The validity of the residual right of remuneration under Articles 17 and 18 CDSMD: Opinion of the European Copyright Society in *Streamz* (Case C-663/24)*

22 June 2026

The European Copyright Society (ECS) was founded in 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy. Its members are scholars and academics from various countries of Europe, seeking to articulate and promote their views of the overall public interest on all topics in the field of copyright, and related matters. The ECS is neither funded nor instructed by any particular stakeholders. Its Opinions represent the independent views of a majority of ECS members.

EXECUTIVE SUMMARY

In its questions for preliminary ruling to the CJEU, the Belgian Constitutional Court asks for clarification as to whether the remuneration rights enacted by the Belgian lawmaker when implementing the Directive 2019/790 on Copyright in the Digital Single Market (CDSMD), in the field of streaming service providers and of open content sharing service providers, are compliant with EU law.

In the present Opinion, the European Copyright Society takes the view that **an inalienable and non-transferrable right or remuneration is a lawful mechanism under EU copyright law** to ensure that authors and performers receive **fair remuneration** for the exploitation of their works and performances.The fair remuneration rationale rests on **fundamental rights protection** and constitutes **an objective and key principle of EU copyright law**, as affirmed in recent CJEU case law.

Article 18 CDSMD requires Member States to ensure that **authors and performers are entitled to an appropriate and proportionate remuneration**, where they license or transfer their exclusive rights, but states that Member States are **free to choose the mechanisms** to achieve that purpose. This flexibility allows national copyright laws to complement obligations of remuneration in the contractual sphere with residual rights of remuneration (RRRs), that authors and performers, generally through a collective management organization, can directly assert against economic operators exploiting their works and performances. **Article 18**

* This opinion relates only to the admissibility of the residual right of remuneration under EU copyright law and does not pertain to the other preliminary questions (namely those related to the press publishers right) which were submitted to the CJEU.

provides only minimum harmonization and is formulated in a way that does not require remuneration to be achieved solely through contractual arrangements between creators and their immediate contractual partners.

RRRs are **well established within EU and Member States copyright law**. The Rental and Lending Rights Directive already provides authors and performers with an unwaivable right to equitable remuneration for rentals. Similar remuneration mechanisms exist in several Member States for diverse modes of exploitation.

The mechanism of RRR **does not unduly interfere with exclusive rights**. Authors and performers benefit from full exclusive rights but retain a right to remuneration (hence called *residual*) after they transfer or license them. This legal technique dissociates the exclusive right, necessary to authorize the reproduction, communication or making available to the public, from a right to get remunerated for such exploitation.

The ECS also rejects the claim that RRRs create **double payment obligations**. Legally speaking, the remuneration paid under exploitation contracts concluded with producers or publishers and the remuneration paid under an RRR arise from different legal bases. Rather than requiring platforms to pay twice for the same use, the mechanism reallocates part of the overall revenue stream to creators. It is therefore **a redistribution mechanism rather than an additional layer of compensation**. It is in line with EU copyright law and CJEU case law admitting that the many entitlements and rights under copyright and related rights can be unbundled and separately assigned for distinct modes of exploitation.

The RRR is not an exception or limitation to copyright either: it does not replace or substitute an exclusive right (as is the case with the right performers and phonogram producers to claim remuneration for broadcasting of phonograms) and it is not a compensatory system for a legally authorized use (as in the case of private copying). Regarding **freedom of contract and freedom to conduct a business**, the Opinion acknowledges that RRRs may require the economic operators concerned to deal with collective management organizations despite the conclusion of an exploitation contract. However, such limitations pursue legitimate public-interest objectives, namely correcting structural bargaining imbalances and ensuring fair remuneration for creators, in a proportionate manner.

The RRR, provided for in Belgium in the field of online content-sharing, is **not contrary to Article 17 CDSMD**, which governs online content-sharing service providers. The maximum harmonization pursued by Article 17 only pertains to the obligation for online content sharing service providers to obtain an authorization for the making available of works and other subject-matter, and to the specific liability regime it lays down. **It does not regulate how artists should be remunerated once authorization has been obtained**. Remuneration issues remain governed by Articles 18–23 CDSMD, which expressly allow Member States flexibility in implementing fair-remuneration mechanisms. **National RRR systems therefore complement, rather than conflict with, Article 17**.

In conclusion, Member States may lawfully introduce RRRs as a means of ensuring that authors and performers receive a fair share of the economic value generated by the exploitation of their works and performances.

OPINION

I. The remuneration of authors and performers – Some economic and legal background

The fair remuneration of authors and performers is a core rationale of copyright law.[1] Remuneration is instrumental to the incentive function of copyright and to creators' personal autonomy and self-determination, allowing them to create and express themselves freely.[2] Hence, the remuneration of authors and performers rests on a particularly strong fundamental rights justification, combining freedom of expression and freedom of the arts,[3] the right to science and culture,[4] the right to human dignity, the right to (intellectual) property, the right to choose an occupation and live from their work and the freedom of contract and freedom to conduct a business.[5]

Despite the importance of securing fair remuneration, the distribution of the revenues generated by the exploitation of literary and artistic works is still often unfair for authors and performers, and is often insufficient to earn a living[6] as evidenced by several studies.[7] Despite the increasing profits deriving from the exploitation of protected content by thriving digital platforms, the revenues of creators have steadily declined over the last decades, particularly during the Covid-19 pandemic,[8] and are further jeopardized by the possible substituting effect of AI-generated content.

EU copyright law has affirmed a general principle of fair remuneration for authors and performers in Article 18 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market[9] ("CDSMD"). The intention was to enable authors and performers "to

[1] C. Geiger, S. Scalzini & L. Bossi, 'Time to (Finally) Reinstall the Author in EU Copyright Law: From Contractual Protection to Remuneration Rights', International Review of Intellectual Property and Competition Law (IIC) 2025, Vol. 56, Issue 10, p. 1866. See also, in this spirit, F. Shaheed, 'Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Copyright policy and the right to science and culture', 2014, United Nations, para. 100: ": "*Merely enacting copyright protection is insufficient to satisfy the human right to protection of authorship. States bear a human rights obligation to ensure that copyright regulations are designed to promote creators' ability to earn a livelihood*".

[2] See Recs. 9-11 Directive 2001/29/EC. See Opinion AG Szpunar, 12 December 2018, Case C-476/17, *Pelham and others*, EU:C:2018:1002, pt 83.

[3] Art. 13 Charter of Fundamental Rights of the European Union ("EUCFR"); Art. 19 International Covenant on Civil and Political Rights.

[4] Art. 27(2) Universal Declaration of Human Rights; Art. 15(1)(c) International Covenant on Economic, Social and Cultural Rights, which recognizes the right of everyone "*to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*".

[5] Respectively Art. 1 EUCFR. Art. 17(1) and (2) EUCFR; Art. 1 of the Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), Art. 15 EUCFR, Art. 16 EUCFR.

[6] See the many CREATe – University of Glasgow studies on earnings of creators and artists on https://www.create.ac.uk/project/dealing-with-creators-project/2024/06/16/creators-hub/

[7] For extensive reference to existing literature and policy studies, see C. Geiger, S. Scalzini & L. Bossi, *op.cit.*, p. 1869, note 14.

[8] See UNESCO, "Reshaping policies for creativity: addressing culture as a global public good", 2022 https://unesdoc.unesco.org/ark:/48223/pf0000380474, p. 3: "*the cultural and creative sectors were among the hardest hit by the pandemic, with over 10 million jobs lost in 2020 alone*".

[9] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

fully benefit from the rights harmonized under Union law"[10] and to have a fair share of the value stemming from the commercial exploitation of cultural works and subject matter. Articles 19 to 23 CDSMD, imposing obligations of transparency, adaptation of contract, alternative dispute means and the possibility of revocation, aim to enhance the effectiveness of the primary objective to ensure fair remuneration.[11]

The CJEU has recently stressed the importance of fair remuneration for performers in the *ONB* case, by reaffirming that "performers, in order to continue their creative and artistic work, have to receive an appropriate reward for the use of their protected subject matter".[12] The Court also recognized the need "to guarantee an adequate income for performers, in order to ensure the continuation of their creative and artistic work".[13] Without any doubt, the CJEU would consider the remuneration of authors as equally important.

In the recent *Meta Platforms Ireland* decision,[14] the CJEU held that Member States enjoy discretion in specifying detailed rules to implement the exclusive rights of press publishers, and validated an Italian legislative provision which introduced a "fair compensation" mechanism to the benefit of press publishers *on top* of the exclusive rights foreseen by Article 15 CDSMD. Such additional measures to secure remuneration are even more justified in the case of authors and performers, who are explicitly entitled to fair remuneration by virtue of Article 18 CDSMD.

With the objective of enhancing remuneration of author and performers, several Member States have introduced a complementary legal mechanism: the residual right of remuneration (hereafter "RRR") that, as introduced in Belgian copyright law, is the subject of the reference in the *Streamz* case before the CJEU.

Such non-transferable remuneration rights aim to strengthen the protection of authors and performers by dissociating the exclusive right to authorize the use concerned, which is transferred or licensed to a derivative right holder, from an inalienable right to receive remuneration which is directly enforceable against distributors of protected subject matter.

The mechanism of RRR also reflects the need for appropriate remuneration to be connected to the economic value of the service provided by the economic actors exploiting works and performances, a principle often highlighted by the CJEU, for instance in *UPFR v. DADA Music*, which affirms that: "Article 8(2) of Directive 2005/115 refers to the concept of 'equitable remuneration' and the second subparagraph of Article 16(2) of Directive 2014/26 contains the terms 'appropriate remuneration', it is clear that the purpose of both those provisions is to ensure the payment to rightholders of remuneration that is connected to the economic value of the service provided".[15]

[10] Rec. 72 CDSMD.
[11] See the European Copyright Society, Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, 8 June 2020.
[12] CJEU, 6 March 2025, *Etat belge c. Orchestre National de Belgique*, C-575/23, ECLI:EU:C:2025:141, pt 98.
[13] *ib.*, pt 99.
[14] CJEU, 12 May 2026, *Meta Platforms Ireland*, C-797/23, ECLI:EU:C:2026:395.
[15] CJEU, 10 July 2025, *UPFR v DADA Music*, C-37/24, ECLI:EU:C:2025:551, pt 38.

This Opinion argues that the fair remuneration rationale of copyright law can be implemented in national law by combining several mechanisms: primarily the contractual obligation of persons to whom authors or performers have transferred or licensed their rights to pay fair remuneration for the exploitation of works and performances, but also the obligation to clear RRRs with collective management organizations for certain modes of exploitation. In particular, it argues that Article 18 CDSMD grants Member States freedom to choose the legal mechanisms they find most appropriate to implement the fair remuneration principle in the EU copyright acquis, a flexibility that is not affected by the specific liability regime of Article 17 CDSMD.

II. The residual right of remuneration (RRR) as a valid option to implement Article 18 CDSMD

A. The minimal harmonization and flexibility of Articles 18 to 22 CDSMD

The introduction of a residual right of remuneration (RRR) regime in national law does not impact the harmonization of contractual protection of authors and performers, including their right to an appropriate remuneration, since Articles 18 to 22 CDSMD only provide a minimal harmonization, leaving it up to the Member States to determine the details of the rules laid down by this part of the Directive.

Article 18 CDSMD requires Member States to "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". The second paragraph of Article 18 states that "Member States shall be free to use *different mechanisms*"[16] to implement this principle. Recital 73 clarifies that Member States are free to transpose this obligation "through different existing or newly introduced mechanisms […] provided that such mechanisms are in conformity with applicable Union law".

The obligation to ensure an appropriate and proportionate remuneration is generally understood to apply to the contract transferring or licensing the copyright or performer's rights to publishers, producers or anyone exploiting the work or performance, the latter being obliged to remunerate fairly the authors and performers with whom they have contracted.

However, Member States are free to apply other legal mechanisms, including collective bargaining (which is referred to in recital 73),[17] a minimum guaranteed remuneration (as provided in France for performers in music streaming)[18], but also a RRR, which – as will be explained below – has been a feature of the EU copyright acquis since the adoption of the Rental and Lending Rights Directive in 1992 (RLRD).[19]

---

[16] emphasis added.

[17] In particular, the reference to "collective bargaining" as an implementation mechanism indicates that the appropriate remuneration principle can be put into practice outside or beyond individual contracts with authors.

[18] See Art. L. 212-14 CPI.

[19] The 1992 Directive has been codified in 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), OJ L 376, 27 December 2006, p. 28.

In its Opinion on the implementation of the Articles 18 to 22 CDSMD, the ECS has already stated that this flexibility allows Member States to have recourse to non-contractual mechanisms, such as an unwaivable right of remuneration, to implement the principle of a fair remuneration.[20] The availability of such mechanisms was confirmed by Commissioner Breton in a reply to the EU Parliament on the compatibility of RRRs with Article 18 CDSMD.[21]

The legislative history of Article 18(2) CDSMD makes it clear that one of the mechanisms the EU legislator had in mind was the instrument of remuneration rights. One of the corresponding recitals originally proposed by the European Parliament, read as follows: "This may be achieved in each sector through a combination of agreements, including collective bargaining agreements, and statutory remuneration mechanisms".[22]

The very wording of Article 18 also allows a broad reading. Indeed, the provision establishes the principle that authors and performers have a positive *right* to receive proportionate and appropriate remuneration ("they are entitled" to it), when they have transferred or licensed their rights, but does not require that such remuneration should necessarily be limited to individual contracts. The Member States are obliged ("*shall* ensure…") to secure in law the means for the achievement of a fair remuneration "*where* authors and performers license or transfer their exclusive rights", but are not obliged to do so through a mechanism embedded in individual licensing or assignment contracts.

This flexibility can be compared with the freedom of Member States to determine what "equitable remuneration" covers, as provided for by the Article 8(2) RLRD, as interpreted by the CJEU in the *SENA* case: "In the absence of any Community definition of equitable remuneration, there is no objective reason to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration, which would necessarily entail its acting in the place of the Member States, which are not bound by any particular criteria under Directive 92/100. It is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law, and particularly Directive 92/100, adherence to that Community concept."[23]

In sum, the CJEU may decide that the notion of remuneration laid down by Article 18 CDSMD is an autonomous concept of EU law and give it a uniform interpretation. However, such an interpretation would be limited to the conditions relevant to the question of whether remuneration is appropriate and proportionate. By reason of the flexibility left to Member States by Article 18 CDSMD, the CJEU should not restrict the legal mechanisms that might achieve

[20] European Copyright Society, Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, 8 June 2020.

[21] E-001255/2022, Answer of Mr Breton on behalf of the European Commission (20.07.2022), https://www.europarl.europa.eu/doceo/document/E-9-2022-001255-ASW_EN.pdf.

[22] See Amendment 80, Parliament's REPORT on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(016)0593 – C8-0383/2016 – 2016/0280(COD)), adopted by the European Parliament on 12 September 2018 (Ordinary legislative procedure: first reading).

[23] ECJ, 6 February 2003, *SENA*, C-245/00, ECLI:EU:C:2003:68, pt 34. That decision interprets the directive 92/100, then in force before it was codified by the directive 2006/115.

it or confine the source of remuneration to the contract between the author or performer and the derivative right holders to whom they have transferred or licensed their rights.

B. The precedent in the EU acquis and Member States legislation

RRR regimes are neither unknown nor rare in European copyright law, but are in line with the EU copyright acquis and the traditions of EU Member States.[24]

The concept of a residual right was introduced by the European legislature in the RLRD,[25] which provides for an unwaivable "right to obtain an equitable remuneration for the rental" that "may be entrusted to collecting societies" and that is retained by the author or performer who has transferred or assigned their rental right to a phonogram or film producer.[26] The unwaivable rental right was justified at the time by the relatively weak bargaining position of authors and performers in the music and audiovisual sectors, and intended to ensure that authors and performers receive a fair share of the proceeds from the rental of sound and visual recordings on which their creative performances were captured, even after the transfer of their rights to phonogram or film producers.[27]

In the national copyright traditions of EU Member States, Spain has a long-standing unwaivable, collectively administered RRR in the area of video-on-demand services.[28] Beyond Belgium, at the source of the reference in the *Streamz* case,[29] several other EU Member States, including Croatia, Estonia, Germany, Italy, Poland and Spain, have enacted similar rights for various uses of protected works or performance. Implementing the CDSMD, Germany has adopted a specific RRR for online content sharing.[30]

III. The legal technique of RRR

The RRR extracts a claim to remuneration for the benefit of author and performers, from their exclusive right, which raises the question of its effect on the exclusive rights granted by the EU law (A.) and on the parties' freedom of contract (B.).

---

[24] M. Senftleben and E. Izyumenko, 'Author Remuneration in the Streaming Age – Exploitation Rights and Fair Remuneration Rules in the EU', *Journal of Intellectual Property Law and Practice* 20 (2025), 807 (818-819).
[25] Art. 4 of the Directive 92/100, that has become Article 5 of the Directive 2006/115/EC.
[26] See further S. von Lewinski, 'Collectivism and Its Role in the Frame of Individual Contracts', in: Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law*, Cheltenham: Edward Elgar 2012, p.121-122.
[27] J. Reinbothe and S. von Lewinski, *The E.C. Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, 1993.
[28] Articles 88, 90(4), (6), (7) and 108(3), (6) of the Spanish Ley de Propiedad Intelectual. Cf. R. Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art. 18 Copyright in the Digital Single Market Directive. Statutory Residual Remuneration Rights for Its Effective National Implementation', *InDret* 4 (2020), p.36, available at https://indret.com/wp-content/uploads/2020/10/1591.pdf.
[29] In Belgium, and in other countries, in addition to the rental right, as prescribed by the applicable EU directive, such a legal mechanism applies to cable retransmission (art. XI.225 CDE) and direct injection (art. XI227/1 CDE).
[30] Section 4(3) of the Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (UrhDaG or OCSSP Act 2021), Federal Law Gazette I, 1204 (1215). Cf. C. Handke, V. Krätzig et al., *Angemessene Vergütung insbesondere im Bereich Streaming und Plattform-Ökonomie/Reform des Vergütungssystems für gesetzlich erlaubte Nutzungen im Urheberrecht*, Berlin: DIW Econ 2025, 23-26, 505-515.

A. The RRR does not limit the exclusive rights of the authors and performers

1. The RRR does not deprive rightsholders of their exclusive rights

It should first be noted that the Belgian regime does not constitute an exception or limitation to exclusive exploitation rights,[31] but rather a specific arrangement for their exercise, by creating a split between (1) the exercise of the right to authorize or prohibit use; and (2) the right, *retained* by authors and performers, to receive remuneration. This system is specifically designed to preserve the structure of exclusive rights in copyright law, while seeking to correct the asymmetry between individual authors/performers and their contracting parties. This corrective approach is two-dimensional: the recognition of a mandatory, unwaivable, and non-transferable "right" to remuneration, and the mandatory exercise of this right by collective rights management organisations (CMOs).

Neither authors, performers, nor derivative rights holders are deprived of the ability to enforce their exclusive rights in any way. Exploitation of protected content always requires a prior authorization. Those who exploit protected subject-matter economically, notably on streaming platforms or content sharing services, must always negotiate this authorisation with rights holders who have obtained exclusive rights from authors or performer through an assignment or licence, or CMOs that administer the exclusive rights on behalf of their members. Exclusive rights of reproduction or making available, then, have not been replaced by RRR but have been transferred or licensed to those derivative rights holders (such a transfer/licence constituting the very exercise of the exclusive rights by authors and performers). The RRR mechanism is referred to as *residual* because it stays with authors and performers once the exclusive right has been transferred to another party.[32]

The Belgian provisions aim only to ensure that a portion of the global revenue generated from the exploitation of protected contents by platforms is directed to individual authors and performers, thereby ensuring a more equitable distribution among the various stakeholders, irrespective of the contract that authors and performers might have entered into and by which they have transferred their exclusive rights.

2. The RRR does not result in an illegitimate double payment

Economically, the RRR may, in certain cases, lead to a reduction in the amount of money paid by economic operators exploiting works or performances to the rights holders to whom copyright or performers' rights have been transferred or licensed, since the economic operator will allocate a portion of the revenues yielded by their exploitation directly to the authors and performers. Yet, the RRR does not *legally* deprive any rights holder of the exercise of their exclusive rights.

Moreover, there is no double payment, as the two sources of remuneration deriving from the exploitation are, by the effect of law, distinct and attributed to different right holders. Legally

[31] In this regard, the reference to Article 5(3) ISD in the preliminary questions referred to the CJEU appears to be misconceived.

[32] R. Xalabarder, 'The equitable remuneration of audiovisual authors: a proposal of unwaivable remuneration rights under collective management', *RIDA* 256 (2018), p.58.

speaking, this is not a question of double payment but of two payments linked to two different causes: (1) remuneration for the authorisation to exploit the works provided for in the contract concluded with producers, publishers and other exploiters; and (2) remuneration due by virtue of law to authors and performers for the economic value of exploitation. In practice, the two payment claims intersect but do not overlap because they do not have the same legal justification.

There is no double remuneration in the sense that a platform has to pay twice for the same thing, since precisely, the national regime has allocated the flow of remuneration due for the same act of exploitation to different phases and persons. In other words, this is not an additional but a residual remuneration, not a multiplication of remunerations but a division of the value of economic exploitation of works and performances among its beneficiaries. As this legal mechanism aims to secure an appropriate remuneration for authors and performers, it is fully compliant with the objectives of the CSDMD.

3. The RRR is not an exception or a limitation to the exclusive right under EU law

This non-transferable right of remuneration cannot be qualified as an exception or limitation to the exclusive right in EU law. The Belgian law does not create a compensatory system *in substitution of* the exclusive right and therefore, does not add an exception to that right, beyond the closed list of Article 5 ISD. Neither does it limit the exclusive right, which can still be fully exercised.

It is thus different in nature from the "right to remuneration" for broadcasting of phonograms, that is granted to holders of related rights, in lieu of an exclusive right, by the Rome Convention and the EU RLRD.[33] In that case, the exclusive right mechanism does not exist and only a right of remuneration is conferred, whereas the contested Belgian system only introduces a duty to pay some rightsholders designated by the law *on top of* the exercise of the exclusive rights.

Neither is the Belgian system comparable to the remuneration for private copying imposed to compensate for the harm associated with the exercise of an exception under Article 5(2) ISD. The RRR regime does not compensate for the legal exclusion of an exclusive right for certain forms of use. Rather, it is intended to compel some content providers to remunerate individuals in a situation of unequal bargaining power, *after* the authorization has been given.

Apart from the rental right mentioned above, the mechanism that most closely resembles this RRR system is the resale right,[34] particularly due to its non-transferable nature. But here again, the parallel is not complete because the resale right is not an exclusive right, but a mere remuneration mechanism that, in certain cases, survives the exhaustion of the exclusive right of distribution and is due from the acquirer of the tangible good, who does not "exploit" the work.

---

[33] International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Rome, 26 October 1961, Article 12; RLRD, Article 8(2).

[34] Directive 2001/83/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art, [2001] OJ L 83/1.

4. A dissociation of the prerogatives compatible with the bundle-of-rights-structure of copyright

Rather than a distinct and additional right to remuneration, the Belgian provision organizes the exercise of the legal monopoly so that the possibility of obtaining a remuneration deriving from the exploitation *stays* with the author and the performer, after the ability to contract has been assigned or transferred to the producer or to the CMO. This model of dissociation of the prerogatives[35] is not unknown in the field of copyright, where either by contract or by law, it is usual for the genuine beneficiary of the legal monopoly to transfer some of these "rights" or sub-rights to another body in charge of exercising them or to claim payment.[36]

Copyright law can be conceived as granting a bundle of rights,[37] consisting of exclusive rights and diverse types of remuneration rights (assignable or not and waivable or not) applicable to distinct modes of exploitation, and, for certain beneficiaries, of moral rights. The ability to split up and distribute those prerogatives between different rightsholders (assignees, licensees, CMOs) according to types of exploitation, duration and territories is part of the essence of the economic model of literary and artistic property. Monopoly may also coexist with a specific distribution of royalty payments to different categories of rightsholders. Such a separation or unbundling of rights along modes of exploitation has long been validated by the CJEU in many cases related to collective management of rights[38] and is also acknowledged by Article 5(2) of the CMO Directive 2014/26.[39]

B. <u>The RRR does not unreasonably limit the freedom to contract</u>

The other argument raised against the Belgian RRR system is that it contravenes Article 16 of the Charter of Fundamental Rights, and the freedom to conduct a business,[40] by forcing the parties to contract, not only with the assignees of the exclusive rights but also with the CMOs. The CJEU has always affirmed that protection afforded by Article 16 of the Charter includes, by virtue of freedom of contract, "the freedom to choose with whom to do business and the freedom to determine the price for a service", and that "the imposition of an obligation to contract constitutes a substantial limitation on the freedom of contract enjoyed, in principle, by

[35] It resembles the dismemberment (or 'démembrement' in French), that can apply to property right in civil law systems.

[36] In the audiovisual sector, in France, the broadcasters pay both the producer and the SACD (an audiovisual rights CMO), despite the contractual assignment of authors' rights to producers. The Competition Council had validated this well-established system. See Décision n° 05-D-16, 26 April 2005, *SACD*, in particular, pts 54 and 55.

[37] S. Dusollier, 'Intellectual property and the bundle-of-rights metaphor', *Kritika – Essays in Intellectual Property,* 3 (2020), p.146-179, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544131.

[38] Namely, Commission Decisions, *GEMA*, 2 June 1971, OJEC n° L 134 20, June 1971, p. 15, and *GEMA*, 6 July 1972, OJEC. n° L. 166 du 24 July 1972, p. 22; ECJ, 21 March 1974 *BRT / SABAM*, C. 127/73, Rec. p. 313; Commission Decision, *Daft Punk*, 12 August 2002 (Comp/C2/37.219). See also Opinion AG Emiliou, 26 March 2026, *Austro-Mechana and AKM,* C-579/24, EU:C:2026:270, pt. 120.

[39] Directive 2014/26/EU 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, [2014] OJ L 84/72.

[40] The protection afforded by that article covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, CJEU, 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, pt 42; CJEU, 30 April 2024, *Trade Express-L*, C-395/22 and C-428/22, EU:C:2024:374, pt 76.

economic operators".[41] However, it also held, most recently in the *Meta* case that "that freedom may therefore be subject to a broad range of interventions on the part of public authorities which may, in the public interest, limit the exercise of economic activity. That circumstance is reflected, in particular, in the way in which EU legislation and national legislation and practices should be assessed in the light of the principle of proportionality under Article 52(1) of the Charter."[42]

In the *Streamz* case, the limitation to freedom of contract, if any, should be considered to be proportionate. Unlike in the *Soulier et Doke c*ase,[43] the performers and authors are not deprived of their exclusive right and consequently, mandatory collective management should not be considered a violation of their freedom to contract, but merely as a justified restriction thereof.[44] In the balance of rights that should be struck, namely between intellectual property and freedom to contract,[45] the Court has always decided that neither is absolute and that they both can bear legitimate restrictions.

The legitimate objective of a better remuneration for authors and performers can be achieved through the mandatory collective management of RRR, because the amount of remuneration overall resulting from the negotiations, on the one side, between their assignees and the platforms, and on the other side, between the CMOs and the platforms, could be higher for them than if they had negotiated it individually.[46] Transparency, which is also a legitimate objective, is increased as well, because the platforms must share the data with respect to use of the repertoire with the CMOs and not only with the primary licensor. Finally, direct payment to the CMOs not only guarantees that the remuneration is effectively distributed to creators but also reduces transaction costs.[47] The restriction on freedom of contract is, thus, proportionate.

IV. Article 17 CDSMD does not constitute maximum harmonization preventing RRRs

With regard to the implementation of RRRs in the area of platforms for user-generated content (UGC), it has been argued in the *Streamz* case that Article 17 CDSMD constitutes maximum harmonization of the legal regime for online content-sharing service providers ("OCSSP")[48]

[41] See, to that effect, CJEU, 22 January 2013, *Sky Österreich*, pt 43; CJEU, 10 July 2025, *INTERZERO and Others*, C-254/23, EU:C:2025:569, pts 211 and 212.
[42] CJEU, 12 May 2026, *Meta Platforms Ireland*, C-797/23, ECLI:EU:C:2026:395, pt 86.
[43] CJEU, 16 November 2016, *Marc Soulier et Sara Doke*, C-301/15, ECLI:EU:C:2016:878.
[44] P. Florenson, 'Management of authors' rights and neighbouring rights in Europe', *RIDA* 196 (2003) ; S. Von Lewinski, 'Mandatory collective administration of exclusive rights: a case study on its compatibility with international and EC copyright law', *Bull. Dr. Aut*., 1 (2004), p. 1-14.
[45] ECJ, 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54.
[46] European Parliament Study, The Collective Management of Rights in Europe, The Quest for Efficiency, July 2006 (available at https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights-/study-collective-management-rights-en.pdf).
[47] Explanatory statement of the Belgian Law, 19 June 2022, Doc. parl., 2021-2022, Ch., n° 2608/001, pp. 90-91 : "*cette gestion collective obligatoire a pour but, d'une part, de faciliter la valorisation du droit à rémunération des auteurs et des artistes-interprètes ou exécutants et, d'autre part, de faciliter le versement de la rémunération par la partie redevable en prévoyant un point de contact unique, à savoir les sociétés de gestion collective ou les organismes de gestion collective*".
[48] See the definition in Article 2(6) CDSMD.

and, as such, does not permit the introduction of additional rules, such as a special remuneration right benefiting authors and performers.[49]

Evaluating this argument, it is important to recall the specific objective underlying Article 17. This provision was conceived as a response to the belief that a so-called "value gap" could arise when users of OCSSP platforms upload content containing protected traces of third-party works without obtaining licenses and paying remuneration.[50] Once this type of content populates UGC platforms, it was argued that the platform provider could derive profit from unlicensed and unremunerated third-party content. Seeking to fill this value gap, Article 17(1) clarifies that an OCSSP performs an act of communication to the public or an act of making available to the public when it gives "the public access to copyright-protected works or other protected subject matter uploaded by its users."[51] OCSSPs are bound to obtain an authorization from right holders, for instance by concluding a licensing agreement. Accordingly, OCSSPs are directly and primarily liable for infringing content that is posted on their platforms. By clarifying that OCSSPs' activities amount to an act of communication to the public or making available to the public, Article 17(1) CDSMD collapses the traditional distinction between primary liability of users who upload infringing content, and secondary liability of online platforms which encourage or contribute to infringing activities. In this way, EU legislation seeks to incentivize rights clearance initiatives as one of the measures to safeguard "fair remuneration of creators in their relations with other parties using their content, including online platforms."[52]

In practice, this regulatory approach leads to the application of an amalgam of licensing and filtering obligations. An OCSSP must make best efforts to conclude licensing agreements with right holders in line with Article 17(1) and (4)(a). To the extent that use of protected content on an OCSSP platform is not covered by licences, Article 17(4)(b) and (c) offer the prospect of a reduction of the liability risk in exchange for the implementation of (algorithmic)[53] content moderation measures that ensure the "unavailability of specific works and other subject matter" on the platform.

Considering this focus and configuration of Article 17, it is clear that – even if maximum harmonization is assumed – this harmonization measure only relates to the specific purpose underlying the liability regime applicable to OCSSPs, i.e. the objective of closing the value gap and encouraging UGC platform providers to obtain permission from right holders for the act of making available to the public which they carry out when users upload content. Article 17(4)(a) sets forth an obligation to make "best efforts to obtain an authorisation." However, it is silent as to the concrete licensing and rights clearance avenues which OCSSPs must follow to fulfil

[49] Belgian Constitutional Court, judgment no. 98/2024, 26 September 2024, available at: https://www.const-court.be/public/f/2024/2024-098f.pdf, pts A.35.1.1, A.79.1.
[50] See the European Copyright Society Opinion on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law, 27 April 2020.
[51] Article 17(1) CDSMD.
[52] European Commission, Communication to the European Parliament, the Council, and the Economic and Social Committee, and the Committee of the Regions, *Online platforms and the digital single market: Opportunities and challenges for Europe* (COM(2016) 288 Final, 25 May 2016), para. 5.II. See also European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A digital single market strategy for Europe* (COM(2015) 192 final, 6 May 2015), para. 2.4.
[53] CJEU, 26 April 2022, C-401/19, *Poland v. Parliament and Council*, pt 53.

this obligation. Nothing in Article 17 CDSMD limits the freedom of Member States to establish the remuneration regime which they find most appropriate to ensure that authors and performers receive fair remuneration for the use of their works and performances on UGC platforms.

The Opinion of Advocate General Emiliou in *Austro-Mechana and AKM*[54] does not change the equation. That case addressed the question as to whether, within the specific liability framework established by Article 17 CDSMD, the making of digital copies of protected content that are technically necessary to give the public access to that content, requires an additional authorization beyond that which OCSSPs must already obtain under Article 17(1). Seeking to preserve the effectiveness of Article 17 and legal certainty for OCSSPs,[55] the Advocate General concludes that no separate, additional authorization is necessary because the authorization required under Article 17(1) "necessarily covers such copies."[56] Evidently, the case and this conclusion do not concern the initial rights clearance process which OCSSPs undertake to obtain an authorization for content sharing in the sense of Article 17(1). With regard to this initial authorization, Member States are, as pointed out above, "free to use different mechanisms", including RRRs, in line with Article 18(2) CDSMD. While Article 17 governs a specific mode of exploitation of works and performances and establishes a specific liability regime for that type of exploitation, it leaves intact and does not predetermine the remuneration rights and mechanisms which Member States implement in their national law to ensure appropriate and proportionate remuneration, in line with Articles 18 to 23 CDSMD.[57]

Vice versa, the introduction of a RRR in national copyright law does not interfere with the specific liability regime resulting from Article 17. If an OCSSP fails to pay the remuneration that is due under a national RRR regime, this missing remuneration leads to liability for an unpaid debt on the ground that the residual remuneration obligation – and the obligation to pay fair remuneration in the sense of Article 18 CDSMD – has not been satisfied, but it does not impair or alter the cascade of licensing and filtering obligations deriving from Article 17(4)(a) to (c).

Hence, Article 17 cannot be considered a measure of maximum harmonization with regard to remuneration issues that it does not regulate. Considering the described interplay between the OCSSP liability regime in Article 17 on the one hand, and the fair remuneration rules in Articles 18 to 23 CDSMD on the other, it becomes apparent that, in EU copyright law, the relevant legal framework for fair remuneration measures relating to UGC platforms is not Article 17, but Article 18.

This conclusion does not depend on whether the right in Article 17(1) is a specific *sui generis* public communication right or an exponent of the general right of communication to the public granted in Article 3 ISD.[58] Even if it is assumed that Article 17 establishes a specific public

[54] Opinion AG Emiliou, 26 March 2026, C-579/24, *Austro-Mechana and AKM*, EU:C:2026:270.
[55] id., pts 82-84.
[56] id., pt 85.
[57] See the European Copyright Society Opinion on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law, 27 April 2020, Part 5.
[58] M. Husovec and J. P. Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive', *Gewerblicher Rechtsschutz und Urheberrecht – International* 70 (2021), p.325-348.

communication right, this does not imply that the provision creates a closed and isolated system that remains unaffected by the principle of appropriate and proportionate remuneration in Article 18 CDSMD. As the CJEU has clarified, a norm of EU copyright law must be interpreted "taking into account the context in which it occurs and the purposes of the rules of which it is part."[59] From a systematic perspective, it would be inconsistent to assume that EU legislation, when adopting fair remuneration rules to strengthen the position of authors and performers, rendered acts of communication to the public in the sense of Article 17 immune to remuneration mechanisms seeking to achieve fair remuneration objectives in line with Articles 18 to 23.

CONCLUSION

In the light of the foregoing, the European Copyright Society reaches the following conclusions.

First, a RRR is not, as such, contrary to EU copyright law. It is a recognised legal technique capable of giving effect to one of the fundamental objectives of EU copyright, i.e. securing appropriate and proportionate remuneration for authors and performers for the exploitation of their works and performances.

Secondly, the introduction of such a mechanism by the Belgian legislature, in the context of music and audiovisual streaming services and online content-sharing service providers, falls within the discretion left to Member States by the CDSMD. Article 18 CDSMD expressly permits Member States to use different mechanisms to ensure appropriate and proportionate remuneration. A RRR is one such mechanism. It is also consistent with the EU acquis, which already recognises comparable unwaivable remuneration rights, notably in relation to rental rights.

Thirdly, such a right does not constitute an exception or limitation to exclusive rights. It does not deprive rightholders of the power to authorise or prohibit the relevant acts of exploitation. Rather, it organizes the distribution of the economic value generated by authorised exploitation, by ensuring that authors and performers retain an unwaivable and non-transferable claim to remuneration after the transfer or licensing of their exclusive rights.

Fourthly, a RRR does not amount to an undue restriction of freedom of contract or of the freedom to conduct a business. Any interference with those freedoms pursues a legitimate objective recognised by EU law: correcting structural bargaining imbalances and ensuring that authors and performers receive a fair share of the value generated by the exploitation of their creative contributions. Subject to the requirement of proportionality, such a mechanism is compatible with Articles 16 and 17 of the Charter.

Fifthly, Article 17 CDSMD does not preclude Member States from adopting a RRR for online content-sharing services. Even if Article 17 is understood as a measure of maximum harmonization, that harmonization concerns the specific liability regime applicable to such providers and their obligation to obtain authorisation. It does not harmonize the modalities by which authors and performers are remunerated for the making available of their works and

[59] CJEU, 3 September 2014, C-201/13, *Deckmyn*, pt 19; CJEU, 21 October 2010, C-467/08, *Padawan*, pt 32.

performances, which are still governed by Article 18 CDSMD that allows some flexibility, including the adoption of a RRR, to Member States.

Accordingly, EU copyright law permits Member States to provide, in national law, for a RRR benefiting authors and performers in relation to streaming services and OCSSPs.

Drafting committee: Valérie-Laure Benabou, Séverine Dusollier, Christophe Geiger and Martin Senftleben.

Signatories :

Prof. Valérie Laure Benabou, Professor, Université Paris Saclay / UVSQ, France

Prof. Lionel Bently, Professor of Intellectual Property Law, University of Cambridge, United Kingdom

Prof. Estelle Derclaye, Professor of Intellectual Property Law, University of Nottingham, United Kingdom

Prof. Thomas Dreier, Emeritus Professor, Karlsruhe Institute of Technology (KIT), Germany

Prof. Séverine Dusollier, Professor, Sciences Po Paris, France

Prof. Christophe Geiger, Professor of Intellectual Property Law, Luiss Guido Carli University, Rome, Italy

Prof. Jonathan Griffiths, Professor of Intellectual Property Law, Queen Mary, University of London, United Kingdom

Prof. Dr. Reto Hilty, Emeritus Director of Max Planck Institute for Innovation and Competition, Munich, Germany

Prof. P. Bernt Hugenholtz, Emeritus Professor of Law, University of Amsterdam, Netherlands

Prof. Martin Husovec, Associate Professor, London School of Economics and Political Science (LSE), LSE Law School, United Kingdom

Prof. Marie-Christine Janssens, Emeritus Professor, KULeuven, Belgium

Prof. Martin Kretschmer, Professor of Intellectual Property Law, University of Glasgow and Director, CREATe, United Kingdom

Prof. Thomas Margoni, Research Professor of Intellectual Property Law, Centre for IT & IP Law (CiTiP), KU Leuven, Belgium

Prof. Axel Metzger, Professor of Civil and Intellectual Property Law, Humboldt-Universität, Berlin, Germany

Prof. Péter Mezei, Professor, University of Szeged, Hungary; Adjunct Professor (dosentti), University of Turku, Finland

Prof. João Pedro Quintais, Associate Professor, University of Amsterdam, Institute for Information Law (IViR), Netherlands

Prof. Martin Senftleben, Professor of Intellectual Property Law and Director of the Institute for Information Law (IViR), University of Amsterdam, Netherlands

Prof. Caterina Sganga, Professor of Comparative Private Law, Scuola Superiore Sant'Anna (Pisa), Italy

Prof. Tatiana Eleni Synodinou, Professor of Private and Commercial Law, University of Cyprus, Cyprus

Prof. Mireille van Eechoud, Professor of Information Law, Institute for Information Law (IViR), University of Amsterdam, Netherlands