyright interest is divisible for the purpose of assignment a copyright interest can be assigned for a limited period, with reversion

[513] It may be noted though that the notion of equitable remuneration is known in English copyright law (due to implementation of EU regulation), albeit in relation to „exception-based" compensation, and that the Copyright Tribunal is the competent body to deal with these claims.

[514] *CDPA, S.90 Assignment and licences*.
(1)Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property.
(4)A licence granted by a copyright owner is binding on every successor in title to his interest in the copyright, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser; and references in this Part to doing anything with, or without, the licence of the copyright owner shall be construed accordingly.

[515]CDPA, S.90 (2)An assignment or other transmission of copyright may be partial, that is, limited so as to apply—
(a)to one or more, but not all, of the things the copyright owner has the exclusive right to do;
(b)to part, but not the whole, of the period for which the copyright is to subsist.

to the assignor/or another at the expiry of that period. Transfer can be for the payment of a royalty (proportional remuneration) or a lump sum.

Assignment

An assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor[516], but the "writing" does not have to have any particular form - a receipt has, for example, been accepted as complying with this requirement in certain circumstances[517]. It is possible to assign the copyright in a work that has not yet been created, such assignment of future copyright is possible by way of Section 91[518].

Assignments in equity is also possible where a party has contracted to transfer the ownership of a copyright interest to another, but fails to do so in the manner required under CDPA 1988. In that case the transfer may be regarded as having already taken place "in equity"[519].

In common law, an applied beneficial assignment can also take place. Therefore, "when a freelance author [designer] is commissioned to create a work [logo] for a client and the contract for the commission is silent as to the ownership of copyright, it will normally be necessary, in order to give business efficacy to that contract, to imply a term requiring the beneficial assignment of the copyright to the client so that he may prevent others from using the work [logo]."[520]

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[516] CDPA s.90 (3): "An assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor."

[517] *E W Savory Ltd v The World of Golf Ltd* [1914] 2 Ch 566

[518] CDPA s. 91: Prospective ownership of copyright.

(1)Whereby an agreement made in relation to future copyright, and signed by or on behalf of the prospective owner of the copyright, the prospective owner purports to assign the future copyright (wholly or partially) to another person, then if, on the copyright coming into existence, the assignee or another person claiming under him would be entitled as against all other persons to require the copyright to be vested in him, the copyright shall vest in the assignee or his successor in title by virtue of this subsection.

(2)In this Part—

"future copyright" means copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event; and

"prospective owner" shall be construed accordingly, and includes a person who is prospectively entitled to copyright by virtue of such an agreement as is mentioned in subsection (1).

[519] *Western Front Ltd v Vestron Inc* [1987] FSR 66.

[520] *Griggs Group Ltd v Evans* [2005] FSR 14 (CA)

Licence

In the UK, licences are governed by Section 90(4) CDPA[521] for general provisions on to what extent licences are binding, and then further in Section 92 CDPA, exclusive licence is discussed.[522] An exclusive licensee cannot sue the copyright owner for infringement of copyright[523], otherwise he has l*ocus standi* against other parties. Non-exclusive licensee has *locus standi* only in some specific circumstances under S.101A CDPA 1988[524]. The rights of the copyright owner and exclusive licensee are concurrent. This restricts the ability of both to bring proceedings alone[525].

Otherwise, the terms of the licence are left to the parties. In the case of exclusive licences. The exclusive licensee´s statutory procedural status is equivalent to that of the owner. Similarly, as is the case in the countries where assignment of author´s rights is not permitted, while there may be some practical differences, the position of an exclusive licensee and an owner of copyright is very similar in terms of their rights.[526] In practice, an exclusive licence is very close to assignment and it is sometimes difficult to determine if the parties drafted a contract for an exclusive licence or an assignment. It is a matter of construction and the words used by the parties are not conclusive.[527]

Implied licenses can also arise, normally in situations where, in the circumstances, it can be inferred that the parties must have intended the licensee to be permitted to use a

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521 CDPA, S.90 (4): A licence granted by a copyright owner is binding on every successor in title to his interest in the copyright, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser; and references in this Part to doing anything with, or without, the licence of the copyright owner shall be construed accordingly.

522 CDPA, S.92: Exclusive licences.

(1)In this Part an "exclusive licence" means a licence in writing signed by or on behalf of the copyright owner authorising the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner.

(2)The licensee under an exclusive licence has the same rights against a successor in title who is bound by the licence as he has against the person granting the licence.

523 CDPA 1988, s 101(1): An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

524 it must be in writing and signed and must expressly grant the non-exclusive licensee a right of action.

525 CDPA 1988, s 102

526 See for example A. Rahmatian, Dealing with Rights in Copyright-protected Works: Assignment and Licenses in E. Derclaye, *Research Handbook on the Future of EU Copyright*, 2009, Chapter 12, at p. 287

527 *Jonathan Cape v Consolidated Press* (1954) 3 All ER 253

work in a manner that would otherwise infringe copyright.[528] However, courts are only willing to imply a term into an agreement in restricted circumstances: it must be reasonable and equitable, necessary to give business efficacy to the contract, obvious that 'it goes without saying', capable of clear expression, and must not contradict any express term of the contract.[529]

English copyright law also knows future licences. Licences can be granted by a "prospective owner of copyright"[530]

Employee and commissioned works

As regards works of employment, again, the employer is "the protected party" in order to give way to purpose of the employment and protect investment the employer puts into conducting business. CDPA 1988 stipulates, that "where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary."[531]

Answer to a question "When is a person an employee?" is best demonstrated in *Robin Ray v Classic*[532]. *Stevenson, Jordan v Macdonald & Evans*[533] and *Noah v Shuba*[534] provide guidance on when a work is created in the course of employment.

As regards commissioned works, transfer of rights is not automatic the same way as with employee works. It must be stipulated in the contract for work.

[528] *Roberts v Candiware Ltd* [1980] FSR 352; *Blair v Osborne & Tompkins* [1971] 2 QB 78
[529] See, for example, *Ray v. Classic FM* [1998] FSR 622, or more recently *Clearsprings Management Ltd v Businesslinx Ltd* [2006] FSR 3
[530] CDPA 1988, s 91(3): A licence granted by a prospective owner of copyright is binding on every successor in title to his interest (or prospective interest) in the right, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser; and references in this Part to doing anything with, or without, the licence of the copyright owner shall be construed accordingly.
[531] CDPA 1988, S. 11(2). Otherwise the author of the work is the first owner of any copyright in the work (CDPA 1988 S. 11(1)).
[532] [1998] FSR 622
[533] (1952) 69 RPC 10
[534] [1991] FSR 14

Performers

Sections 191A to 191H CDPA 1988, listed under the Section Performers´ property rights, mirror the provisions of Sections 90 to 93C CDPA 1988, applicable to authors (to the extent possible, reflecting the differences between them). There are additional provisions dealing with performers´ rights under that section, including equivalents of provisions on remedies, but they are not – again – relevant for this analysis.

General applicable law - contracts

As indicated before, the terms and conditions under which rights to copyright works and recorded performances are transferred are normally determined contractually between the relevant parties. The following text does not aim to explain the general English law of contracts, such as law governing formation of contract, consideration, terms and conditions, infringement and enforcement of terms, etc. General contract law will only be discussed to the extent as relevant for the present evaluation of "first stage" copyright transfers, remuneration for such transfers, and mechanisms providing any sort of protection to the creators as weaker parties in the contract negotiations. It also needs to be reminded that, with some exceptions, English contract law is not codified, it is all built on case law and its interpretation.

The principle of freedom of contract will generally apply, parties are free to agree whatever they wish. In the past, judges were firmly of the view that persons of full capacity should be allowed to make what contracts they wanted and the law interfered under specific circumstances, such as existence of misrepresentation, undue influence, or illegality. The law would not interfere merely because one party was economically more powerful than the other. Important erosions of the principle of freedom of contract only appeared with legislation passed to recompense some imbalance of bargaining power, mostly influenced by the European legislation. For example, many employment contracts are now regulated in detail by legislation; terms are compulsorily implied into contracts and cannot be excluded by contrary agreements; validity of standard form contracts is subject to legislative restrictions. In these cases, the relationship between

the parties is still governed by an agreement, but many of the terms are imposed or regulated by law.[535]

Returning to copyright law though, there are only exceptional situations in which the law in any way controls the way rights to copyright works are exploited. These exceptions fall generally into four categories: (i) mechanisms regulating contracts between creators and their first transferees ("entrepreneurs" within the meaning of English law), (ii) limitations driven by the British and European competition law, (iii) regulation of copyright contracts related to users´ copyright, and (iv) controls imposed by the collecting societies.[536] It is only the first category which is relevant for the present study and the statutory framework has been outlined above.

There are other limitations to the owners´ ability to exploit and use copyright works (resulting either from general regulatory restrictions about acceptability of the content of the works or from rights existing in the underlying works) but these are also not subject of this analysis. The focus is mainly on any restrictions that could in one way or another resemble equivalent of the civil legal systems´ protectionist objectives, i.e. restrictions imposed on the "stronger" party in the contract bargaining (although English law is very reluctant to assign weaker and stronger positions to parties of a contract).

The extent to which UK law interferes to regulate terms of transactions between authors and entrepreneurs (their transferees) – either to protect the psychological link between the author and their work, or to protect author´s financial interest – is very limited compared to what was described in relation to the German and Czech copyright laws as done through interpretation of copyright contracts or overriding terms that protect creators. In the UK, there are very few measures specifically directed at the creators, and validity of transactions is generally dependant on the law of contract not copyright law. The basic principle is that once a contract was freely entered into by two adults it is binding and a court will not reopen it just because it might have been unreasonable

[535] Edwin Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011), 1-004, 1-005
[536] See more in L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 312 *et seq*.

or unfair.[537] There are several theories as to the function and purpose of contract law[538] but the "classical theory" is most influencing in English law: contract is a reciprocal bargain entirely dependent upon the will of the parties, and the general law should intervene as little as possible with the freedom of the parties to contract; parties are entirely free to pursue their own interests.[539]

Any aim to protect the authors and performers should be met through other means than legal regulation. Protection can have a form of collective process (such as unions), promotion of standard contracts with specific sectors[540], or simply by securing the authors or artists an agent who is better positioned to negotiate a reasonable deal on their behalf.[541]

There are, however, a few ways how a contract between an author or performer and their transferee may be regulated, although through general contract law doctrines, not copyright law. In the past, doctrines of undue influence and restraint of trade have been used to protect vulnerable authors. In general, where consent of a contracting party may have been obtained by some form of pressure (enabled through stronger bargaining position), the law may consider it improper and the ´victim´ of such pressure may be entitled to a relief under the common law of duress or under the equitable rules of undue influence. In general, a person may be protected against an unconscionable bargain. In copyright law scenarios, "weaker" parties also sometimes relied on the unacceptability of restraint of trade.

Undue influence

If a disadvantageous bargain is the outcome of the exercise of undue influence, the court may be willing to set such bargain aside.[542] The equitable doctrine of undue

[537] L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 313

[538] See more in John Phillips, 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine', Wake Forest Law Review 2010, vol. 45, no. 3, pp. 837 – 861, 837

[539] ibid

[540] As done for example through the Society of Authors or Writers' Guild

[541] Although, as it turns out in *Elton John v Jones (1985) [1991] FSR 397* (see more below), even the agent may not act in the best interest of the author, and then the author may also need to challenge the contractual relationship concluded with the agent.

[542] See, for example, Hugh Beale, *Chitty on Contracts*: *Vol. 1: General principles* (31st edn., London: Sweet & Maxwell, 2012), para 7-057et seq., or Edwin Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011), 10-012 et seq.

influence covers cases in which a transaction between two parties who are in a relationship of trust and confidence may be set aside if the transaction is the result of an abuse of the relationship.[543] The transaction may be set aside if the claimant shows that the other party obtained it by abusing the relationship ("actual undue influence"), or, in the absence of direct proof, if claimant shows the existence of a relationship of trust and confidence with the other party, and that the transaction is one that "calls for explanation"[544]. In such cases, there will be an evidential presumption that the transaction was the result of undue influence and unless the presumption is rebutted, the transaction may be set aside. The doctrine extends to cases of coercion, domination, or pressure outside those special relations. Most cases in which undue influence was successfully pleaded relate to gifts and guarantees, but the same principles apply to purchases at undervalue or sales at an excessive price[545]. However, the rules may also apply to contracts which are not obviously disadvantageous to the complainant in terms of under- or over-value, at least where undue influence is actually shown.

In copyright field, an extreme example may be where an author assigned copyright to a publisher because of threats made by the publisher. In such cases the court would probably apply the doctrine of undue influence. But the court may extend their hand beyond these extreme scenarios to cases when a ´person in a position of domination has used the position to obtain unfair advantage for himself and so caused injury to the person relying on his authority or aid´[546]. For the court to interfere with the inviolability of a contract, the two following factors need to be present: (i) the parties must be in a relationship where one person has influence over the other one, and (ii) such influence has to be used to secure a ´manifestly disadvantageous transaction´[547]. If it is established that there is an undue influence, the contract is voidable. In such cases copyright assigned under such contract may be re-vested in the author.[548] Before

[543] Ibid Beale (2016), para 7-057
[544] *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [10]
[545] *Tufton v Sperni* [1952] 2 T.L.R. 516, 526.
[546] *Natinal Westminster v. Morgan* [1985] 2 WLR 588, 599
[547] *Goldworthy v. Brickell* [1987] Ch 378, 404-6
[548] See L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 313. They further point out that given that the contract is voidable, not automatically void (as may be the result in case of lack of certain formalities in some jurisdictions, for example), contractual dealings with bona fide purchasers that take place before the contract is voided will remain binding.

further discussing the doctrine of undue influence, it is worth noting that for the present discussion – i.e. assessment of possibilities to protect an author or performer under English law (and arranging for them a fair remuneration) – the outcome of finding presence of undue influence may not be exactly what resolves the creator´s problem. The author may not need the contract to be void but would rather if the contract remained in place but a better remuneration term was implied into it.

For the contract to be set aside due to undue influence, one must show that due to the relationship between the parties, one has influence over another. This will be common where the parties are in a ´fiduciary´ relationship, i.e. normally one of trust. Where the court finds the relationship between the parties to be fiduciary, the necessary dominating influence is presumed. However, in cases involving copyright transfer, for example when publishing contract is being signed, such fiduciary relationship will scarcely exist as there will normally be no previous relationship. But in *John v. James*[549] there was an exception to this.

The case concerned a series of publishing, recording and management agreements, entered into by Elton John and his lyricist, Bernie Taupin, and their manager Richard Leon James and his various co-workers or subsidiaries, all beginning in 1967, when the claimants were unknown and still minors. The agreements were extended and varied from time to time.

From 1971, Mr. James began to set up a network of wholly-owned subsidiaries in the most lucrative world markets in order to sub-publish the plaintiffs' works there and they received substantial rates of commission which, together with the expense of maintaining offices and employing staff, substantially reduced the net earnings of the second defendant, and thus the plaintiffs' share of the gross revenues from their work. The plaintiffs ' primary claims were for the setting aside, on the ground of undue influence, of the publishing and recording agreements, the return of the copyrights in all compositions and recordings covered by the agreements and delivery-up of all master recordings. The claimants conceded that the defendants (Mr. James and the subsidiaries companies) should retain all sums received by them so far, save that they should account for (a) all sums wrongly retained by them by way of the sub-publishing

[549] *Elton John v. James* (1985) [1991] F.S.R. 397

agreements and (b) the difference between the royalty rates in the agreements being set aside and the best possible rates obtainable in the market.

It was held, among other things and dismissing the claims under the management agreements and allowing in part those under the sub-publishing and licensing agreements, that there was a fiduciary obligation on the part of the defendants to account properly for royalties received. It was further held that the copyright agreement was in the nature of a joint venture and the writers would need to place trust and confidence in the publisher over the manner in which it discharged its exploitation function. A publisher's freedom to consult its own commercial interest in balancing expense and risk against prospects of success was not inconsistent with the existence of fiduciary duties. Nor was there any reason why the publisher's ability to assign its rights under the publishing agreement should negative the existence of a fiduciary duty. In addition, the court found that the failure to complain for so many years did not make it unconscionable for the plaintiffs ever to be heard to complain.[550] The court also found that there was deliberate concealment and unconscionable conduct on the part of the defendants in that they kept from the plaintiffs facts relevant to their right of action. The fact that plaintiffs were able to, and did, start their proceedings without this knowledge was not relevant. With regard to royalty rates, the defendants had behaved in an unconscionable way towards the plaintiffs and had concealed facts relevant to their right of action under this head. When the plaintiffs had brought their action within six years of the true facts coming to light, it was not wise for the defendants to plead limitation. In deciding how such unconscionable conduct was to be reflected in the result of the proceedings, however, the court had to bear in mind that its objective was not the punishment of the defendants but the attainment of a just result.

The court further found that, because the two ingredients required before the court would set aside a transaction on the ground of undue influence were, first, a relationship in which one person had a dominating influence over another and, second, a manifestly disadvantageous transaction resulting from that influence[551], to have tied two young men at the beginning of their career to a publishing agreement for six years on the terms

[550] *Habib Bank v. Habib Bank AG Zurich* [1982] C.L.Y. 3262 considered

[551] In appropriate circumstances, presumptions might be employed (*National Westminster Bank v. Morgan* [1985] C.L.Y. 413 followed).

in question represented an unacceptably hard bargain. But in this case, no distinction fell to be drawn between laches and acquiescence, and the test to be applied was whether, having regard to all the circumstances, the balance of justice was in favour of setting the agreements aside. The balance of justice was firmly against setting aside the publishing agreements. However, those to whom royalties were payable ought to be able to have trust and confidence that the publishing and recording companies would treat them fairly in the exploitation arrangements made.

Overall, thus, the doctrine of undue influence can in specific circumstances be used to help young artists. Nicholls J did hold that there was a dominant influence' even though the acquaintance of John and James was short before the publishing arrangement was signed, because James ´really took charge´, knowing that the Elton John was young and eager, and received no independent advice. He stated that in his view, ´it was clear that the reason why Mr. John and Mr. Taupin signed the agreement for such an onerously long period lies not only in their keenness to be signed by Mr. James but also, and importantly, and this is partly why they were so keen, in the trust they reposed in him as a man of stature in the industry that he would treat them fairly´[552].

Similar outcome was achieved in *O´Sullivan v Management Agency*[553], a case brought by a young, then unknown composer, Gilbert O´Sullivan who entered into an exclusive management agreement with the defendant, who operated through several companies with which O´Sullivan entered into publishing agreements. He later sought a declaration that such contracts were void and unenforceable because their signing was achieved through undue influence. It was found that because the defendant (as well as the associated companies[554]) was in a fiduciary position, the agreements were presumed to have been obtained by undue influence. Despite the fact that there had been no pressure placed on Mr. O´Sullivan to sign the agreements, the burden was on the defendants to show that that Mr. O´Sullivan had been fully informed and freely entered the contracts exactly because a fiduciary relationship existed. And because Mr.

[552] *Elton John v. James* (1985) [1991] F.S.R. 397, at 451
[553] *O´Sullivan v Management Agency and Music Ltd*. [1985] Q.B. 428; [1984] 3 W.L.R. 448; [1985] 3 All E.R. 351
[554] *O´Sullivan v Management Agency and Music Ltd*. [1985] Q.B. 428; [1984] 3 W.L.R. 448; [1985] 3 All E.R. 351, at 448

O´Sullivan has no independent advice the defendants were not able to show that the agreements should be upheld.

From the two above explained copyright cases it is possible to deduct that one can rely on the doctrine of undue influence more in relation to the creators´ agents or managers rather than their transferees. But while we still have not established a way how to set a disadvantageous transfer of rights aside, or, even better, claim fair participation on the transferees' financial success achieved by exploitation of transferred work, it clearly demonstrates that the need for fairness and its seeking is present in the English judicial system.

To have a contract set aside based on the claim of undue influence, one must be also be able to show that the dominating influence was used to induce the transaction and that the transaction was manifestly disadvantageous'. But in the complex copyright law scenarios – as was already demonstrated before – it is difficult to determine what is manifestly disadvantageous. Firstly, they can argue that some of the advantages brought to the creators are not of a financial nature and claim it is the transferee´s reputation, experience, contacts, supply chain capabilities and so on what balances the remuneration. Secondly, the assignee or exclusive licensee can argue that such arrangement is a standard and refer to agreements with other authors and practices of other entrepreneurs, equally ´disadvantageous´ - which seemingly makes it a norm. This, however, did not work in *John v. James.* The court found some of the publishing agreements unfair despite Mr. James acting in a bona fide manner, because the royalty under that contract was less than what was paid to other unknown artists.

Restraint of trade

Another doctrine under English contract law capable of protecting vulnerable creators is a doctrine of ´restraint of trade´ which reflects a general policy of contract law that a person should be able to practice their trade.[555]

[555] L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 314 referring to *Schroeder Music Publishing Co v. Macaulay* [1974] 3 All ER 616, see also Hugh Beale, *Chitty on Contracts: Vol. 1: General principles* (32nd edn. incl. 1st suppl.(online version), London: Sweet & Maxwell, 2016), Chapter 16 or Edwin Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011), para 11-062 et seq.

General contract law tells us that all covenants in restraint of trade are *prima facie* unenforceable at common law. They are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Save where the unreasonable part can be severed by the removal of either part or the whole of such covenant, its inclusion renders the covenant, or the entire contract, unenforceable. An unreasonable covenant in restraint of trade is void in the sense that courts will not enforce it. However, if parties wish to implement it they would not be acting illegally and the courts would not intervene to prevent them from doing so. It has been held that "a covenant which is unenforceable *ab initio* should simply be disregarded unless and until it is subsequently and explicitly re-agreed"[556]. The doctrine of restraint of trade is one of the oldest applications of the doctrine of public policy, with cases related to the doctrine going back to the sixteenth century. The validity of a covenant in restraint of trade is assessed at the date when the contract is entered into[557]. [558]

The definition of a covenant in restraint of trade presents special conceptual difficulty, because to some extent all contracts are in restraint of trade by at least preventing the parties to them from trading with others, but there has been no suggestion that all contracts are or should be subject to the doctrine. In the leading House of Lords case, *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[559] Lord Reid stated[560] that he "would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade".[561] Agreements that restrict ability to practice one´s trade will be scrutinised by the courts in order to make sure they are justified[562].

This doctrine has been significant for the music industry, where the long-term contracts have been fairly common. In <u>*Schroeder Music Publishing Co Ltd v Macaulay*</u> [563], it

[556] *Pat Systems Ltd v Neilly [2012] EWHC 2609 (QB), [2012] I.R.L.R. 979*, at [39].
[557] *Ashcourt Rowan Financial Planning Ltd v Hall [2013] EWHC 1185 (QB), [2013] I.R.L.R. 637* at [12].
[558] Ibid Beale (2016), para 16-075,
[559] *[1968] A.C. 269.*
[560] *[1968] A.C. 269, 298*
[561] Ibid Beale (2016), para 16-087
[562] One such case would be in *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444; where the doctrine did apply on an exclusive agreement over image rights of the famous English football player Wayne Rooney even though such deal did not affect his ability to participate in his primary trade – sport.
[563] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All E.R. 616, [1974] 1 W.L.R. 1308

was held by the House of Lords that an agreement between a publisher and a songwriter was invalid because it represented a restraint of trade. The contract was a standard form and bound the songwriter to assign copyright in all his songs to the publisher for the period of 5 years which would extend another 5 years if the royalties received within the first period exceeded £ 5.000. As such, Mr. Tony Macaulay (formerly Anthony Gordon Instone) was bound to the publisher for the period of 10 years without the publisher´s obligation to exploit any of his songs. Lord Reid found it "an unreasonable restraint to tie the composer for this period of years so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish. If there had been […] any provision entitling the composer to terminate the agreement in such an event the case might have had a very different appearance. But as the agreement stands not only is the composer tied but he cannot recover the copyright of work which the publisher refuses to publish."[564]

Another publishing agreement under the scrutiny of the restraint of trade doctrine´s optics was in *Zang Tumb Tuum Records Ltd v Holly Johnson*[565], in which the court assessed a publishing and recording agreements signed by the group Frankie Goes to Hollywood. The pop group entered into a recording contract with a record company which bound them, collectively and individually, for a period of up to nine years, following the initial period of the contract. Soon after the band became popular, the defendant Holly Johnson left the group. ZZT, the recording company tried to enforce a ´leaving member' clause in the recording contract and sought an injunction to restrain Mr. Johnson from cooperating with another record company.[566] The group maintained that the contract was unenforceable because it was in restraint of trade. The company argued that even if the contract was unreasonably in restraint of trade, the pop group had waived their objections thereto. The court held, dismissing the appeal by the company against the finding of the lower court, that the provisions of the agreement were so one-sided as to be unenforceable, and that the fact that the pop group had not objected to the contract at the earliest possible moment did not prove that they had

[564] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All E.R. 616, [1974] 1 W.L.R. 1308, 1314 *per* Lord Reid
[565] *Zang Tumb Tuum Records Ltd v Holly Johnson* [1993] E.M.L.R. 61;
[566] L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 315

waived their right to do so[567]. Dillon LJ further commented: "Pop musicians are promoted by the sales of their records, and obviously a recording company has difficulty in promoting a little known group when there are so many others seeking fame and fortune. Stringent provisions such as many of those in the recording agreement may be justifiable in an agreement of short duration. But the onus must, in my judgment, be on the recording company to justify the length of the Term and the one-sidedness of the provisions as to its duration in this recording agreement."[568] The company failed to justify those terms.

These outcomes represent some "hope" for the artists in the weaker bargaining position, even in the UK. Especially when the outcome in *Schroeder*, de facto achieves the same result as application of the author´s right to withdraw from a contract due to the transferee´s inactivity as embedded in Czech copyright law and described earlier. But the doctrine does have its limitations as demonstrated in ***Panayiotou v Sony Music Entertainment***[569]. Mr. Panayiotou, known to the world as George Michael, was looking to have a recording agreement with Sony, signed 1988, set aside. The chronology and facts of the case are rather complex but to sum up, George Michael first signed an agreement with Sony in 1982 as a member of group called Wham! Validity of the agreement was challenged before court after some initial success of the group but eventually the case was settled between the parties, leading to concluding of a new agreement in 1984. The 1984 contract imposed on Wham! a potential obligation to record eight albums. The group dismembered in 1986 and Sony exercised its ´leaving member clause´, which effectively meant that George Michael was bound by the agreement as an individual recording artist. First Michael´s solo album ´Faith´ was extremely successful and as result, the 1984 contract was renegotiated in 1988. This 1988 contract with Sony bound George Michael to eight albums, should Sony so request, and lasted for 15 years. On the other hand, George Michael was provided much better financial terms. When Sony´s corporate structure changed in 1992, George Michael sought to release himself from the 1988 contract. The claim was rejected by the court on the grounds that it was ´contrary to public policy to seek to reopen a

[567] *Zang Tumb Tuum Records Ltd v Holly Johnson* [1993] E.M.L.R. 61; 77
[568] *Zang Tumb Tuum Records Ltd v Holly Johnson* [1993] E.M.L.R. 61; 73
[569] *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] E.C.C. 395; [1994] E.M.L.R. 229

previously compromised action´ and that ´the 1984 agreement was such a compromise´; the 1988 agreement, being based on the 1984 predecessor, was covered by the same policy[570].

Further in his assessment, Parker J considered whether, had there been no compromise, the 1988 agreement would have been an unreasonable restraint of trade. He found that while it was restrictive of trade[571], the restraint was reasonable.[572] For Parker J the restraint seemed to be an acceptable restraint as being "necessary to protect Sony´s interests in merely not recouping the investment that it had placed in Mr. Michael, but also the investment generally made in young artists who turned out to be unsuccessful"[573]. Also, considering the generous remuneration promised to Mr. Michael under such agreement, and comparing the terms of the 1988 contract to that from 1984, the restraint was minimal and fully attributable to Mr. Michael´s success.

It is clear from this case that there are limits to the application of the doctrine of restraint of trade, however, it is difficult to determine where the limits are. What is still a legitimate interest of a recording or publishing company, making any terms imposed reasonable (is it 5 or 3 years term of the contract; is it an option for 3 albums or 5, etc.).

One additional feature is important for the present discussion. As Bentley points out, the case introduced a new feature limiting the doctrine as a result of Parker J´s final reasoning when dismissing Mr. Michael´s case. He found that by requesting an advance from Sony in 1992, Mr. Michael affirmed the existence of the contract and could not thereafter argue that it should be set aside[574]. Given that this approach is followed by later cases[575], authors and performers who seek to have long-term or one-sided agreements set aside need to be careful not to accept the benefit of the agreement after being informed of its potential unenforceability.

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[570] *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] E.C.C. 395; 401
[571] *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] E.M.L.R. 229, 342
[572] L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 316
[573] L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 316, summing up the position in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] E.M.L.R. 229, 361
[574] *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] E.M.L.R. 229, 385-6
[575] L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014), at p. 316 in fn 25

This basically prevents the reliance on this doctrine in any cases where additional fair compensation is sought. By definition, if one requests ´additional´ adequate remuneration, some previous remuneration had to change hands.

Duress

The literature on general contract law[576] agrees that a contract which has been entered as the result of duress may be avoided by the party who was threatened. A threat to the victim's person has long been recognised as a basis for duress; the same is now established for wrongful threats to person´s property, including threats to seize the victim´s goods, and of wrongful or illegitimate threats to person's economic interests, at least where the victim has no practical alternative but to submit. In each case, the wrongful or illegitimate threat must have had some causal effect on his decision to enter the contract, but the causal requirements may differ between the various kinds of duress.[577] Therefore, a young, unknown artist or author could also, in severe cases, argue that they were under duress when signing a contract, if - for example - the producer threatened them that they would use their influence and make sure that no other company would sign a deal with the artist. There is, however, not a suitable copyright related case to demonstrate this. As such, for the purposes of subsequent discussion, only a brief introduction of general features of the rules for duress are provided below.

It was at one time common to treat the legal rules relating to duress (and frequently also the equitable rules relating to undue influence) as resting on the absence of consent. A party who was subject to duress, or even undue influence, was often said to have had his will "overborne" so that s/he was incapable of making a free choice, or even of acting voluntarily. Most of the older cases rest on this assumption and even many modern decisions use the same language.[578] But the basis of the law relating to these

[576] In addition to below cited Hugh Beale, *Chitty on Contracts: Vol. 1: General principles* (32nd edn. incl. 1st suppl.(online version), London: Sweet & Maxwell, 2016) see also Edwin Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011), 10-002 et seq.

[577] Beale (2016), para 8-003

[578] In *Barton v Armstrong [1976] A.C. 104, 121*, the dissenting speech of Lord Wilberforce and Lord Simon refers to the defence of duress as resting on the absence of true consent; and in several other modern cases courts have continued to use the same kind of language, see *Atiyah (1982) 98 L.Q.R. 197*. See more in Hugh Beale, *Chitty on Contracts: Vol. 1: General principles* (32nd edn. incl. 1st suppl. (online version), London: Sweet & Maxwell, 2016), para 8-004

topics has been reconsidered in light of the speeches in the House of Lords in *Lynch v D.P.P. of Northern Ireland*[579]. The case, albeit criminal, contains an extensive analysis of the juridical nature of duress in the law reports, and on this question, there appears to be no difference between the criminal and the civil law. Indeed, two of their Lordships in the case specifically relied upon the analogy of the law of contract.[580] All five members of the House of Lords in *Lynch* 's case rejected the notion that duress deprives a person of his free choice, or makes his acts non-voluntary.[581] Duress does not "overbear" the will, nor destroy it; it "deflects" it.[582] Duress does not literally deprive the person affected of all choice; it leaves them with a choice between two evils[583] (signing a bad record deal or signing no deal at all). A person acting under duress intends to do what he does; but does so unwillingly[584].[585]

At a later stage, in *Universe Tankships of Monrovia v I.T.W.F.*[586], Lord Diplock said that the rationale was that the party's consent was induced by pressure which the law does not regard as legitimate with the consequence that the consent is treated in law as revocable.[587] Similarly Lord Scarman agreed that the real issue is whether there has been illegitimate pressure, the practical effect of which is compulsion or absence of choice[588].[589]

An analogy with fraud and mistake can also be drawn. In *Lynch* and in *Barton v Armstrong*[590] cases, the analogy with fraud and mistake has been relied upon by the courts. As such, duress renders a contract voidable rather than void; and in this respect it operates like fraud, and not like *non est factum*[591]. No doubt there will be extreme

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[579] *Lynch v D.P.P. of Northern Ireland [1975] A.C. 653.*
[580] See Chitty on contracts (2016), 8-004
[581] *Lynch v D.P.P. of Northern Ireland [1975] A.C. 653*: Lord Morris of Borth-y-Gest at 670, 675; Lord Wilberforce at 680; Lord Simon of Glaisdale at 690–691, 695; Lord Kilbrandon at 703; and Lord Edmund-Davies at 709–711.
[582] Lord Simon, *[1975] A.C. 653, 695*.
[583] *[1975] A.C. 653, 690–691*.
[584] *[1975] A.C. 653, 670*, Lord Morris.
[585] Hugh Beale, *Chitty on Contracts: Vol. 1: General principles* (32nd edn. incl. 1st suppl.(online version), London: Sweet & Maxwell, 2016), para 8-004
[586] *Universe Tankships of Monrovia v I.T.W.F., [1983] 1 A.C. 366*
[587] *Universe Tankships of Monrovia v I.T.W.F., [1983] 1 A.C. 366, 384*.
[588] *Universe Tankships of Monrovia v I.T.W.F., [1983] 1 A.C. 366, 400*.
[589] Beale (2016), para 8-005
[590] *Barton v Armstrong [1976] A.C. 104*.
[591] See Edwin Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011), 8-076: as a general rule, a person is bound by his/her signature to a document whether s/he reads it or understands it, or not. But at the end of sixteenth century an exception to this rule was established

cases of duress, as there are extreme cases of fraud or mistake, in which *non est factum* is available as a plea and in which there is a total absence of consent: for example, if one party seizes another's hand, puts a pen in it and physically forces the other's hand to produce a signature. Equally, the gunman who actually helps himself to his victim's wallet is stealing it against his victim's consent, and in no sense obtaining it by means of a coerced contract. But the gunman who *demands and is given* the wallet by the victim, is obtaining it by duress. Analogy with fraud was also used in *Barton v Armstrong* to justify the view that, at least in a case of duress to the person, a contract entered into under duress may be avoided provided that the duress had some effect on the mind of the party threatened, even if he might have entered the contract anyway for other reasons. However, the contract will stand if it can be shown that the threat had no effect on his mind at all.[592]

Unconscionable bargains as an umbrella doctrine?

Equity can also provide relief against unconscionable bargains[593] in cases in which one party is in a position to exploit a particular weakness of the other one, and in those cases the burden of justifying such a transaction is on the former. Professor Phillips even argues, that the doctrine of unconscionable bargains should provide a unifying doctrine protecting those who are in a disadvantageous negotiating position.[594] One could argue that a creator negotiating his/her first exploitation deal would normally be in such a disadvantageous position. While promises should be fulfilled, as they engender reasonable expectations in the party to whom they were addressed, the liberalism of the classical contract law theory should be "qualified and tempered with coherent mechanisms for relieving persons in disadvantageous position from transactions that are unfair or unjust".[595] The doctrine of unconscionable bargains is in

in *Thoroughgood´s Case* (1584) 2 Co.Rep. 9a: if a person who could not read executed a deed after it had been incorrectly read over to her/him, they were not bound by it. They could plead *non est factum* – it is not my deed.

[592] Ibid Beale (2016), para 8-007

[593] More on the notion of unconscionable bargains see Hugh Beale, *Chitty on Contracts: Vol. 1: General principles* (32nd edn. incl. 1st suppl.(online version), London: Sweet & Maxwell, 2016), para 8-130 et seq.; Edwin Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011), 10-042 et seq.;

[594] John Phillips, 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine', Wake Forest Law Review 2010, vol. 45, no. 3, pp. 837 - 861.

[595] Ibid, 839

Professor Phillips´ view the most appropriate doctrinal tool for achieving this objective. It responds sensitively to a whole range of context. And since unconscionability underpins related doctrines – such as undue influence, duress, and some aspects of mistake – these doctrines should be replaced by an overarching doctrine of unconscionable bargains.[596]

The equitable relief against unconscionable bargains historically derives from English Court of Chancery´s power, but has seen its most expansive development in Australia. The relevant principles were set out by the High Court of Australia in *Commercial Bank of Australia v Amadio*[597]*:* "The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a *special disability* in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that *disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent* to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an *onus is cast upon the stronger party to show that the transaction was fair, just and reasonable… (emphasis added by the author)* "[598].

One could argue that requirement of ´special disability´ is met in the cases discussed above through the young (or otherwise ´novice´) creator´s inability to grasp fully the extremely complex web of transactions, stakeholders and flow of value pertinent to exploitation of copyright works, disabling him/her to reap fully what he/she sewn through the creative effort. Professor Phillips argues that the term ´special disadvantage´ should better be used for the first requirement and include not only constitutional disadvantages but also lack of business acumen, situational disadvantage, etc. Such situational disadvantage could mean a broad spectrum of factors, such as the relative bargaining position of the parties[599], the length and complexity of the negotiations[600], pressure applied during negotiations, or even lack of

[596] Ibid Phillips (2010), 840
[597] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447
[598] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 474
[599] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 476
[600] Ibid

income[601].[602] It is not difficult to imagine how an unknown artist trying to get a deal with the record company is facing any and all of these disadvantages.

The second requirement, of knowledge of the special disadvantage, means that the disadvantage must be "sufficiently evident" to the stronger party to make it unconscionable for the party to accept the weaker party´s consent to the deal[603]. Such requirement will be satisfied not only with the stronger party´s "actual knowledge" of the facts but also if the party was "aware of facts that would raise such possibility in the mind of a reasonable person"[604]. It is also general belief that the stronger party need not act in a "morally reprehensible" manner and actively exploit the other party´s weakness; a "passive acceptance of a benefit in unconscionable circumstances"[605] is sufficient for a relief to be granted.[606] Such approach makes this doctrine even more attractive for the purposes of protection of authors and performers. In addition, it seems that the doctrine of unconscionable bargains could be suited to fight in general against remuneration that is not appropriate from the start not only - at a later stage - requesting additional compensation when the work or fixation of a performance becomes a financial success. The artist can realise that the remuneration negotiated is not appropriate by the work becoming a bestseller. But it can also happen through talking to peers, eventually being able to hire an agent, getting more experience in the field or being offered other – better – deals. Further assessment will follow in the later part of this work, but – possibly – this doctrine could become the "English protection of the weaker party in copyright contracts" should the EU harmonisation fail or come too late for the UK to be still caught by it due to its leave of the EU. It admittedly does sound very optimistic, even naive (given the English courts´ reluctance to apply the doctrine unconscionable bargains in general) but it surely is worth exploring.

Another feature of this doctrine that makes it attractive is that – although not fully settled – the principles of unconscionable bargains are applicable to business undertakings, including companies.[607] Small businesses, even if incorporated, should

[601] *Elkofairi v Permanent Trustee Ltd.,* [2002] N.S.W.R. 413 (Austl.)
[602] Phillips (2010), 841
[603] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 467
[604] Ibid at 474
[605] *Hart v. O´Connor* [1985] 1 A.C. 1000, 1024(P.C.)(appeal taken from N.Z.)
[606] Phillips (2010), 842
[607] Phillips (2010), 842

not be precluded from relying on the doctrine.[608] If that truly was the case and the doctrine would apply to cases of creators getting inadequate remuneration, such protection would place the creators in better position under English law than is the case on the continent, in most civil law jurisdiction, where the protection is afforded to authors and performers as natural persons only. If, under the English law, the weaker party is not the author (natural person) who created the work but his/her "employer" (i.e. the company he/she created) and is still allowed to argue presence of unconscionable bargaining because they were, in fact, in a disadvantageous position, that would be a considerable advantage compared to, for example, Czech law. According to Czech law, such work would fall under the provisions of employee work (so far same as in the UK) but under Czech law, such employer will not be able to argue a weak position because there is no statutory provision such employer could use. The outcome of any such case would always depend on the facts, but it is hard to imagine a successful argument that while an employer, a person is first and foremost an author in a weaker bargaining position when negotiating a deal with a producer. The laws expect certain degree of professionalism and experience from employers.

As pointed out by Professor Phillips, "some consider that the statutory protection of consumers should mark the limits of intervention on the basis of procedural unconscionability in the law of contract"[609]. In addition to judicial reluctance to apply the doctrine, academics also object that as it creates an unacceptable level of uncertainty[610]. This may be true but, firstly, any such protectionist provision creates to some extent legal certainty as to whether and how they will be interpreted and applied by courts (e.g. the provisions enabling Czech authors and performers to withdraw from the exclusive licenses granted by them in case of change of conviction or inactivity of the licensee, as discussed earlier). But that should not be the reason to abandon them. It is a matter of policy and here the public interest in protecting weaker parties to the contract was chosen to prevail over legal certainty (and freedom of contract). Equally importantly, one must acknowledge that often such provisions are not imposed into

[608] Ibid, at 843

[609] Ibid at 845 referring, as an example, to *National Westminster Bank Plc v Morgan* [1985] A.C. 686 at 708. Through the influence of *acquis*, however, we can since 1985 see more and more cases – even in English law – of protectionist tendencies, with regards to employees to name some.

[610] Summary of these objections can be found in Ewan McKendrick, *Contract Law* (8th edn., 2009) 301

laws with the view of being frequently evoked. They more serve as a "motivation" for the stronger parties in relationships to bargain fairly. As such, the mere knowledge of existence of such doctrine (and possible application in similar cases) should deter the stronger parties in the relationship from exploiting weakness of the ´disadvantaged´ party. It would serve as an "incentive through uncertainty". Do I want to wait and see if a contract is set aside due to unconscionable bargaining over the weaker party – the author – or, do I introduce fairer and more responsible practices into my contract negotiation?

It is worth noting here that (at least in civil law jurisdictions) once certain principle in law is formally acknowledged (e.g. by its incorporation into statutory law or by adjudication), "stronger" parties (if responsible enough, and also if having the necessary resources), evaluate the risks of non-compliance and often times adjust their conduct accordingly; whether by amending their T&Cs and/or template contract or by changing their practices. As one example for all, with the adoption of the new Civil Code in the Czech Republic in 2014, new mandatory rules became applicable to so called "contracts of adhesion".[611] Larger institutions with strong bargaining position, for example banks, changed in advance their "template" contracts with T&Cs in miniscule print or with terms extremely disadvantageous for their consumers (common practice under previous legislation) in preparation for the new law, ready by January 2014. They assessed the risk and realised that the uncertainty of how courts will apply these new provisions (expectedly very strictly in favour of consumers) and the potential costs of litigation are not worth maintain the practice. They were not reactive to law suits, they were proactive in protecting their assets and also, most likely, reputation.

There is a slight chance that as a result of protectionist legislation on the continent or aligned application of the doctrine of unconscionable bargains in the UK there would

[611] (Section 1798 et seq. NCZCC) "Contracts of adhesion" are agreements where the terms and conditions are dictated unilaterally by one party, without the weaker party having any real chance to request a change of such T&Cs. For such agreements, mandatory rules apply. Such as that where the T&Cs of an agreement refer to a text not forming part of the actual contract, the stronger party must be to show that the weaker party (most often consumer) was aware of such other text and fully understood the implications. Or, if the contract contains a term that is legible only with special difficulties or is incomprehensible for a person of average reason, such term is valid only if such term is not to the detriment of the weaker party or if the party imposing such term can prove that the content and meaning of such term was sufficiently explained to the party to whose detriment such term is. And so on.

be more pressure on the producers (first creators' transferees) to apply profit based (royalty) remuneration rules rather than lump sum. Or, ideally, their combination: a lump sum at the beginning for the initial "creative effort", followed by a profit based remuneration payable only after the producer recoups their investment. This after all seems to be a common conclusion in all the discussed scenarios, first outlined in the end of chapter 2.4 and finally repeated in the final recommendations.

In fact, relatively recently a copyright case was argued referring, *inter alia*, to the doctrine of unconscionable bargains. Even though the judge declined to set aside a settlement in question in ***Minder Music v Sharples***[612], as not sufficient evidence was presented to show that there was any undue pressure (in fact, to the contrary, the judge found that the co-author of the song claiming unconscionable bargaining being imposed on her actively sought the agreement to resolve her financial problems), it is positive to see the doctrine "at work".[613] Although, Ms Adamson argued her disadvantageous position being in her financial situation at the time the settlement agreement was signed (rather than claiming inexperience or weaker bargaining position or so), claiming that at the time of signing the settlement agreement through which transferred part of her copyright she had been "unfairly pressured", "bullied" and "surrounded and badgered" into signing the agreement with the defendant, his management company and his lawyer. The court found that not enough evidence was provided to prove that.

[612] *Minder Music Ltd. v Sharples* [2015] EWHC 1454 (IPEC)

[613] Although, Ms Adamson argued her disadvantageous position being in her financial situation at the time the settlement agreement was signed (rather than claiming inexperience or weaker bargaining position or so), claiming that at the time of signing the settlement agreement through which transferred part of her copyright she had been "unfairly pressured", "bullied" and "surrounded and badgered" into signing the agreement with the defendant, his management company and his lawyer (*Minder Music Ltd. v Sharples*, H4). The court found that not enough evidence was provided to prove that.
The case´s practical „copyright" significance lies in defining the boundaries of joint authorship of a musical work and in showing that "not every contribution to the creation of a work justifies a share of the copyright in that work; […] contribution at hand must add some value to the work, although it does not need to be equal in terms of quantity, quality or originality among all co-authors; in other words, the contribution must be of the right kind, i.e. sufficiently original." (see Nedim Malovic, ´Joint authorship claim in a musical work: a *Sensitive Touch´*, JIPL&P, (2015) 10(12), 898-899)

4.3.2. Market Practice

"Even on a film like "Notting Hill"[614]*, my contract precluded me from sharing in the massive financial success the film has enjoyed since it was released in cinemas. Nor have I seen a single cent from video or DVD sales. This is creative accounting of the very highest order!"* says Roger Michell, Director of one of the biggest best-seller movies ever.[615]

Market practice (judging from the conclusions of the studies) does not support claims for additional /fair remuneration. While collective/union bargaining may be involved in some industries, in many sectors creators are left fully "to their own fate".

4.3.3. Conclusion to Chapter 4.3.

The regulation of copyright contracts and remuneration of authors and performers in the UK is very different from what was described in relation to the two civil law countries. Only very limited regulation is provided; most arrangements are left on the parties to agree on; market regulates itself. Where there is more direction provided, it usually results from obligations to implement certain rules based on international or regional instruments.

Arguably though, the UK creative industries are one of the most successful in Europe (if not most) and probably the only ones effectively competing with the United States. Is it a coincidence, that jurisdictions that regulate the sectors through law to the smallest possible extent and protect investment more than creators are the most profitable? Probably not. But is that fair? Going back to the 2010 SABIP Study and its comment that economists do not care about fairness, they consider efficiency, this approach is very much reflected in the English approach to exchange of value within copyright industries. Also, the strong resentment to interfere with parties´ freedom of contract plays important role.

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[614] Worldwide theatrical box office gross of "Notting Hill" was $363.89 million, nearly 9 times the cost of the film's production. International television distribution, DVD and video sales generated further sums.

[615] Both the quote and the previous box office reference taken from the 2015 SAA Study, p. 18. Further details on the creators of the movie and its box office can be found at http://www.imdb.com/title/tt0125439/?ref_=nv_sr_1 (accessed July 2017)

It does not need to be further emphasised that no such instrument as “best-seller” clause or “equitable remuneration”, in the sense of general fair compensation, will be found in English law. Maybe through the “unconscionable bargain” doctrine in equity – if it develops in the direction as discussed above – creators could achieve some satisfaction. Otherwise they should hope that the proposed DSM Directive passes through the EU legislative process before the effective day of Brexit and that as such, it will stay part of English law through the effect of the Great Repeal Bill. On the other hand, the UK Parliament would first have to transpose the provisions of the DSM Directive into the national legislation. Judging by the way private copying levies were handled, one might wait forever. In addition to possible reluctance to transpose the provision of Article14, it also seems that the English Parliament will have their hands full “Brexiting”.

Chapter 5 – Reconciling the DSMD Proposal with the national laws and amendment suggestions & Case study

5.1. National laws and their implementation of the DSMD's Article 15

Below in this Chapter 5.1., mainly possible ways of implementation/transposition of the Article 15 DSMD into the three national legislations are discussed. In addition, other provisions of Title IV Chapter 3 of the Proposal are compared to national rules and also overall overview of the legislative measures discussed in Chapters 2.5 and 2.6 is provided in order to assess whether other tools are available to enable achieving the goals set in the Proposal and overall the DSM Strategy.

5.1.1. Germany as the higher standard

It is undisputable, that Germany has the most detailed copyright contract legislation aiming at strengthening creators´ position in their contract negotiations. Referring back to Chapter 2.5., Germany has very strict restrictions on the form of transfer of rights enforced through the doctrinal monistic approach to author´s rights. It has form requirements for some contracts[616]. Scope of rights transferred has to be clearly set in the exploitation contracts[617], remuneration also has to be agreed (either form the start or, for previously unknown types of exploitation once the new type of use becomes known)[618]. In addition, German copyright law provides very broad bestseller clause (discussed above and below, Section 32a – Author´s additional participation) which was also successfully tested before courts[619]. Contracts will be interpreted in favour of the creator[620] and can be terminated for inactivity of the exploiter.[621]

To sum up, Germany seems to take very seriously their commitment set out in Section 11 UrhG that "copyright protects the author in his intellectual and personal relationships to the work and in respect of the use of the work; it shall also serve to ensure equitable remuneration for the exploitation of the work". Below is for completeness of the comparison provided table with provisions on the "contract adjustment mechanism" and "transparency obligation" but is clear that the Commission

[616] See back Figure 4.1. for cases of requirement of written form
[617] Section 31(5) UrhG
[618] Sections 32 and 32c UrhG
[619] See the cases discussed in Chapter 4.1.2.
[620] E.g. Section 31(5) UrhG
[621] Section 41 UrhG

should endeavour to transpose German copyright law into EU legislation, not the other way round (if that option existed) if they truly want to support the creators in their aim to get fairly remunerated.

Article 15 – Contract adjustment mechanism

German copyright law	DSMD Proposal
Section 32a UrhG (1) Where the author has granted an exploitation right to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained. (2) If the other party has transferred the exploitation right or granted further exploitation rights and if the conspicuous disproportion results from proceeds or benefits enjoyed by a third party, the latter shall be directly liable to the author in accordance with subsection (1), taking into account the contractual relationships within the licensing chain. The other party shall then not be liable. (3) The rights under subsections (1) and (2) cannot be waived in advance. An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective. However, the author may grant a non-exclusive exploitation right to everyone free of charge.	Article 15: […] authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.

(4) The author shall have no claim under subsection (1) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement and if further appropriate participation is expressly stipulated for the case referred to in subsection (1).	

Comparing the German clause on authors additional participation with the Czech bestseller clause, what is appreciated is creators are expected to go first to their "first transferees" to claim the additional participation. Only when this fails, they would go to the arbitration body or ultimately court. This is supports economy of disputes and time effectiveness.

Article 14 – Transparency obligation

German copyright law	DSMD Proposal
Section 32d UrhG *(Right to information and accountability)* (1) Where an exploitation right has been granted or transferred in return for payment, the author may once a year request from his contracting party information and accountability in respect of the extent of the use of the work and the proceeds and benefits derived therefrom on the basis of information which is generally available in the ordinary course of business activities. (2) The entitlement under subsection (1) is ruled out if 1. the author has made only a secondary contribution to a work, product or service; a contribution is, in particular, secondary where it has little influence on the overall impression created by a work or the nature of a product or service, for example because it does not belong to the typical content of a work, product or service or 2. the claim on the contracting party is disproportionate for other reasons.	Article 14: (1) […] authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. (2) The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1.

(3) The author shall have no claim under subsection (1) and (2) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement. Section 32e UrhG (*Right to information and accountability in a licence chain*) (1) Where the author's contracting partner has transferred the exploitation right or granted further exploitation right, the author may also demand information and accountability pursuant to section 32d (1) and (2) from those third parties 1. which essentially economically determine the use processes in the licence chain or 2. from whose profits or benefits the conspicuous disproportion pursuant to section 32a (2) results. (2) In order to be able to assert the entitlements under subsection (1) it shall be sufficient that there are clear indications based on verifiable facts that their conditions are met. (3) The author shall have no claim under subsection (1) and (2) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement.	

Later in Chapter 5.1.2. and in Chapter 5.2, it is criticised that assessing the level of contribution of the creator to the success of a work can be very subjective and thus can create unfairness. The German wording, however, seems very well thought of and what constitutes "secondary" contribution seems to be acceptably defined. This may also be a point of inspiration either for the European or the national legislators.

5.1.2. Czech Republic's comparable scope of protection (or not?)

Comparing the provisions of the Czech copyright law with the Proposal´s Article 15, it seems that minor amendment of current law would suffice in order to implement the provision, provided that Article 15 DSMD remains unchanged throughout the EU legislative process.

Czech copyright law	DSMD Proposal
Section 2374 (1) NCZCC: Where the amount of the royalty has not been derived from the proceeds from the utilization of the licence and where such an amount is so low that it is in obvious disproportion to the profit from the utilisation of the licence and to the importance of the work for the achievement of such profit, the author shall be entitled to an equitable additional remuneration.[622]	Article 15: […] authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.

The most significant difference between the two provisions is that according to Czech law, the best-seller clause[623] applies only where the original remuneration is defined by a lump sum (i.e. "not derived from the proceeds of the utilization of the licence"). Also, according to the provision of Section 2374 (1) NCZCC, it will apply only where the profit from the utilisation of the licence is in obvious disproportion to the "importance of the work for the achievement of such profit". This is a "tricky" provision. On the one hand, it enables to eliminate claims from "supporting" artists, and is subject of many of the amendment proposals tabled by the MEPs in relation to the DSMD Proposal as discussed below in Chapter 5.2. On the other hand, this condition represents additional hurdle for the creators to establish that they qualify for the claim under the best-seller clause. How does one establish importance for success. This will depend on

[622] By reference from Section 2378 NCZCC, same applies to performers
[623] Section 2374 (1) NCZCC

circumstances of each case, but will normally be very subjective assessment. What one person can view as secondary feature of a work, another one can perceive as the main reason to buy a copy of a work. For example, illustrations in a book made by someone's favourite artist can induce such person to buy a book without being interested in its content and vice versa. Similarly, one person can be interested in a specific movie for its musical score while other will want to watch it because of their favourite actress, who nevertheless only plays a small part in the movie. Another person will come to the cinema to see the musculature of the lead actor in the same movie and another one is simply intrigued by the overall synopsis. Which of the authors or performers is entitled to the claim for additional fair remuneration when the movie becomes another Titanic? How does the court assess how big a portion of the millions of viewers came to the cinema specifically for the music when James Horner[624] (or his heirs) comes to claim additional compensation?

Nevertheless, going back to Czech Republic´s obligations to transpose the Directive, if the Czech Ministry of Culture notifies the Commission that there is no need to adopt any new specific measures in order to implement Article 15 DSMD based on the above demonstrated similarity of the two provisions, it is likely that any discrepancies would go unnoticed.

Just for completeness, below is also a comparison of the "transparency obligation" provision introduced in Article 14 DSMD. It is an important tool in support of the claim under Article 15 and thus it is worth additional focus.

[624] Author of musical score for the Titanic movie; died in 2015.
This also raises an interesting question for each of the jurisdictions, answer to which will strongly be impacted by the legal tradition followed in the country: is this claim considered an economic right and can thus be invoked by the creator´s heirs, or, does it cease to exist with the creator´s death? In each jurisdiction, this will be dealt with differently, depending on specific shape of their monistic/dualistic or common law principles. This is when even seemingly obsolete notions, as the adherence to specific tradition may seem, demonstrate their relevance. In Czech, the claim is one of creators´ economic rights, which are inheritable as long as they are not personally connected to the creator (not the case). The claim is a receivable which occurs as soon as the remuneration received becomes disproportionately low. If that happens during the creator´s life such receivable is inheritable as any other. The question is whether the receivable is inherited as a „conditional claim/receivable" if the remuneration received becomes disproportionately low only after creator´s death?

Czech copyright law	DSMD Proposal
Section 2366 NCZCC: (2) Where the amount of the royalty has been agreed in dependence on the proceeds from the utilisation of the licence, the licensee shall be obliged to make it possible for the author to audit the relevant accounting documents or other documentation in order to establish the real amount of the royalty. Where the licensee thus provides the author with information designated by the licensee as confidential, the author may not divulge such information to any third party, nor use it according to his needs in contravention of the purpose for which it has been made available to him."[625] (3) The licensee shall submit to the licensor periodic accounts of the fee under Subsection (2) at the stipulated intervals; unless stipulated otherwise, the licensee shall submit the accounts at least once a year.	Article 14: (1) […] authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. (2) The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1.

The Czech provision imposes the obligation to provide information only in relation to proportional remuneration (which may make sense in the context that where revenues are not relevant for the reward, the creator does not need to know). In the background of the aim of the Commission to be able to provide transparent system across all uses, it makes sense that the European proposal is wider. It also emphasizes another problem.

[625] Formerly Sec. 49 (4) CZCA.

Given that under Czech copyright law there is no obligation to provide "equitable remuneration" and at the same time there are no limitations on the type of remuneration allowed, if nothing changes, Czech creators will still have difficulties to receive what they deserve. There is currently nothing in applicable copyright law that prevents producers from providing inadequate compensation to creators. Therefore – for the creators to be adequately rewarded – one of the following should happen: either the Article 15 DSMD is amended to the effect as to impose an obligation on MSs to implement provisions on "equitable remuneration", or, Czech legislator should introduce such provision on its own. The current protection for creators stipulated in the NCZCC is nowhere near sufficient. Even though there is a bestseller clause in place, as outlined in Chapter 4.2. and further demonstrated through the Case study in Chapter 5.3., it simply "does not work".

In addition, the Czech "transparency provision" does not take into account the specifics of each sector as the Draft DSMD suggests. It is difficult though to imagine how to set "taking into account the specificities of each sector"?

More effort will need to be dedicated to implementation of Article 16 of the Draft DSMD as currently no such body exists and proper evaluation will need to be conducted to see whether the arbitration body should be established within existing judiciary system, arbitration or maybe collective management organisation.

To conclude the assessment of provisions provided to creators under Czech copyright law to improve their bargaining position, from the legislative tools discussed in Chapter 2.5, Czech copyright law not only provides a best-seller clause examined in depth in Chapter 4.2. and above in this chapter, but also provides restrictions related to the form of transfer of rights by banning assignment of author´s rights *inter vivos*[626], requires written form for exclusive licences[627], provides rules on interpretation of the scope of licence agreements that in doubt or if agreement is missing, clause is interpreted

[626] Section 26(1) CZCA
[627] Section 2358(2)(a) NCZCC

restrictively. Authors also have the right to terminate contracts due to inactivity of licensees[628].

But despite all the measures just described, it seems from the above and below outlined that except for the protection from full assignment and waivers of rights Czech copyright law does not provide much help to creators to balance their bargaining positions. Surely, additional statutory tools, such as the amended proposal, would be a good start. But also, more attention should be paid to encouragement of collective bargaining and/or formation of unions or guilds, to raising awareness and to looking at additional statutory measures as introduced recently by German legislator. Given the historical connection between the two legal systems and the fact that the post-communist Czech copyright law was heavily built on German law, it could be feasible to propose additional inspiration. Otherwise, it will be difficult to achieve the goals set overall by the Commission in the DSM Strategy.

[628] Section 2378 NCZCC

5.1.3. UK and its almost non-existent protection of creators' economic interests

As commentators claim, as with all current EU legislative proposals, implementation of the Directive in the UK is not only subject to adoption by the European Parliament and the Council of Ministers, but also, following a Brexit, UK Government approval of the relevant provisions.[629]

Assuming that the UK will aim to implement the provisions of the DSM Directive, there is one provision from Title IV Chapter 3 that may not have to be specifically dealt with. The Copyright Tribunal with a bit of adjustment could function as a facilitator of the voluntary dispute resolution procedure as anticipated in Article 16.

Otherwise, Articles 14 and 15 would need particular attention. It seems superfluous to speculate at this stage about the specific technique that could be used to implement the provisions. It would also very much depend on how the rest of the DSMD provisions shape up during the current discussions and what tool would be chosen.

At the same time, in the UK the Proposal has probably brought most disapproval, given the different legal tradition, which the Proposal does not always take into account. For example, the BSAC comments that "encouraging more collective agreements, of the sort that apply in the UK, is a better approach to deliver fair remuneration for authors and performers without the risk of the damaging consequences (particularly in the form of lower content investment) likely from the proposals in the draft Directive."[630] It also comments that rewards in a contract reflect the risk being taken, and that rights holders today have more opportunities to go directly to market (or to a wide variety of other intermediaries) if they are unhappy with the terms on offer from a particular intermediary.[631] Not surprisingly, the BSAC believes that interfering in freely negotiated contracts is not justified, and that intervention, if any, in this area should take into account sectoral differences.[632] That is indeed something that resonates

[629] Ed Baden-Powell, Karim Amijee, ´European Commission proposal to modernise copyright´, Ent. L.R. 2017, 28(1), 9-12, 12

[630] ´Comments from The British Screen Advisory Council (BSAC) on the Digital Single Market Copyright Proposal published by the EU Commission on 14 September 2016´, <http://www.bsac.uk.com/wp-content/uploads/2016/12/BSAC-Response-EU-Sept-2016-Copyright-Package-FINAL.pdf>, published 6 December 2016, accessed June 2017, at p. 3.

[631] Ibid.

[632] Ibid.

throughout the many previously discussed studies and reflection of which is completely neglected in the initial Proposal. In the following Chapter 5.2. it is seen to be the subject of several commentary and/or amendment proposal during the EU legislative process with the Proposal.

Similarly, some comments tabled in the April 2017 session of the Parliamentary Committee on the Internal Market and Consumer Protection confirm BSAC´s argument that accordingly, agreements such as those existing in the UK (collective and individual, that provide for payments to authors and performers linked to future exploitation of content) should in no circumstances be capable of being re-opened[633]. Given the nature of the body, it is not surprising that the BSAC suggests that there should be very clear criteria to establish the very limited set of circumstances, if any, in which a contract could be opened up retrospectively.[634] Nevertheless, this does not seem to be the intention, as understood from the transitional provisions (see more above in Chapter 3.2.2.3.).

We may conclude that UK´s implementation of the provisions of Title IV Chapter 3 of the Proposal is a biggest question mark in this whole examination.

[633] Ibid.

[634] ´Comments from The British Screen Advisory Council (BSAC) on the Digital Single Market Copyright Proposal published by the EU Commission on 14 September 2016´, <http://www.bsac.uk.com/wp-content/uploads/2016/12/BSAC-Response-EU-Sept-2016-Copyright-Package-FINAL.pdf>, published 6 December 2016, accessed June 2017, at p. 3.

5.2. Proposals to amend Article 15 DSMD within the EU legislative debate

Since the publication of the Proposal in September 2016, members of bodies of the European Union and associated institutions had a chance to comment on the overall proposition as well as individual provisions of the Draft DSMD. It is not a surprise that a lot of debate has commenced in this respect. However, commentary on the Title IV, Chapter 3 of the Proposal is a little scarce as much more controversy accompanies the provisions on exceptions and limitation, and – more prominently – on the cross-border availability of VOD services.

Nevertheless, first comment specifically on the contract adjustment mechanism arrived shortly after the Proposal´s divulgation. The SAA commented on its web site as follows: "*In its proposal for a Directive on Copyright in the Digital Single Market presented on 14 September 2016, the European Commission proposes to generalize an exploitation transparency obligation (authors should receive on a regular basis information on the exploitation of their works) and a contract adjustment mechanism for authors considering that the remuneration originally agreed is disproportionately low compared to the revenues derived from the exploitation of the work. These are welcome provisions to start addressing the issue even if they need some amendments to ensure that they deliver the intended effect and are not easily avoided*."[635]

The Resolution on a coherent EU policy for cultural and creative industries (CCIs), adopted by the European Parliament on December 13, 2016[636] calls for the "establishment of the right to fair remuneration and legal protection for authors". Associations[637] now call on the Parliament to make this a reality and to "strengthen the provisions in the Commission's proposal for a Directive on Copyright in the DSM and to add the right to fair remuneration through an unwaivable right to remuneration." Cécile Despringre, Executive Director of the SAA said: "*SAA is delighted that such a*

[635] The Society of Audiovisual Authors´ website, article Authors' Remuneration - The last resort: going to court, posted 13.12.2016, http://www.saa-authors.eu/en/blog/312-authors-remuneration---the-last-resort-going-to-court (accessed July 2017)

[636] See the Report at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0357+0+DOC+XML+V0//EN (accessed July 2017)

[637] E.g. the SAA, see "European Parliament calls for Right to Fair Remuneration for Authors", published on 14.12.2016 at http://www.saa-authors.eu/en/news/313-european-parliament-calls-for-right-to-fair-remuneration-for-authors (accessed July 2017)

large majority in the European Parliament[638] *can get behind a right to fair remuneration for authors. They now have the opportunity to put this in legislation and make a massive difference to the lives of screenwriters and directors across Europe who are too often disconnected from the economic success of their works."*

Also practitioners comment on the proposal, stating that industry reaction has focused on the measures of the DSMD aiming to achieve a well-functioning marketplace for copyright. Copyright holders (and their representative bodies) have praised the measures for addressing the "transfer of value" issue, as well as the intention to redress the current imbalance of interests between user upload platforms and rights-holders. They argue that upload platforms such as YouTube should ensure the functioning of agreements with rights-holders to make works available, and that a rights-holder's remuneration should be proportionate to the revenue that upload platforms generate by exploiting that content. Google's response is that this would effectively turn the internet into "a place where everything uploaded to the web must be cleared by lawyers before it can find an audience".[639] If the proposal is adopted, it could represent a significant victory for the creative industries.[640]

They add, to the interest of this examination, that another key element of the Proposal, which has not yet received the same level of discussion, is the proposal to give authors and performers the right to request "appropriate remuneration" where contractual remuneration is disproportionately low in comparison with the revenue and benefits derived from exploitation. "It remains unclear how such a principle would work in practice and how far recording artists, composers, writers and other creators might be able, in the future, to challenge the terms on which they are remunerated."[641]

Authors of this commentary point out that as the proposals go forward to the Parliament and EU Council, discussions may focus on the obligation on online service providers to take "appropriate and proportionate" measures to protect third-party copyrights, as

[638] The resolution was adopted by a massive majority with the support of 540 MEPs.
[639] https://europe.googleblog.com/2016/09/european-copyright-theres-better-way.html (Accessed July 2017).
[640] Ed Baden-Powell, Karim Amijee, ´European Commission proposal to modernise copyright´, Ent. L.R. 2017, 28(1), 9-12, 11
[641] ibid

well as the related right for press publishers "to conclude licence agreements" with—and so, in effect, to demand payment from—online service providers that reproduce press content on their services. That would, in their view, particularly affect search engines and news aggregation sites that include snippets of text alongside hyperlinks to published content. Critics are referring to this as a "link tax".

Two important discussions took place within the EU floors. In April 2017, during a session of the Committee on the Internal Market and Consumer Protection in the European Parliament, members of the Parliament ("MEP"s) had a chance to table their proposed amendments to the draft DSM Directive. In May 2017, the Council Working Party discussion in the Council of Europe took place.

5.2.1. April 2017 session of the Parliamentary Committee on the Internal Market and Consumer Protection[642]

At the session of the Parliamentary Committee on the Internal Market and Consumer Protection ("IMCO") held on April 5, 2017, several amendment proposals were suggested by the MEPs. In total, there were 576 amendment proposals[643]; proposal numbers 515 to 556 relate to Articles 14 -16 Draft DSMD.[644]

Proposals to amend Article 15

Some proposals suggest also a name change for the Article 15; Pascal Arimont (Am. 542) suggests calling the Article 15 as follows: ~~Contract adjustment mechanism~~ Remuneration for the use of works or performances. He further suggests that a new paragraph 1 is added (Am. 543) of the following wording: "1. Member States shall

[642] In the following text, any strikethrough text represents a text suggested to be removed while any underline text represents the author´s suggestion for additional text.
[643] Below in the text an abbreviation „Am." refers to the amendment proposal (and its number following the abbreviation)
[644] See link to IMCO session notes here: http://www.emeeting.europarl.europa.eu/committees/agenda/201704/IMCO/IMCO(2017)0424_1/sitt-4384281

ensure that authors and performers are entitled to an appropriate remuneration derived from the exploitation of their works.*"*

Similarly, Eva Maydell (Am. 545) suggest the following wording of Article 15: "Member States shall ensure that authors and performers are entitled to ~~request additional, appropriate~~ equitable remuneration ~~from the party with whom they entered into a contract~~ for the exploitation of ~~the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the~~ their works ~~or performances~~.

Both the above proposals suggest that the remuneration claim introduced in Article 15 should not be limited to "additional fair remuneration" – for bestsellers – but should overall capture "general right to fair compensation", similarly as the German model of "equitable remuneration" under Section 32 UrhG.

In a similar tone, Philippe Juvin (Am. 541) proposed introduction of new Article 14a, which, however, better fits to be adopted as a new Article 15a or as new paragraph (1) of Article 15. It is called *"Fair and separate remuneration"* and reads as follows: "Member States shall ensure that authors and performers receive fair remuneration for each mode of exploitation of their protected works and other subject-matter."

Pina Picierno (Am. 546) suggests that the Article 15 reads as follows: "In the absence of existing procedures under applicable national laws or industry practices enabling the modification or annulment of contracts for the exploitation of rights in appropriate circumstances, Member States shall ensure that authors and performers are entitled to request ~~additional, appropriate~~ the adjustment of the agreed remuneration from the party with whom they entered into a contract for the exploitation of the rights ~~when~~, in cases where the remuneration ~~originally~~ agreed ~~is disproportionately low~~ has become strikingly disproportionate compared to the subsequent relevant unanticipated net revenues and benefits derived by the contracting party from the exploitation of the works or performances. When assessing the disproportionality, the appropriate circumstances of each case, including the nature and significance of the contribution of the author or performer to the overall work or performance, should be taken into account." This proposal is therefore keeping the provision addressing "additional"

remuneration (comparably to Section 32a UrhG), but proposes further qualification for its use.

Similarly, Maria Grapini (Am. 552) proposes that the article should be invoked "In the absence of national legislative provisions regarding cancellation or modification of the copyright assignment agreement".

On the other hand, there are some proposals which even suggest that Member States should be able to decide if the introduce best-seller clause (by changing ~~shall ensure~~ to may decide – Am. 547, Daniel Dalton, Anneleen Van Bossuyt), or at least that it should be invoked only if the remuneration is widely disproportionate to the unanticipated benefits (Am. 551, Antanas Guoga). The same MEP also suggests (Am. 555) that new paragraph (2) should be introduced stating that "Paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, or when a revenue or profit share has been agreed.", by which, similarly as is currently the case in the Czech Republic, the provision of Article 15 would only apply if the reward was agreed as a lump sum. It would also only apply to "lead" artists and main authors (and only sometimes). How subjective can this assessment be is discussed in Chapter 5.1.2. above.

Some amendment proposal do not significantly change the wording and meaning of the provision, they only suggest little clarification, such as: "Member States shall ensure that authors and performers, or representatives they appoint, are entitled to request additional, equitable, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights ~~when~~, or their successor in title, when, it is duly justified to claim that the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances." (Am. 549, Virginie Rozière, Marc Tarabella, Sylvie Guillaume, Pervenche Berès).

The above mentioned is just a selection of some proposals, there are more but they more or less revolve around the same suggestions.

Proposals to amend Article 14

Over 20 proposals were suggested to amend Article 14: Transparency obligation). This Article is not paramount for this study but is still important for context. Below are just a few selected proposals.

Pascal Arimont (Am. 524) proposes new subparagraph of paragraph (1), stating the following: "Where the contracting partners of the authors and performing artists have transferred the right of use or granted further rights of use, the authors may also demand information and accountability from those third parties which essentially determine the financial aspects of the use processes in the licensing chain."

This is a frequent line of thinking. In the proposal in the concluding chapter, it is suggested that the obligation to provide sufficient remuneration to creators for uses throughout the whole supply chain is imposed on the "first transferee", in effect transferring the liability for obtaining all the necessary data on them. They would probably need to secure this contractually from their contracting partners, such as distributors. As such, even the information obligation should be carried over to the first transferees. If, however, there is no amendment of Article 15 to the effect of the first transferees having responsibility for the whole supply chain, imposing the information obligation on the subsequent transferees would be crucial for creators in order to obtain sufficient data on the uses of their works and fixations of performances. Also, this obligation of subsequent transferees to provide information may be important for the control of management of rights curtailed (and remunerated) by way of exceptions to copyright protection as proposed by the other DSM Strategy documents.

Stricter version of Article 14 was also proposed by Antanas Guoga in Am. 529, when suggesting amendment of paragraph 2 of the Article 14: "The obligation in paragraph 1 shall ~~be proportionate and effective and shall~~ ensure ~~an appropriate level~~ a high degree of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States ~~may~~ shall adjust the obligation in paragraph 1, under the condition that the level of disproportionality is duly justified, provided that the obligation remains effective

and ensures an appropriate level of transparency.". Similar effect would have proposal of Virginie Rozière, Marc Tarabella, Sylvie Guillaume, and Pervenche Berès (Am. 530).

5.2.2. May 2017 Council Working Party discussion

In the Presidency's Issues Paper for discussion at the Council Working Party ("CWP") 10 and 17 May 2017[645], the Council of Europe prepared materials for Exchange of views on key issues on Articles 10-17 of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market. The document presents a number of issues that were raised by Member States at the Council Working Party (16-17 January, 15-16 February and 1 March 2017) and which the Presidency wished to discuss in more detail in the CWP in May 2017.

In relation to Fair remuneration in contracts of authors and performers (Articles 14 to 16), the following has been discussed and questions asked.

Article 14: Transparency obligation

Persons subject to the transparency obligation

> "Article 14(1) of the proposal provides that the transparency obligation (information on the exploitation of the rights) is imposed on the persons that have entered into licensing or transfer agreements with authors and performers. The Commission explained that the proposal concentrates on the relationship between individual creators and their contractual partners. Against this background, some delegations asked whether such obligations shall be limited to the first contractual partner or extended to other parties involved down the value chain. Some delegations underlined the possible risk that the first contractual partner may not exploit the work himself. In this case, the first contractual partner would not be in a position to report relevant information to the creators, especially in some sectors where contractual arrangements such as commissioning, project companies or special-purpose vehicles – SPVs are relatively common. Similar concerns were also raised with regard to possible circumvention of the transparency

[645] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Exchange of views on key issues (Articles 10-17), Brussels, 28 April 2017, 8613/17, ANNEX – paper drawn up by the Presidency to guide discussion on the Proposal at the meeting of the Working Party on Intellectual Property on 10 May 2017

> obligation (e.g. the creation of shell companies to circumvent the obligation)." [646]

The following questions were drafted to initiate the discussion at the CWP:

- Do the delegations consider that the application of the transparency obligation in Article 14 to the direct contractual partner of the creator is sufficient in order to meet the objective of improving the bargaining position of creators?
- Should actors of the value chain other than the first contractual partner such as distributors be also subject to some requirements? If so, how?
- Do the delegations think that the proposal should clarify that the obligation in Article 14 applies to the creator's first direct contractual partner who is exploiting the work and not only to the first formal contractual partner who may not directly exploit the work (e.g. to take into account contractual arrangements such as commissioning)? If so, how?
- Do the delegations have concerns regarding the practical enforcement of this mechanism?

It is therefore evident that the concern about how far the supply chain should be affected by the provisions of the Proposal is shared across the stakeholders´ camps. In this thesis, the aim is to focus specifically on Article 15 of the Proposal and – as such – specific recommendations are provided only in relation to that provision. Nevertheless, in order to achieve an efficient mechanism providing creators with tools to claim fair compensation for the transfer of their rights and wide-ranging use of their creations, the wording (and use) of the provisions in Title IV, Chapter 3 of the Proposal must be well interconnected and corresponding with each other.

Content of the transparency obligation

> "Pursuant to Article 14(1) of the proposal, the sharing of information shall be regular, timely, adequate, sufficient, and shall take into account the specificities of each sector. The Commission explained that the main objective of the obligation is to provide creators with sufficient information to assess the economic value of their rights. Some delegations questioned

[646] Ibid, p. 13

how the sector-specific transparency requirements will be determined and the role of stakeholders' dialogues in this regard."[647]

And the following question was discussed at the CWP:

- Do the delegations think that the proposal should be more specific regarding the determination and application of the transparency obligations to different sectors? If so, what would be the reasons to do so and what concrete provisions should be added?

Articles 15 and 16: contract adjustment mechanism and dispute resolution mechanism

Practical application of the contract adjustment mechanism

"Article 15 of the proposal allows authors and performers to request additional, appropriate remuneration from their contractual partners when the remuneration originally agreed is disproportionally low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances. Some delegations requested for clarifications on the practical application of the contract adjustment mechanism, and its enforcement by competent authorities." **[648]**

The following questions were drafted to initiate the discussion at the CWP:

- Do the delegations think that the proposal should provide further clarification on the conditions of application of the contract adjustment mechanism (e.g. level of disproportion, revenues and remuneration to be taken into account)?
- What are the delegations' views of how this alternative dispute resolution will work taking into account that other similar mechanisms may already be in place in Member States?
- Do the delegations consider that representative organisations of authors and performers could have role in such mechanisms?

[647] Ibid, p. 15
[648] Ibid, p. 15

Exclusion of collective management organisations (CMOs) from Title IV, Chapter 3 of the Commission proposal

> "Article 14(3) of the proposal excludes the entities covered by Directive 2014/26/EU from the application of Article 14(1) of the proposal, since they already have to comply with transparency obligations pursuant to Article 18 of that Directive. The Commission considered that even if Articles 15, and therefore 16, would in most cases not apply to such entities, they should not be explicitly excluded from the application of these two articles since they are not subject to similar obligations existing in the EU acquis. Some delegations nevertheless argued that CMOs should be excluded as well from Articles 15 and 16 of the proposal."[649]

The CWP then discussed with the delegations whether they think that CMOs should be excluded from the entire Title IV, Chapter 3 of the Commission proposal? If so, why?

[649] Ibid, p. 17

5.3. Case study

In order to demonstrate how the best-seller clause provisions (or lack thereof) work in practice, a short case study will be presented here. The case study is based on an actual situation which happened in 2013/2014 in the Czech Republic (interestingly, around the time the Czech civil law and correspondingly partially also copyright law experienced big changes). For privacy and prevention of liability reasons names of any persons, as well as other features will be changed.

5.3.1. Factual background

Maria is a famous Czech singer. She has stayed among the top 5 most popular female singers in the country for over a decade. She is in her late 30s and her fan base is very diverse in terms of age, musical preferences, geographical and social position. Her style is a main stream pop, however, her fame does not stem from production of popular albums but primarily from performing in theatre musicals (this being rather unique phenomenon). Her voice is easily distinguishable and is considered by experts one of the best in the country, with capability to hit high, complex notes.

Dobey Inc. is an American film studio, top in their field for many decades. Dobey´s main domain are animated movies for children, although they also have other streams of activities. Every few years, Dobey releases an animated movie which becomes a major blockbuster and becomes inseparable part of one children´s generation. Every such hit is accompanied with an abundance of merchandising material. Sometimes the hit movies are turned into secondary works, such as musicals or similar shows.

In late 2013, Dobey released another work, animated musical fantasy called "Chosen" telling a story of a lead character princess Emma and her sister Ava, and the struggle they have gone through. Chosen is a beautiful story, full of stunning songs, with a lot of emphasis on the performance of the lead character, Emma. Chosen quickly becomes a hit of the holiday season, partially due to the catchy beautiful main song, "Let it Glow".

As customary in non-English speaking territories, given the age of the target audience, the whole movie, including the sung parts, is voiced over for the Czech Republic. Not

unusually, Emma´s parts in the script are voiced over by two artists: an experienced dubbing actor for the speaking parts and by Maria for all the singing parts.[650] Maria was chosen specifically by a Dobey representative due to the quality of her voice and her ability to sing well even high notes present in the lead dong, Let it Glow. It is undisputed that there are not many singers in the country who would be able to perform the song easily. In addition, Maria´s good reputation as a person represents important factor, given the target audience.

When recording the voice over songs in the studio, Maria was presented with 2 page long contract and was not given a chance to consult her manager or lawyer as she would normally do. She was told that (in no aggressive but firm tone) by the studio staff that if she did not sign the document they cannot start the recording and that they are instructed by Dobey always to insist on the artist´s signature of an unchanged version as presented before work commences. Should the artist refuse or require changes, different artist would be engaged. It was a standard practice in the studio, which provides dubbing for Dobey productions on a regular basis. With that in mind and seeing that (i) she had already spent considerable amount of time preparing for the recording, learning the song, (ii) relied on good manners and name of the producer, Maria decided to sign the contract and go ahead. After all, having to license rights for reproduction, distribution and connection of the recording with other works in the widest possible scope was relatively customary in the market. In such cases, a recording would normally be used for theatrical release, production of physical carriers, possibly on-line sale and to extent necessary for any advertisement. It was not customary to exploit works/performances beyond that based on a contract like the one presented.

Chosen, in a dubbed version, was released in Czech cinemas before Christmas 2013, on BlueRay in April, and on DVD in June 2014, all in the same, dubbed, version.

In addition to Chosen becoming a cinema and DVD sales hit, Dobey through their intermediaries organises a show called “Dobey on Ice”. It is a chain of shows performed in large sport arenas throughout the world where performers ice-skate

[650] Due to the song´s difficulty, even in the original, US, version, the main song „Let it Glow“, was sung by a different artist that the one voicing the rest of the character of Emma.

dance to songs from Dobey feature hits. The songs are not performed live, they are played from recordings. Where available, the recording used is in the local language of where the given show takes place. The show takes about 90 minutes and comprises of several songs, Let it Glow, lasting approximately 4 minutes, being one of them. The show took place in Prague for two nights in December 2014. Maria was very surprised to learn that her recorded performance was used for the show without her knowledge and any additional remuneration. When contacting representatives of Dobey, her manager was told that Maria transferred all her rights to Dobey and as such will not receive any payment.

Generally, as part of the merchandising, Dobey often sells dolls, soft toys, clothing etc. with the characters of their movies. In this case, they also sell talking (or, more accurately, singing) dolls. The "Emma doll" sings Let it Glow upon a push of a button. The voice used in the dolls marketed in the Czech Republic belongs to Maria, utilising the recording she did during the dubbing session in October 2013[651]. The dolls are released into circulation in the Czech Republic in late 2014, just in time to make most of the upcoming holiday season. Each doll is sold at a RRP approximately 45,- EUR/65,- USD. The dolls are marketed by emphasising that the main Chosen song is sung by the doll in Czech language (which would be decisive factor for many children and their parents), however, Maria´s name specifically is not mentioned. Maria was never approached by Dobey or any of their agents about this and never received any additional remuneration for such use of the recording. In fact, she was unpleasantly surprised when she learned about the existence of the doll and its sale from a TV advertisement, recognising her own voice coming from the speakers.

[651] Given the distinctiveness of Maria´s voice, there is no doubt about the origin of the voice in the doll.

5.3.2. Contractual provisions

5.3.2.1. *Payment*

Maria, who recorded the songs in a studio in October 2013, received an overall payment of 15.000,- CZK[652], half for the performance (7.500,- CZK) and half for the grant of a licence to exploit the recording of the performance (7.500,- CZK).

5.3.2.2. *Scope of transfer of rights*

The provisions on the transfer of rights stipulate the following:

"1. The Artist grants the manufacturer an exclusive licence to use his or her performance to make a sound recording of the performance and to combine it with visual part into an audiovisual work and to produce reproductions in all formats and in any amount, to broadcast the recording of the performance without any time and/or local limitations in all known types of use, for home video purposes, for lending of audio and audiovisual recordings in any format produced and broadcasted by any technological process, for public performance, in particular cinemas, broadcasting as a whole or in parts (with possibility of interrupting the audiovisual work by commercials), in television including satellite, cable, paid and subscription television by any technical means and methods, by selling, lending and renting video cassettes and any audio and video carriers with recording of performance in any language version or with subtitles, for purposes of promoting the audiovisual work in any media and for transfer of these rights to third parties.

2. The Artist grants permission to broadcast his or her performance in the manner specified in Article IV. para. 1 of this Agreement to third parties, i.e. to natural or legal persons in the Czech Republic and abroad with no local and/or time limitation."

5.3.2.3. *Governing law*

The contract and the relationship thus created is governed by the laws of Czech

[652] According to conversion rates applicable at the time of the payment, this equals approximately total of 800,- USD, or 585,- EUR

5.3.3. Legal Issues

The main question is whether the respective national laws give Maria any viable claim to request additional fair remuneration for her grant of the exploitation rights, seeing that the remuneration she originally received for the exploitation rights (7.500,- CZK) seems to be disproportionate to the proceeds generated from the exploitation of the recorded performance?

How does such claim needs to be phrased (or, what needs to be proved) in order to be able to succeed with her claim? Who to claim the remuneration from?

Is there anything stemming from market practice that could also prevent her from bringing the claim or succeeding with it?

5.3.4. Application of law

A little disclaimer is due at this point. The below application does not aim to provide a thorough, complete analysis of all options available; same way an attorney work would entail. Rather, only certain aspects were chosen to demonstrate the relevant issues.

In addition, in relation to Germany and UK, the examination is done with the acknowledgement of no legal training in the two jurisdictions. Therefore, it is more of a guess work that a comprehensive evaluation of Maria´s options.

Relevant provisions of the Czech and German legislation are provided at the back of the work in Annex 1.

5.3.4.1. Czech Republic

Maria signed the contract with Dobey´s (actually with the recording studio, Dobey´s intermediary) in October 2013 which means that besides CZCA, Act. No 40/1964 Coll., the Civil Code and Act No. 513/1991 Coll., the Commercial Code (hereafter as the "CMC"), which were in force prior NCZCC became effective on January 1, 2014, must be applied on the case.

In general contract law, the previous legislation was based on the equality of parties, even though market and negotiating power of the parties may vary dramatically. And,

as it is obvious in this presented case, it is possible abuse of law to the detriment of the weaker party. According CMC all relations between entrepreneurs regarding their business activities were governed by CMC. Further, according to CMC special provision for protection of a weaker party which enabled it to withdraw from an agreement in case such an agreement was concluded in distress and under considerably disadvantageous conditions was explicitly excluded for business relations. The reason for that was the priority of protecting a legal relationship, even if it is unfavourable to one of its parties, over the possibility of a legal relationship being terminated, even if the position of its parties is not balanced

It follows from the above, that the contract under which Maria transferred all her rights to Dobey, without having a chance to consult the contract with a lawyer or to amend it anyhow, would most likely be considered valid in the case of litigation.

Maria would have to claim adequate additional remuneration under Section 49(6) CZCA because she could not achieve setting aside the contract for invalidity. If she could do so, she could then claim unjust enrichment, since it is impossible to return the mutual consideration provided on the basis of this invalidated contract. Maria would not be able to "un-sing" her part. The unjust enrichment would be determined by an expert´s opinion. Such expert opinion would have to take into account - to evaluate such enrichment - potential remuneration in similar cases. Employing the "yield method" of assessment, the result of the evaluation would be a "usual reward". Maria would then request as an unjust enrichment in the amount of a usual reward. It is very hard to say whether such usual reward would be any higher that the initially received payment. In addition, legal costs would apply if she was not successful.

Going back to Section 49(6) CZCA, Maria, as a performer having the right to the claim by way of reference from Section 74 CZCA (analogy between provisions applicable to authors and performers), would argue that "the amount of the remuneration is so low that it is in obvious disproportion to the profit from the utilisation of the licence and to the importance of the work for the achievement of such profit." She would bring this claim against the transferee, i.e. an actual agent of Dobey. Surely, Dobey would argue, that she has no claim against them directly. Equally, the studio would claim they had no profit on the sale of the dolls or on the sales of tickets to "Dobey on Ice". This means

that even before getting to the actual calculation of what should form the equitable additional remuneration, Maria would have struggled as to whom to bring the claim against. Seeing that there is no such condition in the text of Section 49 (6) CZCA providing for an option to claim from the first transferee equitable additional remuneration for all the uses in the whole supply chain (as proposed in the concluding chapter to be introduced for Article 15 DSMD), this would probably terminate any Maria´s attempts to sue.

She could have used the claim under Section 49 (6) CZCA, because "the amount of the remuneration has not been derived from the proceeds from the utilization of the licence" (i.e. was not a "proportionate remuneration"). If a proportional royalty was agreed, Maria could not use this provision and could only rely on general contract law provisions as explained above, but with a very limited prospect of success.

But, due to a lump sum being agreed, she could not even request any information on the amount of proceeds and accounts in order to calculate her equitable additional remuneration.

With all that in mind and the fact that she only received 7.500,- CZK for the license, she would most likely give up her efforts very soon.

It is worth saying here, that if the case was governed by NCZCC (post-2014 legislation), Maria´s situation would be much better in terms of reliance on general contract law. With the new Czech civil code, the principles described above in relation to CMC, have shifted and protection of weaker party and promotion of acting in good faith is now part of general civil – and thus contract – law.

The contract with Dobey may be considered as invalid due to conflict with law and good morals and Maria would be entitled to claim unjust enrichment (details on how to establish such claim see above). The amount of unjust enrichment would be determined by an expert´s opinion through the "yield method"

After evaluating all her options and probably consulting a lawyer, Maria would most likely chose not to pursue this path. Additional reasons for that decision follow later.

5.3.4.2. Germany

For the sake of better argument, it will be assumed that Maria is evaluating her options now, only after the March 2017 amendment of the law.

Maria´s claim in Germany would have much stronger chance of success. Her claim to further equitable participation, appropriate to the circumstances of the transaction under Section 32a UrhG should be relatively easy to establish.

The law says that performer has the claim where he/she has granted an exploitation right to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work. Maria does not have the accounts info yet, but following the "Pirates of the Caribbean" case, this seems to be likely to be established.

Since Dobey has probably "granted further exploitation rights to a third party and the conspicuous disproportion partially also results from proceeds or benefits enjoyed by such third party (producer of dolls, producer of the Dobey on Ice show), these two subsequent licensees will be directly liable to Maria, taking into account the contractual relationships within the licensing chain." Maria will have to find out which person made what profit and then she can evaluate her claim.

In order to calculate the claim, she will make use of the new provisions of Sections 32d and 32e UrhG, respectively. She will request information from Dobey, the studio, as well as the producer of the Dobey on Ice show. She is entitled to request this information, because she did not make only a secondary contribution to the work, product or service; ("her contribution was not secondary, as where was more than little influence on the overall impression created by a work or the nature of a product").

It is very likely that Maria would be able to establish her claim to equitable remuneration also under Section 32(1), last sentence UrhG, arguing that the agreed remuneration is not equitable and thus requiring the other parties to consent to a modification of the agreement so that the she is granted equitable remuneration.

Overall, Maria´s prospects in Germany are very promising.

5.3.4.3. United Kingdom

Basically, there is no statutory provision providing any support to Maria in her situation. Therefore, she will need to turn to the general contract law as shaped by case law and evaluate, whether she can rely on any of the doctrines discussed in previous chapter 4.3.1.

Generally, freedom of contract will apply unless she is able to provide evidence that any of the mentioned parties imposed undue influence or duress, were bargaining unconscionably or that the contract represents restraint of trade. Even then, however, she will not be able to claim additional fair remuneration. She could only achieve for the contract to be set aside.

The equitable doctrine of undue influence could only be used if Maria could prove that the transaction between her and Dobey/the studio was in a relationship of trust and confidence and that such trust has been abused. Since neither of these factors can truly be established, it is unlikely Maria could rely on this doctrine, albeit "equitable".

Neither was Maria threatened by Dobey to sign the contract. True, Maria had some doubts about signing the contract (she did not want to read it as her lawyer normally does so), and was told that without signing they will not record. As a result, seeing the effort she already put into learning the difficult part, she decided to go ahead. Surely though, this cannot be a threat. Duress can therefore also be ruled out.

Some hope could be expressed towards the equitable doctrine of unconscionable bargain. But after a closer look, the chance of establishing that Maria is in this specific case in a position of particular weakness which Dobey chose to exploit is also unlikely. Dobey would be the one with burden of proof, having to justify the transaction, but it does not seem unlikely to be possible.

Since the contract is very simple and does not prevent Maria to record similar part with other studies, restraint of trade does not provide solution either.

All and all, Maria´s chance to succeed in any way in the UK is very poor.

5.3.5. Outcome

5.3.5.1. Czech Republic

The result may be surprising for an observer not familiar with the ways in the Czech legal system. Seemingly, all the provisions of copyright contract law are there to support Maria´s claim. Yet, due to inadequacy of the statutory wording, lack of supporting mechanisms such as Guilds or Unions, costs of legal proceedings, Maria´s prospect of receiving any additional compensation are extremely low. There is a paradox in the situation. No court would grant any additional compensation without first consulting an expert opinion. Such expert opinions are, however, very expensive.

To provide a context, for a matter relatively complex as the one Maria represents, an expert opinion could cost in a realm of 150.000, - to 250.000, - Czech Koruna. With a supportive expert opinion, Maria does have some chance of success. But even if stretched to an extreme it is unlikely that Maria could request more than 150.000, - CZK. That would not even cover the expert opinion if budgeted in the higher part of the scale. If she did not succeed, she would not get any compensation and in addition would have to cover the costs of the whole proceeding. No attorney would therefore recommend Maria to sue unless they wanted to make it their profile case and agreed on a success fee and coverage of legal costs.

5.3.5.2. Germany

It seems that Germany is the only jurisdiction out of the three assessed where there is a considerable prospect of any additional Maria´s participation to be awarded. Both statutory provisions and existing case law would suggest so. Mr. Off´s success in his case gives a good signal to others. His case is comparable to what Maria experienced.

In addition, it may be interesting to see how German case law and practice could help Maria when arguing her case before Czech law. Specifically, one may wonder whether Czech courts, when assessing what represents a customary reward in given time and for given use, would accept Maria´s comparison of remuneration received for equal performance in Czech Republic and Germany. Seeing in the Prates of the Caribbean case how big gaps there are between Czech and German voiceover artists, one could draw a conclusion that Czech rewards are nowhere near equitable. In an expert opinion

provided to court for its assessment of "customary reward", this comparison could be made. In the end, however, it would depend on the individual judge whether they would be willing to look at "how the neighbours do it" (actually, quite a common character of Czech people, judges including).

5.3.5.3. UK

Not only is there no particularly suitable measure in English law that Maria could rely on, in addition, it may be beyond Maria´s financial capabilities. Court proceedings are on its own very expensive. In addition, given Dobey´s high profile, they would be very well prepared. If they were not and were not successful defending the case, this may open a "Pandora box" with similar claims and that is definitely a scenario Dobey would want to avoid. Given the adversary type of proceeding, if Maria lost she would end up with enormous debts in legal costs. With that prospect, it is unlikely Maria would even attempt to bring claim forward.

If there was a slightly bigger chance for Maria to succeed with her claim, they may attempt to settle. However, given the preceding description of Maria´s outlook to succeed, they would have no reason to do so.

5.3.6. Conclusions

Clearly the outcomes are as different as the three national legislations in questions. The results support the assumption that Germany is on a good track in helping to strengthen creators´ bargaining position. Some may even argue that Germany has reached the goal and going any further would now be counterproductive. Surely, the industries´ representatives are less excited about the outcome.

It is also worth mentioning here that outcomes of this law-applying exercise just presented is only one side of the story. The fact that Maria may not chose to pursue her claim because she simply did not want to "go against" her potential source of further business is the other side.

Dobey Inc. are a powerful and omnipresent studio and further work may come from their side. If Maria decided to go against Dobey and pursue her claim for additional appropriate remuneration, any subsequent work would be given to another singer. The

Czech market is rather small in terms of opportunities, but still full enough of artists looking to make a break through. Cooperation with a major worldwide studio is one of those rare occasions when a breakthrough is possible.

Maria, when recording the songs for Chosen, was already at a stage of her career that the cooperation represented connection of two well-known names in the territory. However, if that was not the case and equally talented, but yet unknown singer got and utilised the same opportunity, arguably, such singer would benefit from the mutual cooperation to the same extent as Dobey, irrespective of the remuneration received. Being able to be connected in the eyes (ears) of your "consumers" with such a household name as Dobey is an invaluable advertisement for any artist.

Performing artists such as Maria have two main sources of business, sale of their records and demand for life performances. The type of "clientele" as well as the proportion between these two main sources of income may vary considerably[653]; however, for both these streams of revenue a publicity based on voice-over of a major season (or even decade) blockbuster cannot be properly evaluated. Being "the voice of Chosen lead character" attracts more traffic to the performer´s life performances. It is likely that playlists of such shows will contain "the hit" and since it is not otherwise possible to hear the lead song from Chosen live (after all, it is a movie hit, not a regular "chart" song) this becomes a magnet and a considerable selling point. It is equal to a band´s own hit song attracting fans to concert shows.

As such, one may argue that this represents the "benefit" (in the "revenues and benefits" part of the best-seller clause) arising from the exploitation of a performance, although in these cases, such benefit should be accounted for on the performer´s side of the remuneration equation. Establishing and maintaining a world known, successful film

[653] In the Czech Republic many artists, such as Maria, make most money from more frequent, smaller scale life shows/events (own concerts, balls, corporate events) and to some extent from musical theatre performances; with some appearance on TV shows, which, however, are not a source of income but rather boost popularity. Payment such artist receives can be between 1.000,- and 10.000,- EUR, depending on the artists popularity and the event in question. Payment for the lead role in a musical would not go over 500,- EUR per show. Sale of recorded music represents only a very small portion of the artist´s income, if any.
On the other side of the scale may be artists who hardly ever appear on TV, would not perform in a theatre musical under any condition, and their main source of income is divided between sale of CDs/digital tunes and payments for appearance on festivals or their own big concert shows/gigs; their main publicity boost is done through social media.

studio with such strong reputation is a long run and represents a chain of investment successes and failures throughout years. One can never predict if a project will become a success; however, no one invests into an undertaking hoping it will fail. But without the initial investments and the risks they entail there would be no successful and popular content. This case study demonstrates that this is also one of the aspects one must consider. How do the failed investments transpire into the overall remuneration equation? If one wanted to make a point through exaggeration, one could ask a rhetorical question: “Should overpaid Hollywood actors reimburse the studios if – due to a limited quality of their performance – a film fails to profit?”

Chapter 6 – Conclusions and recommendations

Time constraints

Unfortunately, due to the enormous debate on the Proposal for the DSMD within the EU structures (primarily caused by the controversy of the first part of the Proposal), the discussion and progress with its amendments and adoption is taking a delay from the original estimates. As such, at the time of the submission of this thesis less has been resolved than the author of this work had hoped.

While there is enough indication from the above discussed commentary and consultations that amendments will be proposed and that if Articles 14 to 16 are not adjusted accordingly it will stir a lot of disapproval, due to the delay, the following proposals are accompanied with a lot of "if"s. Many aspects can change in the process, including addition or deletion of some provisions in total.

The below conclusions and recommendations therefore work with the proposal as was introduced in September 2016 and the debate happening until June 2017. It is based on the author´s understanding of the specific issue of fair remuneration of authors and performers taken somewhat out of context of the rest of the Digital Single Market agenda and issues discussed within.

Due to the topicality of the research, it is impossible to guarantee that any conclusions discussed here will be equally relevant at the time of the defence of the thesis. It is still worth the analysis but undertaking a research that is too topical runs a risk of loss of relevance. For example, in July 11, 2017 the European Parliament Industry and Culture committees voted in favour of an unwaivable right to fair remuneration for authors and performers for the making available of their works[654]. As explained by the SAA, this is supported by the European audiovisual authors' community, because "such a remuneration right would ensure that screenwriters and directors receive royalties when their works are exploited on on-demand services, wherever in Europe, thanks to its collective mechanism."[655]

[654] http://www.saa-authors.eu/en/news/410-european-copyright-parliament-committees-vote-for-an-unwaivable-right-to-fair-remuneration-for-audiovisual-authors (accessed July 2017)
[655] ibid

This is the kind of progress that can either enforce the need for the changes proposed below (e.g. exclusion of remuneration based on collective management from the obligations imposed in Articles 14 and 15 DSMD), or, it can initiate a significant shift in the whole process of adopting the DSM Strategy. For example, of addressing specific issues and proposed provisions can be "redistributed" within the whole range of legal instruments proposed in the DSM Strategy.

Scope of amendments proposed

The provisions that will ultimately govern the creators´ contractual remuneration must be sufficiently broad to cater for all the diversity and intricacies of relations and transactions within dealing with copyright works and performances. On the other hand, it should not be too vague. That could allow the businesses to abuse any difficulty to clearly meet the criteria given in the provision and to rely on the need to refer interpretative questions back to courts.

How exactly the provision should read will also depend on the overall objective of the EU legislator for Article 15. Was it to provide a general best-seller clause as known in other jurisdictions? Or, was the goal to provide a corrective tool which will enable the author to reclaim any (additional) fair remuneration, irrespective of the mode of exploitation and the identity of the exploiters and users, i.e. taking into account any and all modes of exploitation and business models, possibly not even known at the time of the drafting? Should it be a provision that could be used as a "last resort" measure if other paths fail to secure for the author or performer a fair share of revenues generated by exploitation of the work or fixed performance?

From all that was evaluated above in the thesis, the conclusion inclines much more towards the latter. In this light, following proposals will be designed. Nevertheless, if Article 15 of the Draft DSM Directive remains unedited throughout the ongoing legislative process on the EU level, it is unlikely that it will achieve either of the aims, irrespective of what the Commission set out to accomplish when proposing it. Not even in combination with Articles 14 and 16.

It has been shown, that in some Member States, specifically in the Czech Republic, provisions seemingly compliant with the requirements of the current DSMD text are already in place. That does not secure fair remuneration for authors and performers any more that it is secured in jurisdictions without any contract adjustment mechanism in place, specifically the UK. Not without either much better education, enforcement, and judicial acknowledgement and interpretation, or, without further and more detailed law of copyright contracts. This is demonstrated also in the outcomes of the Case study in Chapter 5.3.

On the other hand, in Germany, with their provisions connected well with each other, dealing with any potential "workaround" that have been thought of by the businesses, much stronger protection of creators in their endeavour to be fairly compensated is seemingly achieved. However, as pointed out, only with more time passing it will possible to truly evaluate the impact of the adopted legislation.

The EU legislator does not expressly state what measures should be employed to "ensure that authors and performers are entitled to request additional, appropriate remuneration"[656] but if a specific form, text, or tool were requested, the Commission knows better than to leave the options this open. But leaving the requirement extremely vague for execution in national laws can be unhelpful.

The Czech text, for example, now reads "where the amount of the royalty has not been derived from the proceeds from the utilization of the licence and where such an amount is so low that it is in obvious disproportion to the profit from the utilisation of the licence and to the importance of the work for the achievement of such profit, the author shall be entitled to an equitable supplementary remuneration"[657]. That may assure that the author is *entitled* to the request additional, appropriate remuneration, however, that does not necessarily mean that the creator will be able to *enforce* it due to difficulty to establish such factors as "importance of the work for the achievement of such profit". This was evaluated in Chapter 5.1. with respect to Czech national law. This was also tackled in the German – more specific – provision of Section 32d (2) UrhG[658], which

[656] Article 15 Draft DSMD, COM(2016) 593 final
[657] Section 2374 (1) NCZCC, or Section 49 (6) CZCA as applicable until 31.12.2013
[658] Section 32d (2) "The entitlement under subsection (1) is ruled out if

demonstrates the scope of detail a provision can be drafted in. Surely, if no amendment of Article 15 DSMD takes place, sooner or later there will be an interesting test case to be referred to the CJEU for preliminary question, but until such time there will be additional provision in the European copyright law difficult for national courts to interpret and enforce.

On the other hand, if European copyright law is ever to shift towards stronger protection of creators and clearer balance between the interests of creators, exploiters and users, the effort must commence somewhere.

Returning to the objective of Title IV, Chapter 3 of the DSMD, it seems safe to conclude that the primary goal was not to differentiate between digital and "analogue", domestic and cross-border transactions with copyrighted content. In order to incentivise creativity, creators should be allowed an overall fair remuneration in contracts. That will not be achieved by providing a bestseller clause, i.e. a reactive claim. In combination with the transparency obligation that is surely welcome and achievable. But it should at least include also the need to involve transactions happening at a later stage of the supply chain. The hypothetical example of calculating additional participation of a German creator provided in Chapter 4.1.2.3. was quite enlightening. On the other hand, a limitation to the current wording must be suggested based on use of the words "in contracts" in the title of Title IV Chapter 3 of the DSMD. It suggests that these provisions truly do not capture compensation based on exceptions and limitations.

Recommendations

As demonstrated above, in the Czech Republic, many of the provisions strengthening the position of authors and performers are also implemented. They are not that detailed and "fine-tuned" as in Germany but they are still quite extensive. Nevertheless, from Chapter 4.2.2. on Czech Market practice, it can be deducted that the existence of

1. the author has made only a secondary contribution to a work, product or service; a contribution is, in particular, secondary where it has little influence on the overall impression created by a work or the nature of a product or service, for example because it does not belong to the typical content of a work, product or service or
2. the claim on the contracting party is disproportionate for other reasons.

provisions in the statute does not secure achieving the goal these provisions were implemented with. The provisions should be sufficiently interconnected with each other and possibly also with other provisions on contract law in order to prevent any "workarounds"; such as in Germany. This should also be the case for the DSM Directives´ provisions. They should "play well" with each other. However, since no "other" provisions on protection of creators exist in European copyright law framework, it would be difficult for Article 15 DSMD to achieve its objective. That is why the below suggested amendments should place the Article in a better context.

Possibly, the "safest" solutions would be to introduce extensive provisions as in Germany to cover all possible "bases". However, this would neither fit the current European copyright legislative framework, nor would it be possible for Member States such as the UK to incorporate them into their national laws which come from a completely different legal tradition, employing different techniques in legislation.

Trying to accommodate for all variety of legal systems within the EU may have also been the driver behind drafting Articles 14 to 16 in such "minimalistic" manner[659]. While acknowledging this possibility, below are some proposals for a "gentle" amendment of Article 15 DSMD. Two options will be presented. These recommendations reflect all the previous analysis – the context of the regulation, previous experience in Member States, and already tabled proposals of the MEPs.

Option 1[660]

Option 1 aims at improving merely the "best-seller" scenario. Only the minimal extent deemed necessary is suggested. Additional comments on the rationale behind the below options are provided after both recommendations are outlined.

Acknowledging the text of Article 14, in order to secure better enforcement of the "best-seller" scenario, it is suggested to amend Article 15 DSMD as follows:

[659] because Germany was subject of all the studies referred to in Chapter 3.3. and as such the provisions and analysis on the extensivity and shape of ´German remuneration provisions were available to European bodies

[660] In the following text, again, any strikethrough text represents a text suggested to be removed while any underline text represents the author´s suggestion for additional text.

Option 1

(1) Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation through the whole supply chain of the works or performances, or, when the remuneration received does not reflect all modes of exploitation of the works or performances actually utilised.

(2) Without prejudice to Paragraph 1, any remuneration received by the author or performer for the exploitation of their work or performance through collective management *(compulsory or voluntary)* or other similar mode of exploitation or as a result of collective bargaining shall be considered when determining whetheher a remuneration is equitable or additional remunaration is adequate.

Option 2

Option number two aims at securing overall fair remuneration for creators, not only exploitation of commercially successful works.

Change of Article 15 Title:

Article 15 – Fair contractual remuneration for authors and performers and contract adjustment mechanism

Change of Article 15 Text:

(1) Member States shall ensure that authors and performers are entitled to request ~~additional, appropriate~~ equitable remuneration for expolitation of their rights from the party ~~with~~ to whom they ~~entered into~~ transferred by a contract ~~for the~~ such exploitation ~~of the~~ rights; Member States shall also ensure that authors and performers are entitled to request additional, appropriate

remuneration ~~when~~ where the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from ~~the~~ such exploitation through the whole supply chain of the works or performances, or, when the remuneration received does not reflect all modes of exploitation of the works or performances actually utilised.

(2) Without prejudice to Paragraph 1, any remuneration received by the author or performer for the exploitation of their work or performance through collective management *(compulsory or voluntary)* or other similar mode of exploitation, or as a result of collective bargaining shall be considered when determining whetheher a remuneration is equitable or additional remunaration is adequate.

Rationalle behind proposed changes

The suggested text works – as a basis for the recommendations – with the original text of the Proposal, trying to add as little new paragraphs as possible in order to make only minimum changes necessary. If the whole draft was created "from scratch", the wording would probably be slightly different, maybe more in line with the current German legislation (although not that extensive).

Also, the semantics chosen by the Commission reflect quite well the differences in concepts of author´s rights jurisdictions and common law countries, including the terminology, by choosing relatively neutral expressions. The proposal uses the term "transfer", which can reflect both, assignment and licence, and thus does not pose implementation challenge for MSs following either of legal systems. It also stipulates that "revenues and benefits" are taken into account which is approach taken in Germany and accepted with agreement.

Both Options 1 and 2 impose more burdens on the first transferees (e.g. producers, publishers, broadcasters) by way of granting the entitlement to request equitable remuneration/additional adequate remuneration for the "exploitation through the whole supply chain" from them.

On the other hand, it attempts to balance any unfairness towards the exploiters by making sure that remuneration already secured through collective bargaining, collective rights management and new modes of exploitation (such as possibly individual licensing directly to users in sectors where possible) is reflected when calculating the request.

European Copyright law already acknowledges situations when reference between different sources of payment is needed. Recital (35) of the InfoSoc Directive for example states that "in cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive."[661] Similarly, connection between different sources of revenue can surely also be made in Article 15 DSMD.. But Recitals are not binding; for the rule to be easily interpreted and clearly enforceable, it must form part of the body of the binding text.

The bracket with reference to ("compulsory or voluntary") collective management is just for consideration. This is additional suggestion to clarify that any remuneration channelled through collective rights management should be taken into account when assessing whether remuneration is equitable, irrespective of the basis for such collective management; however, it is noted that this addition may be considered superfluous.

Option 2 is drafted in a way that it covers wider set of scenarios and should – ideally – secure the author or performer a fair remuneration for any and all uses (if correctly transposed, interpreted and enforced) that may be the result of the transfer of rights to a first transferee. By emphasising that the author "transferred by a contract such exploitation rights" the vision was that it is clear that if the author enters into several contracts with first transferees for different exploitation right each, that each such transferee will be responsible for guarantee to the author equitable remuneration for the uses resulting from their specific contract. For example, if the author transfers rights to

[661] InfoSoc Directive (2001/29/EC), Recital (35)

publish their book to a publisher and the rights to make the book into a movie to a film producer, the book publisher will be responsible for making sure that the author gets proper remuneration for sale of hardbound copies, paperback, e-books; irrespective whether they further "hire an intermediary" with better capability to do the digital exploitation. Equally, such book publisher will have to provide regular accounts to the author for all such uses. That means that such publisher has to negotiate mirroring provisions with the intermediary providing the online exploitation for him. If, however, the author grants the digital rights to the book separately from the right to exploit the book in hard copy, each such publisher has their own obligation towards the author. Correspondingly, the film producer (if acquiring rights for all the modes of exploitation of a film) will be bound to provide remuneration (and accounts) for all releases – theatrical, BlueRay & DVD, VOD, "sale" on iTunes, etc.

For this reason though, it is crucial that the rights and/or modes of exploitation are clearly stated in any of the contract for transfer of rights between an author or a performer and their first transferee(s), or, that, in doubt, the contracts are interpreted in favour of the author or performer. Such need would speak in favour of adopting, even on EU level, provision requesting the scope of rights transferred being expressly agreed (following German example). On the other hand, it may happen that the practice will regulate itself exactly for the risk on the part of exploiters of facing creators´ claims.

With the new responsibility for equitable remuneration and transparency obligations, it would, however, be expected that producers, publishers, broadcasters, and the like would pay much more attention to remunerating properly the rights/uses subject to the contract in question. As such, "take it or leave it" and "buy-out" contracts should also slowly disappear. It would be only until the first successful case was argued where an author claims either remuneration for any and all uses of their work (even where such uses are outside reach of the transferee) or claim that the purpose of the transfer was only for theatrical and DVD release but not for online uses, and sold the online rights to a competitor, that the practices of the frequent "out-buyers" would start shifting. Hopefully. But as with any other legal issue this depends on appropriate interpretation, and most importantly, good and easy enforcement of the rights.

When discussing other measures that could accompany the contract adjustment mechanism provisions, it is worth remembering that throughout the previous debate, both on law and market practice, the type of remuneration also seemed to be important factor in achieving fairness of compensation. While separately mere lump sum as well as proportionate compensation do not secure the desired effect, when combined they seem to be effective. Therefore provision on type of remuneration may also be added to the European harmonised provisions. They could, for example, state something along the line that combination of lump sum and royalty based remuneration is to be applied, with the royalty portion only being triggered when the producer recouped the investment made into marketing of the creation.

Additional commentary

Provision of Article 16 also needs to be evaluated here. As was described in relation to the Czech Republic, court proceedings are lengthy and cases are heard by unspecialised judges, not trained in copyright law. It is therefore of no use that Czech copyright law does have a best-seller clause if it is almost impossible to enforce it. In some countries, in addition, court proceedings are extremely costly (we did conclude that Maria in the Case study would also struggle financially to fight her case before court in the UK). It is therefore, in the opinion of the author of this thesis, important that the Commission also indeed introduces provision requesting the Member States to implement a mechanism that would enable to eliminate these barriers that authors and performers have to face when trying to secure their rights. Whether this will be done effectively through existing Copyright Tribunals or IP Courts, where they exist, or through newly established bodies is fully in the hands of each MS. But let us hope that the Member States will not be too indifferent to these provisions. After all, the main controversy of the Draft DSM Directive is not in the final Chapter 3 and there is a threat that MSs will have their hands full focusing on the preceding provisions of the Proposal.

It follows also, that the provisions must be adequately interpreted and, more importantly, enforced by the courts. Above all though, there must be sufficient awareness about such regulation among creators. Without good understanding of what

these provisions mean and how to use them for their own benefit, and without requesting adequate reference to them in the contracts, the creators will not get any help through these rules. The studies also concluded that authors all over Europe lack legal skills and knowledge about the legal framework and this may be one of the causes of why they enter contracts without being fully aware of what they are signing.

Final remarks

Seeing all the attempts in Germany to help creators level their positions with the industry and how the law is never able to cover all the situations life may bring, especially in such a labyrinth of relations as the one seen in the market with copyright subject matters, one may think: how far does it make sense to go? It is evident that the German legislation is by far most detailed in their capture of copyright contract content and aim to balance the parties´ strength. But even in Germany new and unexpected challenges arise which must be faced. And the statutory provisions get longer and more and more casuistic, while the industries always manage to catch up and find a way around them. But when the law was more general, vague even, it did not meet its objective either. Courts – unlike in common law jurisdictions – are not used to co-shaping the law and filling the gaps. It is not in the country´s tradition. But the continuous adding of new provisions addressing new inadequacies is likely to have to stop at some point. What is the way forward then? A combination of the best features from each system? It would not work. The traditions and principles which make the systems different from each other are too enrooted in them. It would not work taking one principle (for example equity from English law) and planting it without proper surrounding "soil" into the German ground, next to all the statutory provisions strengthening authors´ positions. The pall mall that would be thus created would not survive. Therefore, while trying to figure out the best way forward, taking small steps in the shape of the provisions of the DSMD is more than the creators hoped for less than a year ago.

And while a lot of suggestions for improvement, criticism even, are presented on the account of the Proposal´s Article 15 in this thesis, it is for some a welcomed initiative on the part of the EU legislator and an excellent starting point for the creators. The buzz

this initiative will create can generate more public awareness and industry´s self-reflection than any other attempt made in the past few years. Even open discussion and raise of awareness is a positive development for authors and performers.

On the other hand, a sceptical person may argue that attempts to tackle the issue have been seen in various national legislations (including, as described here in detail, in Germany and Czech Republic) but still there is no hard evidence that implementing bestseller-clause-like provisions actually helped strengthen the creators´ position. Not even in Germany with a 100% success. Probably such sceptical person may ask: Why then imposing such regulation on a European level at all? From that, there is difficult way back. And they may be right. Perhaps, even stronger, economic, evidence should precede this type of regulation. Sufficient, specifically targeted studies thoroughly thought through ought to be commissioned before committing to a solution that may not even bring its desired effect.

To conclude: raising awareness of the issue is good but why the rush? Sometimes, no measure is better than an ill-constructed one.

Bibliography and Table of cases

Secondary resources

Books

A. Abovyan, *Challenges of Copyright in the Digital Age. Comparison of the Implementation of the EU Legislation in Germany and Armenia* (Herbert Utz Verlag, 2013).

H.-J. Ahrens, M.-R. McGuire, *Modern Law on Intellectual Property. A Proposal for German Law reform – Abbreviated English Edition* (GRUG, sellier european law publishers, Munich, 2013)

L. Bentley, B. Sherman, *Intellectual Property Law* (4th edn., OUP, 2014).

L. Bentley, U.Suthersanen, P. Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (1st edn., Edward Elgar, 2010).

H. Beale, *Chitty on Contracts*: *Vol. 1: General principles* (31st edn., London: Sweet & Maxwell, 2012).

H. Beale, *Chitty on Contracts: Vol. 1: General principles* (32nd edn.incl. 1st suppl.(online version), London: Sweet & Maxwell, 2016).

A. De Franceschi (eds.), *Euroapean Contract Law and the Digital Single Market. The Implications of the Digital Revolution* (Intersentia, Cambridge UK, 2016)

G. Dutfield, U. Suthersanen, *Global Intellectual Property Law* (1st edn., Edward Elgar, Cheltenham, 2008).

W. W. Fisher III, *Promises to keep. Technology, Law, and the Future of Entertainment* (1st edn., Stanford University Press, Stanford 2004).

K. Garnett, G. Davies, G. Hardbottle, *Copinger and Skone James on Copyright. Volume 1* (16th edn., Sweet & Maxwell, 2011) as amended by First (2012) and Second (2013) Supplements.

B. A. Garner, *Blacks Law Dictionary* (3rd pocket edn., Thomson West, St. Paul, USA, 2006).

K. Garnett, G. Davies, G. Hardbottle, *Copinger and Skone James on Copyright. Volume 1* (17th edn., Sweet & Maxwell, 2016).

L. M. C. R. Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International, London, 2002).

M. Hulmák, and coll, *Občanský zákoník VI. Závazkové právo. Zvláštní část* ["Civil Code VI. Obligation law, Special part – Commentary"], (1st edn., C.H.Beck, Praha 2014)

A. Klett, M. Sonntag, S. Wilske, *German Law Accessible: Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution* (Verlag C.H.Beck Lexis/Nexis, 2008 Münich).

J. Kříž, I. Holcová, J. Kordač, V. Křesťanová, *Autorský zákon – komentář a předpisy související* ["Author's Act – Commentary and Related Regulations"] (2nd edition, Linde Praha, 2005).

H. Laddie, P. Prescott, M. Victoria, A. Speck, L. Lane, *The Modern Law of Copyright and Designs* (3rd edn., Butterworths, London, 2000)

K.-C. Liu, R. M. Hilty (eds), *Remuneration of Copyright Owners. Regulatroy Challenges of New Business Models* (Springer, Germany, 2017)

R. P. Merges, *Justifying Intellectual Property* (Harvard University Press, London 2011)

E. Peel, *Treitel. The Law of Contracts* (13th edn., Sweet & Maxwell, 2011).

I. L. Pitt, *Economic Analysis of Music Copyright. Income, Media and Performances.* (Springer, New York, USA, 2010).

M. Richardson, S. Ricketson (eds.), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar, London, 2017).

G. Schricker, *Urheberrecht - Kommentar* (2nd edn., C.H.Beck, Munich 1999).

J. A. L. Sterling, *World Copyright Law* (3rd edn., Sweet & Maxwell 2008).

T.-E. Synodinu (eds), *Codification of European Copyright Law. Challenges and Perspective* (Wolters Kluwer, Law & Business, Netherlands, 2012)

I. Telec, P. Tůma, *Autorský zákon – komentář* ["Author's Act – Commentary"] (1st edn., C.H.Beck, Praha 2007).

I. Telec, *Přehled práva duševního vlastnictví: Lidskoprávní základy, Licenční smlouva* ["Summary of Intellectual Property Rights: Basis of Human Rights, License Agreement"] (2nd edn., Doplněk, Brno 2007).

I. Telec, *Autorský zákon a předpisy související -Texty s předmluvou* [„Copyright Act and Related Regulation – Texts with Introductions"] (2nd edn., C.H.Beck, Prague 1996).

P. Torremans, *Holyoake & Torremans Intellectual Property Law* (7th edn, OUP, 2013).

R. Towse (eds.), *Creativity, Incentive and Reward. An Economic Analysis of Copyright and Culture in the Information Age* (Edward Elgar, Cheltenham, UK, 2001)

R. Towse (eds.), *A Handbook of Cultural Economics* (2nd edn., Edward Elgar, Cheltenham, UK, 2011).

P. Tůma, *Smluvní licence v autorském právu* ["Contractual License in Copyright Law"] (1st edn., C.H.Beck, Praha 2007).

Ch. Waelde, A. Brown, S. Kheira, J. Cornwell, *Contemporary Intellectual Property. Law and Policy* (4th edn., OUP, 2016).

Contributions to edited books

A. Dietz, ´Chapter 14 - Germany´ in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016).

D. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', in D Gervais (eds), *Collective Management of Copyrights and Related Rights* (2nd edn., Kluwer Law International, 2010, the Netherlands).

L. Guibault, ´Relationship Between Copyright and Contract Law´, in Estelle Derclaye (eds.), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, 2009), Chapter 20.

R. Leška, K. Štechová, ´Chapter 12 - Czech Republic and Slovakia´ in Gillian Davies (eds), *Moral Rights* (2nd edn., Sweet & Maxwell, 2016).

A. Rahmatian, ´Dealing with Rights in Copyright-protected Works: Assignment and Licenses´ in Estelle Derclaye (eds), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, 2009), Chapter 12.

R. Watt, ´Licensing of copyright works in a bargaining model´, in Richard Watt (eds.), *Handbook on the Economics of Copyright* (Edward Elgar Publishing, 2014), Chapter 6.

Journal Articles and Studies

E. Baden - Powell, K. Amijee, ´European Commission proposal to modernise copyright´, Ent. L.R. 2017, 28(1), 9-12.

R. Budnik, ´Copyright and the value of attention´, JIPL&P 2016, 11(5), 355-359.

B. Clark, ´Oh my word! –German Federal Court of Justice decides that publishers should not receive a flat-rate contribution of collecting society VG Wortś revenues´, JIPL&P 2016, 11(11), 814-816.

T. Cook, E. Derclaye, ´An EU Copyright Code: what and how, if ever?´, I.P.Q. 2011, 3, 259-269

A. Dietz, ´Amendment of German Copyright Law in order to strengthen the contractual position of authors and performers´, IIC 2002, 33(7), 828-842.

J. Drexl, S. Nerisson, F. Trumpke, R. M. Hilty, ´Legislative Comment: Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM (2012)372´, 44(3) IIC 322 (2013).

S. Dusollier et al., 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States', study prepared for the European Parliament, Committee on Legal and Parliamentary Affairs, PE 493.041, European Union, 2014.

European Copyright Society, ´Case Comment: ECS position paper on the Opinion of the Advocate General in the case HP Belgium v Reprobel before the Court of Justice of the EU´, E.I.P.R. 2016, 38(2), 71-74.

C. Geiger, O. Bulayenko, G. Frosio, ´The introduction of a neighbouring right for press publishers at EU level: an unneeded (and unwanted) reform´, E.I.P.R. 2017, 39(4), 202-210.

K. M. Gutsche, ´Equitable remuneration for authors in Germany - How the German Copyright Act secures their rewards´, 50 J. Copyright Soc´y U.S.A 257, 2002-2003

K. M. Gutsche, ´New copyright contract legislation in Germany: rules on equitable remuneration provide "just rewards" to authors and performers´, E.I.P.R. 2003, 25(8), 366-372.

R. Hilty, S. Nerisson, ´Overview of national reports about “balancing copyright”´, Max Planck Institiute for Intellectual Property and Competition Law Research Papers Series, 2012.

R.Hilty, A. Peukert, ´"Equitable remuneration" in copyright law: the amended German copyright act as a trap for the entertainment industry in the U.S.?´, (2004) 22 Cardozo Arts & Ent LJ 401.

M. Kretschmer, S. Dusollier, C. Geiger, P. B. Hugenholtz, ´The European Commissions´s public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society´, E.I.P.R. 2016, 38(10), 591-595.

M. Kretschmer, ´Private Copying and Fair Compensation: An empirical study of copyright levies in Europe´, commissioned by the Intellectual Property Office, October 2011.

C. Jansen, ´Economic Effects of the New German Copyright Contract Law´, Humboldt-University of Berlin, Department of Economics, 2002.

O. Lando, H. Beale, 'The principles of European contract law, I. Performance, non-performance and remedies, Commission on European contract Law' (Dordrecht, Nijhoff, 1995).

S. J. Liebowitz, ´Is the Copyright Monopoly a Best-Selling Fiction?´ (School of Management University of Texas at Dallas, 2008, electronic copy available at: http://ssrn.com/abstract=1266486)

A. Peukert, ´Protection of authors and performing artists in international law - considering the example of claims for equitable remuneration under German and Italian copyright law´, IIC 2004, 35(8), 900-922.

A.Peukert, N. Hesse, ALAI Congress 2017 in Copenhagen: Copyright, to be or not to be - Questionnaire (Justification for copyright and related rights): Country Report Germany, accessible at the Congress website www.alai2017.org.

J. Phillips, 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine', Wake Forest Law Review 2010, vol. 45, no. 3, pp. 837 - 861.

A. Rahmatian, ´Non-assignability of authors' rights in Austria and Germany and its relation to the concept of creativity in civil law jurisdictions generally: a comparison with U.K. copyright law´, Ent. L.R. 2000, 11(5), 95-10.

A. Ramalho, ´Beyond the cover story - an enquiry into the EU competence to introduce a right for publishers', IIC 2017, 48(1), 71-91.

N. Reber, 'The "further fair participation" provision in Art. 32 a (2) German Copyright Act - Claims against a third-party exploiter of a work´, JIPL&P 2016, 11(5), 382-385.

M.Schippan, ´Codification of contract rules for copyright owners - the recent amendment of the German Copyright Act´, E.I.P.R. 2002, 24(4), 171-174.

G. Schricker, ´Efforts for a better law on copyright contracts in Germany - a never ending story´, IIC 2004, 35(7), 850-858.

T. Shapiro, ´Legislative Comment: EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM)´, E.I.P.R. 2016, 38(12), 771-776.

A. Sterling, ´UK, EU & US Copyright Law – Unit 1 Historical Background, International Context and General Principles´, (2010-2011, King´s College London).

I. Telec, ´Některé základní a obecné otázky nového českého autorského práva – část 1´, [„Some Fundamental and General Issues of New Czech Author's Rights Act – part 1"], Buletin Advokacie, 2001, 2, 25.

I. Telec, ´Některé základní a obecné otázky nového českého autorského práva – část 2´, [„Some Fundamental and General Issues of New Czech Author's Rights Act – part 2"], Buletin Advokacie, 2001, 3, 40.

P. Tůma, ´K problematice převoditelnosti majetkových autorských práv´, ["On the Issue of Transferability of Economic Rights"], Buletin Advokacie, 2012, 4.

G. Westkamp, J. Cahir, ´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´, (University of London Press, London, 2005).

G. Westkamp, J. Cahir, Supplement to ´International and comparative law of copyright and related rights. Section B: French and German copyright law and related rights´,

(University of London Press, London, 2005) - ´Recent developments 2012´ (University of London Press, London, 2012).

L. Zemer, ´On the Value of Copyright Theory´, I.P.Q. 2006, (1), 55-71..

Other

K. Stechova, 'Can an Exclusive Licensee Ever be the Owner? An Examination of the Non-Assignability of Author´s Economic Rights in the Czech Republic' submitted as an LL.M. thesis at the Center for Commercial Law Studies, Queen Mary University of London, 2010.

Department for Exiting the European Union, ´Legislating for the United Kingdom´s withdrawal from the European Union´, March 2017

The Wittem Project, ´The European Copyright Code´, April 2010, accessible online at

Studies

´2016 Print Remuneration Study´ a study called "*Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*" prepared in 2016 for the European Commission DG Communications Networks, Content & Technology / DG Internal Market by Europe Economics and IViR (Study internal contract No. MARKT/2014/088/D1/ST/OP).

´2015 EU Remuneration Study´ a study called "*Remuneration of authors and performers for the use of their works and fixations of their performances*" prepared in 2015 for the European Commission DG Communications Networks, Content & Technology / DG Internal Market by Europe Economics and IViR as part of the Digital Single Market Strategy preparation (Study internal contract No. MARKT/2013/080/D).

´2014 Creators´ Contracts Study´ a study called "*Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States*" commissioned by the European Parliament, DG for Internal Policies in 2014 to a group of copyright and economics academics led by S. Dusollier (details in bibliography section).

´2010 SABIP Study´ a Research commissioned in 2010 to a group of copyright and economics academics by the Strategic Advisory Board for Intellectual Property Policy (SABIP) called *"Relationship Between Copyright and Contract Law*".

´2002 EU IP Contracts Study´ a study called "*Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*" commissioned by European Commission, DG Internal Market to IViR, Amsterdam in 2002 (Study contract No. ETD/2000/B5-3001/E/69) L. Guibault, P.B. Hugenholtz.

Report on the responses to the Public Consultation on Review of the EU Copyright Rules, Directorate General Internal Markets and Services, Directorate D – Intellectual Property, D1 – Copyright, July 2014.

Audiovisual Authors' Rights and Remuneration in Europe. SAA White Paper (2nd edn., Society of Audiovisual Authors, 2015).

Consultation on Copyright - Comments on Economic Impact, (Oxford Economics (Commissioned by the UK Government), Oxford, 2012)

Websites and blogs

<www.wipo.int/treaties/en/> accessed July 2017.

<www.publishingperspectives.com/2016/09/no-agreement-copyright-controversy-germany-vg-wort/> accessed 19 July 2017.

<www.europa.eu/rapid/press-release_IP-15-6261_en.htm> accessed 17 July 2017.

Christoph Kolonko, 'New Copyright Law in Germany' <www.adlawinternational.com/news/new-copyright-law-in-germany.html> published 25 May 2017.

'The Society of Audiovisual Authors´ website, article Authors' Remuneration' <www.saa-authors.eu/en/blog/312-authors-remuneration---the-last-resort-going-to-court> accessed July 2017.

<www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0357+0+DOC+XML+V0//EN > accessed July 2017.

E.g. the SAA, 'European Parliament calls for Right to Fair Remuneration for Authors' <www.saa-authors.eu/en/news/313-european-parliament-calls-for-right-to-fair-remuneration-for-authors> accessed July 2017.

<www.saa-authors.eu/en/news/410-european-copyright-parliament-committees-vote-for-an-unwaivable-right-to-fair-remuneration-for-audiovisual-authors> accessed July 2017.

'Act on the Administration of Copyright and Neighbouring Rights of 9 September 1965 (Urheberrechts- wahrnehmungsgesetz vom 9. September 1965, "UrhWG")' <www.wipo.int/wipolex/en/details.jsp?id=1033>
<www.wipo.int/wipolex/en/details.jsp?id=14015>.

European Commission DG Communications Networks, Content & Technology by Europe Economics and Lucie Guibault, Olivia Salamanca at the Institute of Information Law (Instituut voor Informatierecht) of the University of Amsterdam, European Union (2016), Contract number MARKT/2014/088/D1/ST/OP; ISBN 978-92-79-54131-5
<www.ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17026>
<www.ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17027>.

'Act on Strengthening the Contractual Position of Authors and Performers of March 22, 2002 (Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern)' <www.wipo.int/wipolex/en/details.jsp?id=1048>.

'Federal Law Gazette (Bundesgesetzblatt) of March 28, 2002, Part I, p.1155 et seq.' <www.urheberrecht.org/law/normen/urhg/2002-03-22/text/>.

'Impact Assessment' <www.eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX:52016 SC0301> accessed July 2017.

'German Copyright Act' <www.gesetze-im-internet.de/englisch_urhg/englisch _urhg.html #p0177> accessed July 2017.

‘Even on a film like “Notting Hill”" <www.imdb.com/title/tt0125439/?ref_=nv_sr_1> accessed July 2017.

‘I ZR 127/10'<www.juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=0eec396206a41d5e4590bddd213385e0&nr=59538&pos=0&anz=1>.

‘The Pirates of the Caribbean' <www.ipkitten.blogspot.cz/2011/08/court-as-film-critic-no-fairness.html> <www.imdb.com/name/nm0000136/awards?ref_=nm_awd >.

‘Mr. Off, 'Pirates of the Caribbean' <www.youtube.com/watch?v=4yeNzU8epeo>.

‘Das Boot'

<www.imdb.com/title/tt0082096/?ref_=nv_sr_1>
<www.imdb.com/title/tt0081834/?ref_=nv_sr_2>

<www.ipkitten.blogspot.cz/2009/02/will-german-cameramans-compensation.html>
<www.imdb.com/title/tt0082096/awards?ref_=tt_awd>

<www.ipkitten.blogspot.cz/2009/02/will-german-cameramans-compensation.html>
<www.imdb.com/title/tt0082096/business?ref_=tt_dt_bus;>
<www.en.wikipedia.org/wiki/Das_Boot>

<www.ipkitten.blogspot.cz/2009/02/will-german-cameramans-compensation.html>.

‘Bundesgesetzblatt [Federal Law Gazette] of March 28, 2002, Part I, p.1155 et seq.' <www.urheberrecht.org/law/normen/urhg/2002-03-22/text/>.

‘Tatort'

<www.imdb.com/title/tt0806910/?ref_=nv_sr_3>
<www.youtube.com/watch?v=veOJYxHlgW8>

<www.ipkitten.blogspot.cz/2011/03/tatort-no-fairness-compensation-for-co.html>.

‘Results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy'

<www.ec.europa.eu/digital-single-market/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society'<www.ec.europa.eu/internal_market/copyright/ studies/ index_en.htm>.

'Study on the legal framework of text and data mining' <www.ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf>.

'Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions' <www.ec.europa.eu/internal_market/ copyright/docs/studies/141219-study_en.pdf>.

'Study on the remuneration of authors and performers for the use of their works and the fixation of their performances' <www.ec.europa.eu/digital-single-market/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations; Study on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works: [hyperlink to be included – publication pending]>.

'Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU"' <www.ec.europa.eu/internal_market/copyright/docs/studies/131001-study_en.pdf >.

'Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options"' <www.ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf>.

'Urheberrecht' <www.urheberrecht.org/UrhGE-2000/download/bgbl102021s1155.pdf. >.

Paul Herbert, ´EC Proposals for a directive on copyright in the digital single market. Implications for book publishers.´ <http://gdknowledge.co.uk/ec-proposals-for-a-directive-on-copyright-in-the-digital-single-market/>, accessed June 2017

European Parliament Research Service Blog, ´Copyright In The Digital Single Market [EU Legislation In Progress]´,<https://epthinktank.eu/2016/11/30/copyright-in-the-digital-single-market-eu-legislation-in-progress/>, posted in November 30, 2016, accessed June 2017.

Comments of SA&S on the Directive Proposal on Copyright in Digital Single Market, <http://www.auteursrechtensamenleving.be/en/comments-sas-on-the-directive-proposal-on-copyright-the-digital-single-market/>, published December 1, 2016, accessed June 2017.

´Comments from The British Screen Advisory Council (BSAC) on the Digital Single Market Copyright Proposal published by the EU Commission on 14 September 2016´, <http://www.bsac.uk.com/wp-content/uploads/2016/12/BSAC-Response-EU-Sept-2016-Copyright-Package-FINAL.pdf>, published 6 December 2016, accessed June 2017.

´Study of the European Parliament on the Protection of Creator's Rights in a Changing Environment´, White & Case, accessible at <www.whitecase.com/ publications/article/study-european-parliament-protection-creators-rights-changing-environment>, published 26 February 2016, accessed June 2017.

<u>Primary resources</u>

National, EU and International Legislation

CZECH REPUBLIC

Act No. 40/1964 Coll., Civil Code, as amended (‘Civil Code’) (Zákon č. 40/1964 Sb., občanský zákoník).

Act No. 2/1993 Coll., On Proclaiming the Declaration of Fundamental Rights and Freedoms as Part of the Constitutional Order of the Czech Republic (the ‘Declaration’) (Zákon č. 2/1993 Sb. O vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky).

Act No. 513/1991 Coll., Commercial Code, as amended ('Commercial Code') (Zákon č. 513/1991 Sb., obchodní zákoník).

Act No. 151/1997 Coll., Article 17 (5) on Evaluation of Property (Zákon č. 151/1997 Sb. o oceňování majetku).

Act No. 121/2000 Coll., On Author's Rights, Related Rights, and on Change of Several Acts as Amended ('Copyright Act') (Zákon č. 121/2000 Sb. o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon).

Act No. 216/2006 Amending Act 121/2000 Coll.

Act no. 89/2012 Coll., Civil Code (Zákon č. 89/2012 Sb., Občanský zákoník).

CZECHOSLOVAKIA

Act No. 100/1960 Coll., Constitution (Ústavný zákon č. 100/1960 Sb., Ústava Československé socialistické republiky)

Act No. 35/1965 Coll., on Literary, Scientific, and Artistic Works ("1965 Act") (Zákon č. 35/1965 Sb., o dílech literárních, vědeckých a uměleckých (autorský zákon).

GERMANY

1901 Act on author´s Rights in Relation to Works of Literature and Music (Gesetz betreffend das Urheberrecht an Werken der Literartur un der Tonkunst (LUG) of 19 June 1901, Reichsgesetzblatt (RGBl.) 1901, p.22).

Act on Authors Rights in Relation to Works of Art and Photography (Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie – „Kunsturhebergesetz" (KUG) of 9 January 1907, Reichsgesetzblatt (RGBl.) 1907, p.7.

Act on Copyright and Neighboring Rights of September 9, 1965 (Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtgesetz) vom 9. September 1965), as amended.

Act on the Administration of Copyright and Neighboring Rights of 9 Septemebr 1965 (Urheberrechts- wahrnehmungsgesetz vom 9. September 1965, “UrhWG”).

Act on Strengthening the Contractual Position of Authors and Performers of March 22, 2002 (Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern).

German Civil Code (Bürgerliches Gesetzbuch, "BGB").

Code on Civil Procedure of 30 January 1877 (Zivilprocessordnung).

Drucksache Deutscher Bundestag (printed report of the German Federal Assembly) 14/6433, p.9, No.3(a).

Federal Law Gazette (Bundesgesetzblatt) of March 28, 2002, Part I, p.1155 et seq.

UNITED KINGDOM

UK Copyright, Designs and Patents Act 1988 (‘CDPA 1988’).

European Union (Withdrawal) Bill (also known as "Great Repeal Bill").

OTHER EUROPEAN UNION MEMBER STATES’ NATIONAL LEGISLATION

AUSTRIA

Act No. 197/1895 RGBl., the Copyright Act.

BELGIUM

Law of 30 June 1994 on Copyright and Related Rights (Moniteur belge of 27 July 1994, p. 19297).

FRANCE

Law No 92-597, Intellectual Property Code (Code de la propriété intellectuelle), dated July 1, 1992 ("1992 IP Code"), as amended.

HUNGARY

Act No. XVI/1884 (1884. évi XVI. törvénycikk), the Copyright Act.

Act No. LXXVI of 1999 on Copyright, as amended.

POLAND

Act of February 4, 1994, on Copyright and Neighboring Rights, as amended.

European Union Documents

Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society COM(2016) 596 final.

Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled COM(2016) 595 final.

Proposal for a Regulation of the European Parliament and of the Council 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 COM(2016) 594 final.

Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, published in Brussels, 14.9.2016, COM(2016) 593 final, 2016/0280 (COD).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market, September 2016, COM(2016) 592 final.

Communication of the Commission Towards a modern, more European copyright framework COM(2015) 626 final issued in December 2015.

Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council 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 (SWD(2016) 301 final).

Digital Single Market Strategy as introduced by the Commission in May 2015 COM(2015) 192 final.

Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, adopted by the Commission in December 2015 COM(2015) 627 final.

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.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version).

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

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).

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

Directive 93/13/EEC European Council of 5 April 1993 on unfair terms in consumer contracts.

Case law

GERMANY

Comics-Übersetzungen I (§ 36 a.F.) - GRUR 1998, 390.

Das Boot - BGH ZUM-RD 2012, 192; GRUR 2012, 496.

Destructive Emotions - BGH, Judgement from January 20, 2011 – I ZR 19/09 (OLG Munich).

Fluch der Karibik - BGH GRUR 2012, 1248.

Horoskop-Kalender (§ 36 a.F.) - GRUR 1991, 901.

Kinderhörspiele (§ 36 a.F.) - GRUR 2002, 153.

Musikfragmente (§ 36 a.F.) - GRUR 2002, 602.

Salome (§ 36 a.F.) - GRUR 1990, 1005.

Talking to Addison - BGH, Judgement from October 7, 2009 – I ZR 38/07 (OLG Munich).

Tatort - 29 U 2749/10 of 10 February 2011.

Wetterführungspläne II (§ 36 a.F.) - GRUR 2002, 149.

UNITED KINGDOM

Ashcourt Rowan Financial Planning Ltd v Hall [2013] EWHC 1185 (QB), [2013] I.R.L.R. 637.

Barton v Armstrong [1976] A.C. 104, 121.

Blair v Osborne & Tompkins [1971] 2 QB 78

Clearsprings Management Ltd v Businesslinx Ltd [2006] FSR 3

Commercial Bank of Australia v Amadio [1983] 151 CLR 447.

Elkofairi v Permanent Trustee Ltd., [2002] N.S.W.R. 413 (Austl.).

Elton John v. James [1985] [1991] F.S.R. 397.

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269.

E W Savory Ltd v The World of Golf Ltd [1914] 2 Ch 566

Goldworthy v. Brickell [1987] Ch 378.

Habib Bank v. Habib Bank AG Zurich [1982] C.L.Y. 3262 considered.

Hart v. O´Connor [1985] 1 A.C. 1000, 1024 (P.C.) (appeal taken from N.Z.).

Jonathan Cape v Consolidated Press [1954] 3 All ER 253.

Lynch v D.P.P. of Northern Ireland [1975] A.C. 653.

Minder Music Ltd. v Sharples [2015] EWHC 1454 (IPEC).

Natinal Westminster v. Morgan [1985] 2 WLR 588; A.C. 68;, C.L.Y. 413

Noah v. Shuba [1991] FSR 14.

O´Sullivan v Management Agency and Music Ltd. [1985] Q.B. 428; [1985] 3 All E.R. 351.

Panayiotou v Sony Music Entertainment (UK) Ltd [1994] E.C.C. 39;] E.M.L.R. 22.

Pat Systems Ltd v Neilly [2012] EWHC 2609 (QB), [2012] I.R.L.R. 979, at [39].

Proactive Sports Management Ltd v Rooney [2011] EWCA Civ 1444.

Ray v Classic FM [1998] FSR 622 (ChD*).*

Roberts v Candiware Ltd [1980] FSR 352

Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773 at [10].

Schroeder Music Publishing Co v. Macaulay [1974] 3 All ER 616.

Stevenson Jordan v. MacDonell & Evans [*1952*] *69 RPC 10.*

Tufton v Sperni [1952] 2 T.L.R. 516, 526.

University of London Press v. University Tutorial Press [1916] 2 Ch 601, 610.

Universe Tankships of Monrovia v I.T.W.F. [1983] 1 A.C. 366.

Zang Tumb Tuum Records Ltd v Holly Johnson [1993] E.M.L.R. 61.

BELGIUM

Case 6 U 2492/12, 17 October 2013, [2014] G.R.U.R. 272 (Reprobel before national refering court).

EU

Case C-572/13; HP Belgium v Reprobel, Judgement of November 12, 2015 (ECLI:EU:C:2015:750).

Case C-572/13; HP Belgium v Reprobel, Opinion of A.G. Cruz Villalón of June 11, 2015 (ECLI:EU:C:2015:389), Reference for preliminary ruling from the Brussels Court of Appeal, 23 October 2013; [2016] Bus. L.R. 73; [2016] E.C.D.R. 2.

C-277/10 Luksan v van der Let, Judgement of the Court of February 09, 2012; (EU:C:2012:65); [2013] E.C.D.R. 5.

Appendices

1. Annex No 1 – Comparison table for key provisions

Annex 1 -comaprison table for key provisions

General description	Section	CZ former (until 31.12.2013)	Section	CZ new	Section	Germany	Article	EU - draft DSMD
Stipulation of remuneration	S. 49 CZCA - Remuneration	(1) Unless otherwise provided hereinafter, the agreement shall stipulate the amount of the remuneration or at least the way of its determination. (2) Where the amount of the remuneration or at least the way of its determination is not provided for in the agreement, the agreement shall be invalid, except for cases where: a) The will of the parties to conclude an agreement for a consideration without determining the amount of the remuneration ensues from the negotiations between the parties on entering into the agreement; in such a case the licensee shall pay remuneration to the author in an amount usual at the time of the conclusion of an agreement under contractual terms similar to their content to such an agreement for such type of work, or b) The parties to the agreement agree that the licence is granted gratuitously. .... (see (6) below ... (7) During negotiations on the remuneration, heed shall be taken of the purpose of the licence and the manner and circumstances of the use of the work and the scope of the licence in terms of territory, time and quantity.	S. 2366 NCZCC - Remuneration	(1) If the amount of the remuneration or the manner of its determination has not been stipulated, the agreement is nevertheless valid if: a) the negotiations of the parties to conclude the agreement show their will to conclude an onerous agreement even without determining the amount of the remuneration; in such a case, the licensee shall pay to the licensor remuneration in an amount which is usual at the time of the conclusion of the agreement under similar contractual terms and for such a right, or b) the parties have stipulated in the agreement that the licence is provided gratuitously.	S. 32 UrhG - Equitable remuneration (Angemessene Vergütung)	(1) The author shall have a right to the contractually agreed remuneration for the granting of exploitation rights and permission for exploitation of the work. If the amount of the remuneration has not been determined, equitable remuneration shall be deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration. (2) Remuneration shall be equitable if determined in accordance with common remuneration standards (Section 36). Any other remuneration shall be equitable if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the nature and extent of the possibility of exploitation granted, in particular the duration, frequency, extent and time of exploitation, and considering all circumstances. (3) The other contracting party may not rely on any agreement deviating from subsections (1) and (2) to the detriment of the author. The provisions referred to in sentence 1 shall also apply if they are by-passed by other arrangements. However, the author may grant a non-exclusive exploitation right to everyone free of charge. (4) The author shall have no claim under subsection (1) sentence 3 if the remuneration that has to be paid for the exploitation of his work is specified in a collective bargaining agreement.		
Transparency obligation	S. 49 CZCA - Remuneration	(4) Where the amount of the remuneration has been agreed in dependence on the proceeds from the utilisation of the licence, the licensee shall be obliged to make it possible for the author to audit the relevant accounting documents or other documentation in order to establish the real mount of the remuneration. Where the licensee thus provides the author with information designated by the licensee as confidential, the author may not divulge such information to any third party, nor use it according to his needs in contravention of the purpose for which it has been made available to him. (5) The licensee shall submit to the author, at agreed time intervals, regular financial statements of the remuneration referred to in Paragraph (4) above; unless otherwise agreed, he shall do so at least once a year.	S. 2368 NCZCC - Remuneration	2) Where the amount of the remuneration has been stipulated based on the yields from the use of the licence, the licensee shall allow the licensor to inspect the accounting records or other documents to determine the actual amount of the remuneration. Where the licensee thus provides the licensor with information designated as confidential by the licensee, the licensor may not disclose such information to a third person or use it for his needs contrary to the purpose for which it was provided. (3) The licensee shall submit to the licensor periodic accounts of the fee under Subsection (2) at the stipulated intervals; unless stipulated otherwise, the licensee shall submit the accounts at least once a year.	S. 32d UrhG - Right to information and accountability (Anspruch auf Auskunft und Rechenschaft) / S. 32e UrhG - Right to information and accountability in a licence chain (Anspruch auf Auskunft und Rechenschaft in der Lizenzkette)	(1) Where an exploitation right has been granted or transferred in return for payment, the author may once a year request from his contracting party information and accountability in respect of the extent of the use of the work and the proceeds and benefits derived therefrom on the basis of information which is generally available in the ordinary course of business activities. (2) The entitlement under subsection (1) is ruled out if 1. the author has made only a secondary contribution to a work, product or service; a contribution is, in particular, secondary where it has little influence on the overall impression created by a work or the nature of a product or service, for example because it does not belong to the typical content of a work, product or service or 2. the claim on the contracting party is disproportionate for other reasons. (3) The author shall have no claim under subsection (1) and (2) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement. (1) Where the author's contracting partner has transferred the exploitation right or granted further exploitation rights, the author may also demand information and accountability pursuant to section 32d (1) and (2) from those third parties 1. which essentially economically determine the use processes in the licence chain or 2. from whose profits or benefits the conspicuous disproportion pursuant to section 32a (2) results. (2) In order to be able to assert the entitlements under subsection (1) it shall be sufficient that there are clear indications based on verifiable facts that their conditions are met. (3) The author shall have no claim under subsection (1) and (2) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement.	Article 14 DSMD - Transparency obligation	1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. 2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency. 3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
Fair additional remuneration	S. 49 CZCA - Remuneration	(6) Where the amount of the remuneration has not been derived from the proceeds from the utilisation of the licence and where such an amount is so low that it is in obvious disproportion to the profit from the utilisation of the licence and to the importance of the work for the achievement of such profit, the author shall be entitled to an equitable additional remuneration.	S. 2374 NCZCC - Fair additional remuneration	(1) Where the stipulated remuneration for the granting of a licence is not based on the yields from the use of the licence and it is so low that it is clearly disproportionate to the profits from the use of the licence and the relevance of the subject of the licence for gaining such profit, the author has the right to an adequate additional remuneration; he may not waive this right. (2) The amount of the additional remuneration is determined by a court, having particular regard to the amount of the original remuneration, the profit gained from the use of the licence, the relevance of the work for such profit, and the usual amount of a remuneration in comparable cases if based on yields; an out-of-court agreement of the parties on the amount of the additional remuneration is not thereby excluded.	S. 32a UrhG - Author's further participation (Weitere Beteiligung des Urhebers)	(1) Where the author has granted an exploitation right to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained. (2) If the other party has transferred the exploitation right or granted further exploitation rights and if the conspicuous disproportion results from proceeds or benefits enjoyed by a third party, the latter shall be directly liable to the author in accordance with subsection (1), taking into account the contractual relationships within the licensing chain. The other party shall then not be liable. (3) The rights under subsections (1) and (2) cannot be waived in advance. An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective. However, the author may grant a non-exclusive exploitation right to everyone free of charge. (4) The author shall have no claim under subsection (1) if the remuneration has been determined according to common remuneration standards (Section 36) or by a collective bargaining agreement and if further appropriate participation is expressly stipulated for the case referred to in subsection (1).	Article 15 DSMD - Contract adjustment mechanism	Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.
Fair additional remuneration for employee works	S. 58 CZCA - Employee works	(6) Unless agreed otherwise, the author of an employee work is entitled to an equitable additional remuneration from the employer if the salary or any other compensation paid to the author by the employer is in evident disproportion to the profit from the utilisation of the rights to the employee work and to the importance of such work for the achievement of this profit; this provision shall not apply to works referred to in Paragraph (7), irrespective of whether they are actual employee works or are as such just considered, unless otherwise agreed.	S. 58 CZCA - Employee works	(6) Unless agreed otherwise, the author of an employee work is entitled to an equitable additional remuneration from the employer if the salary or any other compensation paid to the author by the employer is in evident disproportion to the profit from the utilisation of the rights to the employee work and to the importance of such work for the achievement of this profit; this provision shall not apply to works referred to in Paragraph (7), irrespective of whether they are actual employee works or are as such just considered, unless otherwise agreed.	S. 43 UrhG - Authors in employment or service (Urheber in Arbeits- oder Dienstverhältnissen)	The provisions of this Subchapter (Section 31 to 44) shall also apply where the author has created the work in the fulfilment of obligations resulting from an employment or service relationship, unless otherwise provided in accordance with the terms or nature of the employment or service relationship. (Note: The general copyright regime as described above applies exactly the same with regards to exploitation rights of employees, "unless otherwise provided in accordance with the terms or nature of the employment or service relationship")		