Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market

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EXECUTIVE SUMMARY

The European Copyright Society (ECS) welcomes the protection that Articles 18 to 22 of the Directive on copyright in the digital single market offer to authors and performers in their contractual dealings with economic actors to whom they transfer or license their rights. The ECS advises the Member States to give full force and efficiency to this part of the Directive.

The fundamental objectives of Articles 18-22 are to entitle authors and performers to an appropriate and proportionate remuneration; to information about the exploitation of their work/performance; and to mechanisms to complain about or revoke an unfair contract. The protection of authors and performers is thus the core principle which should inform the interpretation and implementation of these provisions in the Member States. That principle implies the following:

- Articles 18-22 have a binding nature and cannot be contractually overridden, except insofar as expressly permitted by the Directive.
- Exclusions from the scope of application of the Articles 18-22, despite their role in balancing the different interests of all stakeholders, have to be interpreted in a strict manner and should not serve as ways to exclude some contracts or situations from the protective provisions to the detriment of authors and performers. In particular, Member States should ensure that any of the permissible derogations for computer programs, employment contracts, contracts by CMOs, open access licences, do not circumvent the protection that the Directive provides for authors/performers;
- The choice of law applicable to transfer or licence contracts should not deprive the authors and performers of the benefit of the mandatory provisions of the Directive;
- Articles 18-22 should apply, as a matter of principle, to existing contracts, as laid down by Article 26.
- Authors and performers are entitled to an equal level of protection, as a matter of principle, but performers may choose to accept a differentiated treatment if this is better for them in the light of their specific circumstances.

The Directive does not provide for a maximal harmonisation as far as the contractual protection of authors/performers is concerned. Its primary objective is to ensure the principle of an appropriate and proportionate remuneration, and the means to guarantee it, as well as a right to revoke the contract where there is insufficient exploitation. Member States are permitted to

maintain or enact greater protection to authors and performers relation to transfer/licensing contracts.

Even though Articles 18-22 apply to all contracts, not just those related to digital exploitation of works/performances, the ECS suggests that Member States particularly consider, when transposing and interpreting these measures, the specific economic conditions of digital modes of exploitation and markets, to enable authors and performers to benefit fully from the opportunities of the information society. Such attention to the digital environment would be in line with the overall objective of the CDSM Directive to ensure a fair digital single market.

The ECS believes that the Articles 18-22 and the rights they confer, could benefit from collective bargaining agreements, establishing sectoral codes of practices or model schemes and conditions, or agreeing upon adaptations of standard legal provisions. Member States are encouraged to have recourse to such collective negotiations in specific sectors and to ensure their fairness and the representativeness of all stakeholders.

As to individual articles, the ECS recommends:

Article 18 – Right to an appropriate and proportionate remuneration: "Appropriate" and "proportionate" are two distinct elements of the remuneration to which authors and performers are entitled. Proportionate refers to a percentage of the actual or potential economic value of the rights and constitutes a principle that may be substituted by a lump sum only under strict and limited conditions. Sectoral collective bargaining agreements could help better define the factors of a fair remuneration and the limited cases where a lump sum could be admitted. The ECS reminds that Member States may achieve the principle of an appropriate and proportionate remuneration by other mechanisms, such as the granting of unwaivable rights of remuneration.

Article 19 – Transparency obligation: Authors and performers are entitled to receive relevant information necessary to ascertain the revenues yielded by the exploitation of their works, which should comprise all revenues generated, all financial flows between exploiters as well as expenses occurred. The ECS underlines that Member States should consider the issue of sanction, should the transferees or licensees not comply with their obligation to provide the required information. In addition, the ECS welcomes the possible extension of the transparency obligations to sublicensees when necessary, including to obtain information about the revenues generated by Internet platforms exploiting creative content.

Article 20 – Contract adjustment mechanism: The ECS is of the opinion that the contract adjustment mechanism is broader than a best-seller provision, where the remuneration can be readjusted in case of unforeseen commercial success of a work. Instead, authors/performers should be entitled to receive an additional, appropriate and fair remuneration, in any situation where the originally agreed-upon remuneration is disproportionately low compared with all the subsequent relevant revenues derived from the exploitation of the works or performances.

Article 22 – Revocation right: The Directive conditions the right for authors/performers to claim back their rights from their counterparty upon the lack of exploitation of rights they have acquired. To ensure a better and more efficient protection of authors and performers, Member States are advised to broaden the scope of the right of revocation so that it can operate in cases of partial exploitation that do not meet the customary standards of the sector concerned. However as the revocation might be a problematic and risky option for authors and performers, other possibilities, such as a right to revise the contract on a regular basis, may be provided by Member States.

COMMENT

I. General observations

1.1. Objectives and extent of harmonisation

Articles 18-22[1] of the CDSM Directive provide harmonized protection for authors and performers when they have transferred or licensed their rights to a contractual counterpart. This is a first and important step in the EU copyright acquis to deal with the contractual protection of creators.[2]

From the perspective of cultural economics, the proposed interventions are an attempt to regulate the market for creators. The new provisions aim to address "the weaker contractual position when [authors and performers] grant a licence or transfer their rights" (recital 72). There is a well-established body of empirical studies that shows an enormous disparity between the earnings of winners-take-all star authors and performers, as well as the persistent precariousness of the financial situation of the vast majority of creators and performers.[3] Such studies demonstrate that median creators' earnings (not only in Europe) are often below the minimum income. Incomes typically are supplemented from non-creative jobs. In the view of the European Copyright Society (ECS), a key principle of copyright is that creators and performers should be able to share in the income generated through the economic exploitation of their works and performances. The ECS therefore welcomes the introduction of a harmonised and mandatory contractual framework, to ensure that European authors and performers are fairly and adequately compensated for their creative efforts.

Nevertheless, the ECS is perfectly aware that the regulation of contracts is no magic solution.[4] The market dynamics of the cultural industries are complex.[5] Copyright measures to secure adequate revenues to artists may need to be accompanied by social and economic measures tailored to the specific circumstances of creative sectors and professions and by adequate social

[1] The third chapter of the CDSM Directive includes Articles 18 to 23, Article 23 dealing with the binding nature of the protection and the exclusion of computer program from its scope. For sake of simplicity, this comment includes Article 23 in its analysis, but refers to Articles 18-22, which concern the substantive protection granted to authors/performers.

[2] "Creators" or "artists" will be used here to refer to authors and performers, as individuals.

[3] C. Ker, S. Dusollier, M. Iglesias Portela and Y. Smits, *Contractual arrangements applicable to creators : Law and practice of selected Member States*, (European Parliament, 2014); IVIR, *Remuneration of authors and performers for the use of their works and the fixations of their performances*, (European Commission, 2015); CREATE, *UK Authors' revenues and contracts* (2019); M. Kretschmer, A.A. Gavaldon, J. Miettinen, S. Singh, *UK Authors' Earnings and Contracts: A survey of 50,000 writers* (Glasgow: CREATe Centre, 2019); Report for the French Ministry of Culture, *L'auteur et l'acte de création*, 22 January 2020.

[4] Cf. J. Yuvaraj & R. Giblin, Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements (November 19, 2019). Melbourne University Law Review, Vol. 44, No. 1, 2020; U of Melbourne Legal Studies Research Paper No. 871. Available at SSRN: https://ssrn.com/abstract=3541350.

[5] Cf. R. Caves, *Creative Industries: Contracts Between Art and Commerce*, (Harvard University Press, 2000); R. Towse, *A Textbook of Cultural Economics* (2nd ed.), (Cambridge University Press, 2019). In particular, the relationship between substantive rights and contracts remains theoretically and empirically under-researched: M. Kretschmer, E. Derclaye, M. Favale and R. Watt (2010), *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy* (SABIP).

security status. The ECS would also recommend follow-up empirical research be commissioned by the European Union to assess the effects of copyright contract regulations brought in by the CDSM Directive.

All the rules contained in Articles 18-22 of the CDSM Directive grant an *ex post* protection, that is, they regulate contracts that have already been concluded, rather than seeking to control either the negotiation phase or the content of an exploitation contract (with the exception of the principle of fair remuneration and related rules discussed further in this opinion). The harmonisation brought by the CDSM Directive is incomplete. It focusses on the guarantee to receive appropriate and proportionate remuneration; on measures to ensure ways for the author/performer to monitor the exploitation of her work/performance; and on mechanisms that authors/performers can use to complain about or revoke an unfair contract.

It is clear from the background, but nevertheless important to emphasise, that Articles 18-22 do not provide for a maximal harmonisation, even in relation to the specific obligations, such as transparency, that are dealt with.[6] This means that Member States are entitled to maintain existing contractual protection or even introduce further protection, of authors and performers. Typical provisions recognised in Member States include, but are not limited to: a requirement of a written agreement; a principle of strict interpretation in favour of authors; a requirement that parties to a contract specify particular terms (e.g. the substantive and geographical scope of the rights transferred or licensed, the duration of such transfer/licence and the mode of remuneration); a prohibition on the transfer of rights in future works or in unknown modes of exploitation. Such provisions in national law are unaffected by the harmonised protection now required by the Articles 18 to 22 of the CDSM Directive.

The Directive does not adopt a sectoral approach; nor does it regulate specific categories of contract, such as publishing contracts, audiovisual production contracts, which are the subject of tailored regulatory regimes in some Member States. However, several provisions allow the national legislator to consider sector specificities when they implement the provisions of the Directive.

1.2. A protection of authors and performers

The beneficiaries of the protection are authors and performers, who, according to recital 72, are considered as being in a weaker contractual position (than their contractual counterparts) when they license or transfer their rights. This premise is fundamental to the interpretation of Articles

[6] European Commission, *Impact Assessment*, Vol I, 191 (explaining that the proposed directive "would require MS to review these [existing] obligations in consultation with stakeholders to make sure that they comply with the *minimum* requirements set out by the legal instrument." (emphasis added). The *Impact Assessment*, at 177, recognised the range of other author-protective regulation in the laws of Member States, but decided to focus the harmonization primarily on the issue of "information asymmetry". Moreover, recital 76 affirms that "Member States should have the option, in compliance with Union law, to provide for further measures to ensure transparency for authors and performers."

18-22. The implementation of these Articles should directly benefit to authors and performers, and not be diluted merely for the profit of other economic actors.

As a matter of principle, the same level of protection applies to authors and performers; so, the implementation of Articles 18-22 should be based on the principle of an equal protection for authors and performers alike. That said, equal protection for authors and performers need not always imply identical implementation. Adaptation of the protection given to performers might be justified in some cases, without reducing their rights to a fair remuneration (under Article 18) or to remedy an unfair contract (under Article 20), by virtue of the particular situation of performers. Performers are sometimes better paid by remuneration rights than by royalties gained upon transferring their exclusive rights. They are often paid for a specific performance by lump sums and do not expect to be paid further, this remuneration being sometimes higher than what they could expect from a proportional share of the revenues. They might act in some circumstances under an employment contract, which, as we will see, may warrant a specific treatment. In addition, performers might receive stronger protection when collectively represented and collective agreements might provide adequate protection on a sectoral basis (e.g. musicians in ensembles or orchestras). When relevant in the present opinion, specific attention will be paid to performers.

Recital 72 also refers to authors and performers who transfer their rights "including through their own companies". It is a regular practice for many artists, e.g. for social and/or tax reasons, to separate their legal personhood as individuals from their professional activity by acting through a specific legal person, having recourse to the legal forms national regimes offer them. When implementing the provisions on contracts, Member States should take that fact into consideration and make clear - in their legislation or in the official memorandum - that the protection equally applies to authors and performers entering contracts through their own legal company or non-for-profit association.[7] The protections provided by Articles 18-22 therefore should not be regarded as inapplicable merely because the author or performer enters agreements through a legal entity. Each Member State will need to ensure that principles such as those of separate corporate personality do not impede the applicability or effectiveness of these measures.

1.3. Scope of application

1.3.1 Computer programs

Article 23(2) appears to require Member States to preclude the application of Articles 18-22 of the CDSM Directive to authors of a computer program. This provision did not feature in the Commission's Proposal, the European Parliament's Amendments or the Council's text. Instead, it seems to have been introduced during the secret Trialogue negotiations. The rationale for it remains unclear. Given that Articles 18 to 22 of this Directive establish a minimum level of

[7] Generally, copyright laws might require that the transfer of copyright is agreed upon by the author, being a physical person, which would render this precision useless.

protection, it might be that Article 23(2) was intended to leave flexibility to Member States, so that they can apply Articles 18-22 to the authors of computer programs or to some such authors.

The exclusion seems particularly problematic where a computer program is incorporated in a videogame. Following the *Nintendo* decision of the CJEU[8], a hybrid regime applies to videogames:

> "videogames (…) constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29."

Graphical and sound elements of a videogame are not considered in that decision to be computer programs protected by Directive 2009/24. Therefore, the contractual protection scheme arising from the implementation of the Directive, applies to the videogames sector at least with respect to these works. However, a hybrid regime, as suggested by the CJEU in *Nintendo*, could create discrimination in contracts between a videogame company and its different creators, whereby programmers would be excluded from protective provisions (and the right to a fair remuneration) while graphic designers could claim to benefit therefrom. This seems in tension with the principle of equal treatment which requires that "comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".[9] The better view seems to be that the authors of computer programs incorporated in video games ought to be able to take advantage of the provisions of Article 18-22.

1.3.2 Employment contracts

Chapter 3 is entitled "Fair remuneration in *exploitation* contracts of authors and performers" (emphasis added). Recital 72 indicates that Articles 18-22 do not apply "where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts". This statement aims at excluding from the regulations contractual relationships where the author or performer provides her creation or performance for the direct use and benefit of her contractual counterpart, rather than for *exploitation.* The reference to employment contracts in recital 72 points at the situation where employees transfer the copyright in works they create in the context of their employment. The relationship between an employer and an employee does not normally involve a "licence or transfer" of copyright or performers' rights and when it does, it is not the primary object of the employment contract.

[8] CJEU, 23 January 2014, *Nintendo*, C-355/12, EU:C:2014:25.
[9] CJEU, 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, [31] and [32].

In implementing recital 72, Member States should not exclude employment contracts per se from the protective provisions.[10] It is important to emphasise, rather, that the Directive refers to the absence of exploitation of the works and performances by the contractual counterparty. There are many situations in which creators or performers are employees but whose jobs is to create works or other creative outputs that will be exploited by their employer. For example, a director may be hired under an employment contract by a film producer; or, a dramatic writer might write a play for the next season under an employment contract. Many creators and performers actually mitigate their precarious social situation by working on the basis of short-term employment contracts with cultural institutions where the main object of their contract is to deliver one specific creative output to be exploited by the institution.[11] This could particularly occur for performers. In such circumstances it would be unfair not to protect creators in the same way as they are when they are acting independently. Consequently, Member States should pay particular attention when delineating the scope of application of Articles 18-22, not to exclude contracts with the "end-user" (as clumsily called by recital 72), including employment contracts, where the primary object of the contract is to acquire rights in a work or performance in order to exploit it. The key standard for application of Articles 18-22 should then be *whether the contractual counterparty exploits the exclusive rights* through making or selling copies, communicating the work or arranging its public performance, or licensing such use.

1.3.3. Open access licences

The Directive also indirectly considers the case of open access and copyleft licensing. Recital 82, even though it does not specifically interpret the Articles 18-22, is of particular importance. It states that "nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive licences for the benefit of any users". When applied to Articles 18-22 of the Directive, this recital seeks to leave intact the freedom for authors to engage in open access licensing. Although such arrangements are not excluded as such from the operation of Article 18-22, the same result is achieved because the notions of an appropriate remuneration or the obligation of transparency need to be thought differently in the open access context. For instance, an absence of remuneration will be "appropriate" for a Creative Commons licence due to the general balance of such contracts and exploitation models. This is confirmed by Recital 74, which removes the need for information to be given to authors and performers (to assess the economic value of their right and thus to better determine a fair remuneration) where they have "granted a licence to the general public without remuneration".

[10] The peculiar situation in some Member States such as the Netherlands where the employer is deemed to be the copyright owner would complicate the question here. Arguably, the employment contract should then comply with the standards of copyright contract law, such as the right to fair remuneration for creative work.

[11] This situation has even become the norm in some countries, such as Belgium, where a not-for-profit association acts as the employer in charge of the social and tax obligation of creators when they are "hired" for limited times or performances.

As a result, the protection of authors and performers should be limited to traditional bilateral exploitation contexts and should not extend to most open content situations, where the creator is not negotiating with a single business entity.[12]

However, the exemption of open access licences from Articles 18-22 should not lead exploiters of works and performances to impose upon creators and performers obligations to authorise the use of their creations under such free licences,[13] notably to circumvent the protective provisions of the Directive. National lawmakers should make this clear in the explanatory memorandum accompanying the implementation bills.

1.3.4. Exclusion of contracts concluded by CMO

Articles 19(6) and 20(2) indicate that contracts concluded through collective management organisations and independent management entities[14] are not subject to the same obligations as to transparency and contract adjustment mechanisms. While the exclusion of the transparency mechanism seems appropriate given the fact that Directive 2014/26/EU contains its own transparency rules,[15] there is no equivalent in that Directive to the contract adjustment mechanism in Article 20. The ECS is concerned that this absence of equivalence should not be allowed to become a means to circumvent the protection provided by the Directive to authors and performers. This is particularly important when the contract with users of works or performances has been negotiated by an independent management entity, which is not subject to the same obligations towards rightholders whose rights it manages, as the collective management organisations, under the collective management Directive.

The ECS therefore suggests that this "exclusion" in Article 20(2) be understood in the light of article 20(1), which states that an individual claim for revision would apply, "in the absence of an applicable collective bargaining agreement providing for a *mechanism comparable* to that set out in this Article". Therefore, Member States shall consider that any contract concluded through a collective management organization or independent management entity should likewise provide creators with a mechanism comparable to the adjustment mechanism provided by the Directive. This could be achieved either by collective negotiations reassessing the level

[12] This is already the case in German copyright law, where in cases "where the author grants an unremunerated non-exclusive right of use for every person" three author-protective rules do not apply: Section 31a (contracts concerning unknown types of use have to be in writing), Section 32a (author's further participation), and Section 32c (Remuneration for types of use which subsequently become known).

[13] Producers or publishers should not be allowed to avoid the application of the protection of art.18-22, merely by imposing open access licensing to creators and performers as the recital 82 refers to "non exclusive licences for the benefit of any users".

[14] As defined by the article 1 of Collective Management Directive 2014/26/EU, a "collective management organisation" refers to any organisation which is authorised to manage copyright or related rights on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is owned or controlled by its members and/or organised on a not-for-profit basis. By contrast, an "independent management entity" manages copyright and related rights on behalf of more than one rightholder but is neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and is organised on a for-profit basis.

[15] Directive 2014/26/EU, Art 18.

of remuneration in response to the overall evolution of the modes of exploitation of the works/performances or on a more individual basis, for example, by allowing the creator to "opt out" if the legal entity representing her fails to renegotiate the terms of the contracts despite the imbalanced situation or whenever the terms negotiated by this entity do not match the reasonable expectations of readjustment of the remuneration.

1.4. Digital exploitation

It is notable that the whole section on contractual protection is not tied to any consideration of the digital environment. This is in stark contrast with the other parts of the Directive that regulate, in one way or another, issues relevant to the digital market (see also the title of the Directive). Articles 18-22 apply to all modes of exploitation, analogue or digital, which underlines the aim of the European legislator to improve the protection of authors. However, the ECS regrets that some issues particularly related to digital exploitation were not given closer consideration. More specifically, consideration could have been given to the particular economic context of digital modes of exploitations and their impact on a fair distribution of revenues between all actors involved, whether distribution platforms, copyright owners or creators/performers. For example, the exploitation of an e-book differs from the sale of tangible books, in terms of intermediaries involved (including their economic power), production and distribution costs, consumer distribution models (that could include subscription-based or advertisement-sustained models). In order to ensure a better protection for creators in this evolving environment, the changed economic context needs to be reflected in modified contractual provisions, including tailored modes of calculation of revenues to which authors and performers are entitled.

There is still room for Member States to respond to the needs of authors and performers when their rights are transferred or licensed, then exercised, for digital modes of exploitation. In particular, we suggest that authors and performers should benefit from an appropriate remuneration for digital exploitations, in consideration of their economic value and context. The mere replication of the calculation of remuneration from analogue exploitation to digital modes should be avoided. For instance, providing the same percentage of revenues yielded by sales of tangible books as compared to e-books might be unfair. Specific models of digital distribution, e.g. subscription-based music or advertisement-supported streaming services, should also be taken into account in the calculation of a fair remuneration. It is suggested that national copyright laws or collective agreements should provide some guidance in this respect.

National laws could in addition introduce (if such provisions do not currently exist) an obligation to revise a contract, in particular the originally agreed remuneration, in case of new and unexpected methods of digital exploitation or known digital exploitations that gain in importance during the life of the contract.

Other digital peculiarities will be addressed when analysing each article separately.

1.5 Collective agreements and representation

The Directive leaves wide room for collective interventions and negotiations as far as contractual protection of creators is concerned. The recourse to collective agreements, model contracts or the intervention of collective management organisations, is already largely practised in some Member States (e.g. France or Germany), where the lawmaker sometimes makes mandatory the arrangements largely agreed upon by the collective representatives for the sector in question. Despite the possible encroachment upon individual contractual freedom, such collective schemes have proved useful in representing the interests of individual authors or performers and strengthening their position in contract negotiation or enforcement. That said, the use of such collective intervention should depend on the representativeness of the actors involved. Such collective arrangements would also need to comply with the obligations of transparency and accountability applicable to collective management organisations and should not have anti-competitive effects.

Such collective frameworks could be found in collective agreements, model agreements, best practices or remuneration rates decided by all stakeholders, memorandum of understanding or codes of practices. Member States should seek to ensure the representativeness of the collective bodies called upon to negotiate such agreements, to initiate and supervise their negotiation and possibly to make those agreements mandatory for a sector if it has proven to be fair, representative and widely adopted in practice.

When advising on the implementation of each Article in the Directive, this Comment will identify situations where recourse to such collective is recommended.

1.6. Application in time

One difficult issue is the application in time of Articles 18-22 and mostly the question as to whether they apply to existing contracts.

According to its Article 26, the Directive applies from 7 June 2021 to works and other subject matter protected by national law. In principle, therefore, Articles 18-22 might be applied to licences and transfers that occurred before that date. Article 27 provides that agreements for the licence or transfer of rights of authors and performers "shall be subject to the transparency obligation set out in Article 19 as from 7 June 2022". Recital 77 explains that this is necessary "to enable the adaptation of existing reporting practices to the transparency obligation". With this provision, the legislator confirms that the contract provisions can and should be applied also to existing agreements.

However, under Article 26(2) the Directive should not prejudice "any acts concluded and rights acquired before 7 June 2021".[16] Member States might wrongly consider that Article 26(2)

[16] The provision in Article 26(2) replicates Article 9(2) of the Information Society Directive, 2001/29/EC. The history of that provision is not irrelevant. The original proposal had contained a requirement that the Directive was to be applied to existing contractual arrangements at the very latest after 5 years. See COM(1997) 628 final (and Amended proposal, COM(1999) 250 final, Arts 9(3) and (4). In the Council proceedings it was decided to delete

requires that all existing contracts be exempted from Arts 18, 20, 21 and 22 (while Article 27 clarifies that only the transparency mechanism applies to existing contracts, as of 7 June 2022). The ECS is concerned that such an interpretation would undermine the objective of the whole protection scheme, i.e. enhanced protection for authors and performers in their contractual relations with exploiters. In reality, many exploitation contracts are concluded "for the duration of copyright".[17] If Article 26(2) was interpreted as precluding the application of Articles 18-22 to contracts concluded before 7 June 2021, this would lead to the continued existence of unfair and disproportionate contractual terms for decades to come.

The ECS submits that such an interpretation is incorrect. The CJEU has already offered guidance on how Member States are to give effect to transitional provisions, most importantly in Case C-168/09, *Flos v Semeraro*, EU:C:2011:29. We draw from that judgment three key points of relevance here:

(i) Member States must ensure that the law comes into effect:[18] as a result, a blanket exemption in relation to all existing contracts would be inappropriate;[19]
(ii) the transition must not defer for a substantial period the acquisition of the rights;[20]
(iii) the transition must balance the interests of the contracting party with those of the person on whom the Directive requires rights be conferred (here, authors and performers) and be proportionate to the contracting parties acquired rights.[21]

In applying these principles, separate consideration needs to be paid to each obligation.

First, the introduction **of alternative dispute resolution** in accordance with Article 21 has no effect on acquired rights and interests. Considering that this mechanism is intended to help give effect to the transparency mechanism, it must apply to existing contracts like the transparency mechanism, as from 7 June 2021.

Second, the **contract adjustment mechanism** in Article 20, as a mechanism to enforce the transparency obligation[22], that clearly applies to existing contracts, needs also to be available in relation to existing contracts. If a transitional period is regarded as appropriate, it must not

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this provision because the Directive was not regarded as the appropriate place to harmonize matters relating to contract (Commission to European Parliament, SEC/2000/1734 final). It would be possible to infer from this that the same provision in the CDSM Directive equally leaves the determination of the transitional law to Member States, apart from that there just be respect for "acquired rights." However, as we show, various inferences can also be drawn from the new Directive that restrict any such freedom.

[17] In contrast, the Unfair Terms Directive 93/13 did not apply to existing contracts, but such consumer contracts are usually of a short duration. Conversely, the Directive (EU) 2019/770 on contracts for the supply of digital content and digital services, applies to the supply of digital content and services after the date of its entry into force, and even if the contract has been concluded before that date.

[18] *Flos*, [51], explained that amending legislation applies, except where otherwise provided, to the future consequences of situations which arose under the law as it stood before amendment"; [53] ("the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules.")

[19] See also Case C-457/11, *VG Wort*, EU:C:2013:426, [28]-[29], interpreting Art 10(2) as only relating to acts of exploitation completed before the date of transposition.

[20] [55] "the measure does not have the effect of deferring for a substantial period the application of the new rules on copyright protection"

[21] [56]-[57].

[22] Explanatory Memorandum, [8].

extend beyond 7 June 2022 (when the transparency obligation comes into operation). That said, the principle in Article 26(2) means that a claim to adjustment cannot be made that would require the payment of a share of remuneration that accrued to the contractual counterpart before the coming into operation of the Directive.

Third, with respect to the **revocation mechanism**, this more directly implicates "acquired rights." After all, it empowers "the author or performer [to] revoke in whole or in part the licence or the transfer of rights," so clearly applies where rights have already been transferred. However, as already noted, implementation must reconcile such rights with the principle that the Directive applies to the future consequences of existing situations. This balance is given effect to under the conditions intrinsic to the operation of Article 22. This safeguards the real economic interests of holders of any acquired rights: the mechanism is only available after "a reasonable time following the conclusion of the licence or the transfer of the rights" and where there is a "lack of exploitation." Given this internal balancing built into Article 22, there is no reason why it should be subject to any transitional measure to protect "acquired rights." It should therefore be made applicable by Member States to existing contracts and with effect from the implementation date. Contracting parties have had plenty of time since the publication of the Directive on 17 April 2019 to rectify failure to exploit the work or other rights.

Finally, with regard to the **right to remuneration** of Article 18, there is no reason why it should not apply to existing contracts.[23] As with the revocation rights in Article 22, Article 18 itself allows for recognising the interests of contractual counterparties since the right is one to "appropriate and proportionate remuneration." Article 18(2) specifies that in their implementation Member States shall take into account "the principle of contractual freedom and a fair balance of rights and interests." Remuneration – even proportionate – for exploitation under existing contracts from before 7 June 2021 should not be available as these acts may be said to have been definitively concluded. In these circumstances, further transitional provisions are unnecessary to achieve a fair balance. Moreover, the national legislator could leave open room for collective agreements to define principles for appropriate remuneration that could lead to the revision of existing contracts by the parties abiding to such collective frames.

1.7. Binding nature of the contractual protection and applicable law

Article 23(1) provides that Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers. Thus, the principle of appropriate and proportionate remuneration (Article 18) and the right of revocation (Article 22) appear to be subject to party autonomy. However, the right to an appropriate and proportionate remuneration is stated by Article 18 as a principle that Member States can achieve by imposing an obligation on contractual licensing/transferring of the rights or by other mechanisms (see *infra*). If the right to a fair remuneration is implemented

[23] That said, it might be noted that the language of Article 18 itself relates to where authors and performers "license or transfer" whereas Article 19, 20 and 22 more clearly impose future rules applicable to past situations (where authors or performers "licensed or transferred their rights" or have "entered into a contract").

by way of contract law, this should by definition be a provision that cannot be overridden by contract, or else it will have no effect, and Member States will not comply with Article 18. As to the right of revocation, Article 22 already recognises the possibility that Member States may limit its being overridden by contract, hence implying that such override is permitted. But Member States can further decide that the right of revocation is incapable of being overridden by contract, as the Directive does not create maximal harmonisation in that regard.

It should be evident, also, that the mere existence of an exploitation contract cannot of itself be viewed as excluding the operation of those rights.

This binding nature of Articles 19, 20 and 21 also implies that the contractual parties cannot decide for an applicable law that would bypass the application of those mandatory provisions. To that effect, Recital 81 refers to the application of Article 3(4) of Rome I Regulation 593/2008 on the law applicable to contractual obligations: where all elements relevant to a situation are located in one or more Member States, the provisions on transparency, contract adjustment and alternative dispute resolution should apply. Such relevant elements for a contract transferring or licensing copyright or performer's right consist in the place of exploitation of the work or performance, the place of establishment of the transferee or licensee, even perhaps the residence of the author and performer, and the place where the creation has taken place.

Should any of such elements be located in the EU, Member States need to state clearly that provisions on a right of fair remuneration, transparency, contract adjustment, alternative dispute resolution and revocation right cannot be set aside by the application of a foreign law.

For contracts with elements outside of the EU, especially with parties from third states, Member States should consider applying the implementing provisions as internationally mandatory provisions based on Article 9 of the Rome I Regulation or as public policy based on Article 21 of the Rome I Regulation.[24] These instruments could be used by Member States' courts even if not mentioned explicitly in Member States' legislation implementing the Directive or in the official memorandum accompanying that legislation.

[24] Compare with section 32b German Copyright Act.

2. Analysis of articles

2.1. Article 18 - A principle of an appropriate and proportionate remuneration

Article 18 provides that "Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration".

This principle of an appropriate and proportionate remuneration applies to contracts granting a licence or transferring any economic right of an author or performer.[25]

The terms "appropriate" and "proportionate" are two distinct elements that should receive a separate interpretation,[26] even though they could inform each other. "Appropriate" refers to some fairness and could be interpreted considering objective and usual practices in cultural sectors. "Proportionate" is used in the English version of the Directive. In other languages versions, it oscillates between "proportionate", meaning a reasonable amount (and being close to "appropriate"), or "proportional", referring to a proportion or percentage of the revenues.[27]

This linguistic variation presents a challenge for national implementation and EU harmonisation. To ensure that the requirements that the remuneration be both "appropriate" and "proportionate" are not conflated, the ECS suggests that it is best to understand the term "proportionate" as reflecting the principle that the remuneration of the author and performer should increase with any increase in the returns to the licensee or transferee, that is be "proportional."

According to Recital 73, the notion of a proportionate remuneration is linked to the **actual or potential economic value** of the licensed or transferred rights. The author's or performer's contribution to the overall work and other circumstances, such as market practices or the actual exploitation of the work need to be taken into account. In defining the contribution of an author or performer, a qualitative and quantitative assessment could be considered. A qualitative appraisal of a contribution would consider its relative importance e.g. by reference to the conventional hierarchy between roles in an orchestra, or between "lead" actors and others. A quantitative appraisal would consider e.g. the amount of material contributed, the duration of a part or of a musical performance in relation to the whole (work or performance). There is certainly a role for national lawmakers or for collective bodies representing authors and performers to lay down factors to help authors and performers to assess the economic value of their works and performance in each cultural or economic sector, namely by pointing out the

[25] Recital 72 implies that the obligation applies at least to the extent that it is a right harmonised under EU law. However, it is permissible for Member States to apply the protection to *all rights* of authors and performers provided by their national law, and it seems to the ECS that it would be desirable that they do so. To differentiate between harmonized and unharmonized rights would make national law unnecessarily and unjustifiably complex.
[26] The use of the word « and » confirms this interpretation.
[27] E.g. in French, "appropriée et proportionnelle"; in Italian "adeguata e proporzionata"; in Spanish, "adecuada y proporcionada" ; in Portuguese, "adequada e proporcionada" ; in German, "angemessene und verhältnismäßige" ; in Dutch, "passende en evenredige" ; in Danish, "passende og forholdsmæssigt" ; in Swedish, "lämplig och proportionell"; and in Polish, "odpowiedniego i proporcjonalnego".

discrete revenues, including advertisements on webpages where creative content is exploited, that economic actors could generate from exploitations.

The rule of the remuneration is its **proportionality to such economic value**. Yet, recital 73 of the Directive indicates that it can accommodate an **exception for lump sum** payments, which seems reasonable considering the many different models and contexts where works and performances are exploited. The Directive does not provide any criteria by which to judge when such a derogation is permissible, but allows Member States to define sectorial-specific cases where a lump sum could be consistent with the requirements of Article 18. Such derogations should be applied with caution by Member States when implementing the provision in order to prevent the principle of a proportional remuneration becoming empty of any substance,[28] and should be duly justified by the particularities and well-established practices of the sector concerned. Member States should ensure that the choice of a lump sum does not operate to the detriment of the creators when compared with the income they would have received as a percentage of the revenues (according to the uses of the sector).

In identifying the situation where a lump sum is acceptable, the ECS recommends Member States to ensure that this exception is not used to justify "buy-out contracts," where all rights of an author or performer are acquired for any possible use against a one-off payment. This would not amount to an "appropriate" remuneration.

The force of the principle of a fair remuneration embraced in Article 18(1) is qualified by the second sentence of the article that allows Member States "to use different mechanisms and take into account the **principle of contractual freedom** and a fair balance of rights and interests". The insistence on contractual freedom and a fair "balancing" of rights and interests of all parties involved might be thought to undercut the objective of protecting the weaker parties to copyright contracts, i.e. the individual authors and performers. However, it should not be used as a justification to eliminate the right of creators and performers to claim such remuneration. If imposed by national law as a contractual obligation on transferees and licensees of copyright and performers' rights, it cannot be set aside, except in situations where the law admits a lump sum or a remuneration agreed upon by a collective agreement. Courts should also be able to correct a possibly unfair remuneration in a contract even if the parties pretend it is fair.

According to Article18(2) and recital 73, Member States are said to be free to determine the proper methods and mechanisms by which to implement the principle of fair remuneration. In order to identify the circumstances in which remuneration can be treated as adequate and proportional, Member States might appeal to **collective bargaining** between representatives of the authors and performers and representative associations of exploiters of creative content. Such collective agreements have been deployed with satisfactory results for some sectors in France or Germany, where authors' associations or collective management organisations have succeeded in establishing framework contracts with defined remuneration schemes for

[28] Recital 73 is clear: "A lump sum payment … should not be the rule. »

particular sectors[29]. Sectoral agreements can provide framework or model schemes and factors determining revenues for each type of exploitation. In addition to improving protection of authors or performers, who would not be left alone in negotiating that part of their contract, such measures would also reduce transaction costs for their contractual counterparts and ensure equal conditions across a cultural sector. The lawmaker could encourage such collective agreements and possibly make those collective agreements mandatory for a whole sector (at least, when of the processes have been fair and the organisations are truly representative). In particular, in light of the Directive's goal to guarantee to authors and performers appropriate and proportionate remuneration and the reference to collective bargaining in Article 20(1), the European Commission and the national competition authorities should generally permit collective bargaining and the ensuing agreements, since they contribute to general welfare.

Member States are also free to use non-contractual mechanisms to implement the principle of a fair remuneration. One such mechanism that Member States are free to maintain or introduce in their laws could consist in an **unwaivable right of remuneration** that authors or performers cannot transfer (except upon death or for administrative purposes to a CMO) and that could be managed and collected by CMOs. The EU recognised such a right in relation to rental of phonograms and films in Article 4 of Council Directive 92/100/EEC of 19 November 1992 (codified as Article 5 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006). Many Member States, including Belgium, Spain, Italy, Estonia, Germany, recognise such rights of remuneration that authors and performers (generally through their collective management organisations) can directly claim from economic actors exploiting their works (e.g. for cable retransmission, or for some secondary exploitations of an audiovisual work), even when the latter have cleared the rights from the producers to which authors and performers have transferred their rights. Some commentators have called for the introduction of such an unwaivable remuneration right for audiovisual authors.[30] It could also be an efficient mode of remuneration of performers. By applying such a solution, Member States separate the licensing of exclusive rights between economic operators, enabling them to engage in exploitation of creative content, and the remuneration of authors and performers, whose efficiency might be enhanced if properly managed by CMOs.[31]

2.2 Article 19 - Transparency obligation

Article 19 aims at securing the right to a fair remuneration by providing authors and performers with all the information needed to ascertain the revenues generated by the exploitation of their

[29] See the German article 36 UrhG that refers to collective negotiations to established "joint remuneration agreements" determining an equitable remuneration for authors.

[30] R. Xalabarder, The equitable remuneration of audiovisual authors: a proposal of unwaivable remuneration rights under collective management, *R.I.D.A.*, 2018, n°256; SAA, *White Paper – Audiovisual Authors' Rights and Remuneration in Europe*, 2015, available at http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf.

[31] That would require a high level of efficiency and transparency of CMOs, in compliance with the collective Management Directive, to mitigate the possible cost of collective management.

works and performances.[32] To that end, they should receive on a regular basis, at least once a year, "up to date, relevant and comprehensive information" about such exploitation from the parties to whom they have transferred or licensed their rights. This obligation is imposed on the licensees or transferees of the right, and does not require a prior request.[33]

The information to be supplied to authors/performers should identify all the modes of exploitation of the work/performance, all revenues generated and remuneration due. When implementing that provision, Member States could further **specify the type of information** that should be communicated to authors, performers or their representatives. As explained in recital 77, collective agreements or model documents could be the best way to determine the relevant information.[34]

Recital 75 provides that the information should be "comprehensive in a way that it covers all sources of revenues relevant to the case, including, where applicable, merchandising revenues". Therefore, the information should encompass all financial flows between economic actors exploiting such works. Apart from obvious flows such as sales or licensing fees, less obvious financial returns such as advertisement revenues, rebates, promotional advantages, that could be a form of disguised revenues, should also be notified to authors/performers. Expenses should also be detailed as these play an important part in calculating the revenues from which the author's or performer's share will be paid. Where works are bundled and exploited along with other works, details of total revenues and the mechanism used to calculate shares attributable to specific works should be specified. The right does not appear to extend to a right to see the evidential basis for the accounts (e.g. to inspect), though some national laws contain such provisions[35]. Member States could consider buttressing their implementation of Article 19 with a provision of this sort.

The Directive does not specify a remedy or penalty for this failure to comply with the obligation embodied in Article 19. The Commission clearly envisaged that the ADR scheme and contract adjustment mechanisms would play some role here, so that, for example, authors and performers could request before courts or in the ADR scheme that the relevant information be provided to them as a principal claim or as a claim accessory to their demand for an appropriate remuneration. Member States should consider whether, and if so, how far they want to go further in establishing sanctions for failure to comply with the transparency obligation. One possibility would be to treat the obligation as automatically implied into the contract and specify that where a failure to provide the required information is significant and regular, it could amount to a breach of contract and become a reason for the author or performer to pursue the revocation of the contract. A Member State may also provide that collective representatives are

[32] Recital 75 : "sharing of adequate and accurate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system governing the remuneration of authors and performers ."
[33] Impact Assessment, Vol 1, 178. At n 551, the IA says a request-based mechanism would not be effective.
[34] Recital 77: "Collective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency".
[35] See Article 57(2) of the Danish Copyright Act or the Polish law that also gives a right of access "as necessary, to the documentation being essential to determine such remuneration."

able to intervene and bring legal proceedings demanding that economic operators comply with their transparency obligation. Another alternative might be a statutory penalty for failure to comply.

The obligation to provide the specified information is imposed upon any transferee or licensee with whom the author or performer has concluded a contract. However, the Directive entitles the author or performer to request **any sub-licensees** to provide additional information when the person to whom she has transferred or licensed the right does not hold all the necessary information. This extension of the obligation beyond the contractual realm of the first transfer/licence is remarkable and could be considered as a genuine protection of authors/performers. Member States might wish to specify that such sublicensees include internet platforms (e.g. e-books sellers or music streaming services) that exploit masses of copyright-protected works and whose economic models might sometimes obfuscate the revenues they generate. Getting access to relevant information on the sales, distributions and streams of works and performances is crucial for publishers and producers to be able to give to authors and performers a proper view of the revenues generated on those platforms. In their implementation of Article 19, national lawmakers will need to provide effective mechanisms for ensuring that creators can receive such information from third parties. Member States may decide to entrust collective bodies or sectoral collective agreements to determine the modalities and scope of such requests to third parties.

According to Article 19(3), while the transparency obligation clearly should not become disproportionately burdensome for the contractual counterpart, the obligation must remain effective and ensure a high level of transparency in every sector. The Directive offers Member States two avenues to reconcile these goals.

First, to avoid the administrative burden becoming disproportionate in the light of the revenues generated by the exploitation of the work or performance, Member States may limit the types and level of information that a contractual counterpart is required to provide. Such limitations are available only for "duly justified cases". Thus a Member State might provide that where annual payments due to an author/performer fall below a certain level, there is no obligation to provide more detail than the number of copies sold.

Second, under Article 19(4), Member States may decide to exclude the obligation when the contribution of the author or performer is "not significant" having regard to the overall work or performance.It seems sensible that transparency could be reduced for contributors of non-significant portions of a copyright-protected work or where the work only yields minimal revenues. However, in deciding where these thresholds lie, Member States need to consider sectoral differences and are obliged to consult all relevant stakeholders.[36] Member States will want to consider whether this is best achieved through **collective agreements** entered on a sectoral basis.

[36] Recital 77: "When implementing the transparency obligation provided for in this Directive, Member States should take into account the specificities of different content sectors, such as those of the music sector, the audiovisual sector and the publishing sector, and all relevant stakeholders should be involved when deciding on such sector-specific obligations."

2.3. Article 20 – Contract adjustment mechanism

Article 20 imposes a mechanism that already exists in some Member States, though sometimes only for publishing contracts, and entitles authors and performers to claim additional, appropriate and fair remuneration when the remuneration originally agreed upon turns out to be disproportionately low compared to the revenues that have been derived from the actual exploitation of the work or performance. The right is exercisable against "the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party". It is not capable of contractual exclusion according to Article 23(1). Such a right could be actioned by authors' and performers' representatives.

This adjustment mechanism is often called the best-seller clause or success clause,[37] because one circumstance in which it would apply is where a work turns out to be more successful than initially expected: the contract adjustment mechanism allows for correction of the resulting gap between the income derived from a work that turns out to be successful and the remuneration, generally in the form of a lump sum, that was originally agreed for its creator. However, the mechanism has a broader **scope of application** than the case of an unexpected success of a work. The formulation of Article 20 is more comprehensive and covers any situation in which the agreed remuneration ends up being inadequate. For instance, it would apply in a situation where a creator underestimated the economic importance of a particular mode of exploitation. If the percentage of revenues allocated to authors and performers was at the time of the contract fixed at a very low rate, but the particular mode of exploitation turns out to be significant, it might be appropriate to alter the rate. As an example, in many countries, the remuneration of performers for cable distribution was collectively fixed at a time when this mode of retransmission of broadcasts was rather insignificant. Today this mode of exploitation has gained in importance and as a result the original remuneration is disproportionately low compared to the economic value of such exploitation. The Article 20 does not require that the success of exploitation was not anticipated by the parties to the contract. In other words, no condition of unforeseeability should be required.

Member States should thus take care not to implement Article 20 as a best-seller clause. The mechanism should be capable of being engaged in any situation where the remuneration of the creator is disproportionately low compared with all the subsequent relevant revenues derived from the exploitation of the works or performances. Member States that operate similar mechanisms but with stricter thresholds, such as "serious" or "gross" disproportion must remove such conditions. In the light of recital 78, it might be acceptable to add the requirement that the remuneration has "clearly" become disproportionately low.

Once the threshold is met, the mechanism must allow for the creator to receive an "additional, appropriate and fair" remuneration. Although these terms are notably different from those in Article 18, it is suggested that the effect of the "additional" remuneration should be that the creator receives an "appropriate and proportionate" remuneration.

[37] Impact assessment, Vol 1, 180, n 559 (noting the term can be misleading); Impact assessment, Vol 3, annex 14d, 220 (referring to as bestseller clause).

Beyond delineating the scope of application of the contract adjustment mechanism provided by Article 20, the **Member States have room for manoeuvre** in deciding several points.

In assessing whether remuneration is "disproportionately low", Article 20 refers to "all the subsequent relevant revenues derived from the exploitation of the works or performances." Recital 78 only provides that all revenues, including merchandising ones, should be taken into account. Consequently, Member States could improve the protection afforded by this Article by specifying the "relevant" revenues that need to be considered. Member States can also identify what circumstances are relevant to the assessment of "disproportionality", such as the contribution of the author or performer to the whole, or the practices in each sector. In accordance with the wording of Article 20 ("in the absence of an applicable collective bargaining agreement…") and with Recital 78, sectoral collective agreements could again play a useful role in establishing the criteria by which the disproportionality of the agreed-upon remuneration is to be judged.

2.4. Article 21 – Alternative dispute resolution mechanism

Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.

This provision aims at helping authors and performers to enforce their rights without being subjected to the high cost and burden of judicial proceedings. Such a mechanism could to some extent attenuate the risk of black-listing that complaining authors have sometimes suffered as retaliation when they undertake legal action against their publisher or producer, as documented in some studies.[38]

Here also, the Member States are free to decide about the modalities of organization of such alternative dispute resolution schemes. They may also decide not to implement this Article if efficient and reliable mechanisms are already in place and accessible to authors and performers. As Article 20 makes clear, such systems should allow for representatives of authors and performers[39] to intervene on their behalf.

2.5. Article 22 – Right of revocation

Article 22 of the Directive allows authors or performers to terminate a licence or transfer in case of lack of exploitation. It provides that "where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis,

[38] C. Ker, S. Dusollier, M. Iglesias Portela and Y. Smits, *Contractual arrangements applicable to creators: Law and practice of selected Member States*, (European Parliament, 2014), at 23.
[39] Representatives could namely be CMOs or agents.

the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter".

Despite the contradiction with the binding nature of the contract, revoking a copyright contract might prove necessary if the exploiter fails to deliver the essential object of the agreement: the actual exploitation of the work for which she has obtained the rights. The right to revocation provides a strong weapon to authors and performers, but a weapon that it might be dangerous for a creator to trigger. Therefore, Member States should implement it with suitable safeguards to protect the interests of all parties to the contract and thus to make it an efficient and fair tool to deploy as a last resort.

The **freedom of manoeuvre left to Member States** in national implementation is broad. Once again, significant assistance in implementation and application of the right might be gained through collective bargaining agreements concluded on a sector-by-sector basis.

Firstly, in conformity with Article 22(2), specific provisions may be adopted for specific sectors, different types of works and performances, and for works composed of multiple contributions. In relation to the latter, Member States may decide to exclude the availability of the right of revocation if such works or other subject matter usually contain contributions of a plurality of authors or performers.[40]

Second, Member States may also provide that the revocation only applies within a certain time frame, if such restriction is justified by the specificities of the sector or types of works or performances concerned. It could be the case if the exploitation of some categories of works is not on-going but is usually carried out for a short period of time.

Finally, Member States can offer the choice to authors and performers to terminate the exclusivity of the contract instead of revoking it completely. A revocation of exclusivity could multiply the choices of the author to see her work exploited and incentivize the first publisher or producer to do better.[41]

Member States are required to determine a period of reasonable time after the conclusion of the contract and the modalities for the exercise of the claim of revocation. This includes the requirement for a prior notification that sets an appropriate deadline to undertake or resume the exploitation. The reasonable period of time could be fixed by the law, by the parties themselves in their contracts, by collective agreements or, by default by sectorial professional practices (that could be codified).

The "**lack of exploitation**" of the work or subject-matter that triggers the possible application of the revocation right is not defined further in the Directive. Member States could determine, in concertation with each sector, what would be a satisfactory level of reasonable exploitation (e.g. the threshold of published copies, the lack of a reprint despite some demand, the lack of merchandising, the refusal to engage in some modes of exploitation).

[40] Art. 22(2).
[41] The Section 40a of the German copyright law gives the right to authors who have granted an exclusive right of use against a flat-rate remuneration to exploit the work in another manner after 10 years.

The Directive only provides the right to revoke the contract for lack of exploitation of the work or subject-matter.[42] This does not prevent national lawmakers from going a step further and making the right available *when the exploitation is minimal or does not meet the customary standards of the sector.* In such a case, the national laws, directly or by reference to sectoral collective agreements or codes of practice, need to establish the criteria to assess the inadequacy of the exploitation. Some consideration of digital context would be particularly relevant. Authors of literary works could consider that the publisher to whom they have transferred their copyright for all types of exploitation, does not comply with her obligation if she declines to offer the works in an e-book format. In a similar way, where some licensed or transferred rights (e.g. the translation rights) are not exploited, this also justifies the revocation of that part of the transfer.[43] France entitles authors to take back their rights in such a case, either totally or only for digital exploitation.[44] Such partial revocation, applicable only to modes of exploitation that the transferee or licensee has not developed, could inspire other Member States. They would need then to determine what would amount to sufficient exploitation in the channels concerned, in different formats and platforms.[45]

As discussed above, recital 72 gives the possibility to exclude some works created by employees from the scope of application of Articles 18-22, including this right of revocation. As said earlier and for better protection of creators and performers, any such exclusion should not apply where the primary object of the contract is to acquire rights in a work or performance in order to exploit it.

In contrast to the provisions on transparency and contract adjustment,[46] the right of revocation can be excluded by contract. To reduce the risk of ineffectiveness of the right of revocation, the Directive allows Member States to make such a contractual derogation dependent on the existence of a collective bargaining agreement.[47] The ECS recommends that Member States limit derogations to such circumstances.

Recourse to sectoral collective negotiations and agreements will be essential for all the practical application of the revocation right and therefore should be encouraged.

[42] Although the term "lack" in English is not unambiguous, the other languages suggest that the Directive only requires the right be available where there is no exploitation at all, ie a "complete lack" of exploitation: French "non-exploitation" ; in Spanish "no se está explotando" ; in Italian "mancato sfruttamento".
[43] In a way, that envisages copyright as a bundle of distinct rights, with revocation still available in relation to each. On this, see S. Dusollier, Intellectual property and the bundle-of-rights metaphor, *Kritika – Essays in Intellectual Property,* Vol.3, 2020, p.146-179, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544131.
[44] Cf. Art. L.132-17-2 of the French Code de la Propriété Intellectuelle.
[45] French copyright law refers to publishing codes of practice to determine on which conditions a digital exploitation of book is deemed sufficient to bar the author from taking back her right.
[46] Art. 23(1)
[47] Art. 22(5).

2.6. Possible complementary measures

As mentioned in the introduction, Articles 18-22 only provide for minimum harmonization and do not prevent Member States from providing better protection for authors and performers in relation to transfers or licences. *Ex ante* protection, such as mandatory provisions relating to the creation of valid licences or assignments, could be considered by Member States, and there is some evidence that these provide creators with valuable protection. As far as *ex post* protection is concerned, two further options could be considered by Member States.

Aside of the right to revocation whose implementation is mandatory, Member States could consider providing authors and performers with a more efficient mechanism for rebalancing a contract that has become unsatisfactory. A **right to regular revision of contract,** as it already exists in countries such as Sweden, could be introduced. Such a right would be a less radical option for authors and performers than revocation. Moreover, rather than focussing on more extreme situations, such as disproportionately low remuneration or non-exploitation, such a right could address issues such as adaptation of arrangements to reflect changes in business models and exploitation modes.[48] Such a "revision right" would reduce the risk for creators of being black-listed in the cultural sector in which they operate for exercising the right of revocation, and well as resolve the difficulties associated with the possible lack of alternative producers or publishers who might be willing to exploit the work/performance (after the revocation of rights in it). Moreover, in comparison to the revocation right, a "revision right" could benefit publishers or producers by reducing the risk of termination of the contract, and thus maintaining the incentive for the publisher to invest in exploitation.[49] A "revision right" could also accommodate the difficulties faced by parties negotiating contractual terms in the digital context where modes of exploitation, costs and revenues derived from different uses might radically change.

Instead of a right to revise the contract, an alternative could be to impose a limited duration of contracts of copyright transfer or licence with an option of renewal (accompanied by a possible renegotiation), open to both the author/performer and the transferee or licensee. Such option was rejected by authors when discussed in some States, such as the Netherlands, for fear of receiving royalties only for a limited-in-time exploitation and of copyright losing its value at the expiration of the first contract. If the duration is too short, it could also drastically reduce the incentive for publishers and producers to invest in the exploitation of the works/performances.

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[48] Cf. Art. L.132-17-7 of the French Code de la Propriété Intellectuelle that imposes that the publishing contract includes a provision on the revision of the economic conditions of the transfer rights of exploitation of a book in a digital format.

[49] Economic studies are divided as to the beneficial effect of the right of termination of copyright transfers, see M. Karas & R. Kirstein, "More rights, less income ? An economic analysis of the new copyright law in Germany", Journal of Institutional and Theoretical Economics (JITE), vol. 175(3), pages 420-458, available at https://ideas.repec.org/a/mhr/jinste/urndoi10.1628-jite-2019-0029.html (concluding that a reversion right would lead to lower earnings). Other studies point at the beneficial effect of a termination/reversion right for authors after some time, see P. Heald, The Impact of Implementing a 25-Year Reversion/Termination Right in Canada (2020). Journal of Law, Technology, & Policy, Available at SSRN: https://ssrn.com/abstract=354870.

Nevertheless, a limited duration of transfer or licence could be an option to explore where exploitations is expected to be of a short duration, to avoid buy-outs contracts where all rights in a work or performance are acquired for one or a few foreseen uses, often ultimately in a disproportionate manner. Member States could equally require that the scope of the contract ought to be limited to the field of intended exploitation, so that any new or unforeseen modes of exploitation would require a new negotiation between the transferee/licensee and the authors and performers.

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