

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

Abstract

Directive (EU) 2019/790 of 17 April 2019 on Copyright and related rights in the Digital Single Market [CDSM Directive] has taken a significant step towards improving fair remuneration of Authors and Performers across the EU, by establishing a set of harmonized mandatory principles and rights to strengthen their contractual position. Now, it is up to Member States to complete this job by implementing them in national laws.

Member States must ensure that Authors and Performers effectively obtain fair remuneration for the exploitation of their works and performances. To that end, Member States must rely on a variety of mechanisms at their disposal. Statutory contract rules (already existing in most national laws) are necessary, but not enough. Sectorial collective bargaining, where available, may help define minimum remuneration schemes as well as other rules for the enforcement of the transparency, contractual adjustment, alternative resolution and revocation provisions mandated by the CDSM Directive. However, conditions for a successful negotiation and enforcement of collective bargaining agreements are only a reality in a handful of countries and for specific sectors and, even then, with a limited scope (affiliated members and new productions).

Statutory residual remuneration rights, granted by law as unwaivable (and inalienable) rights to receive remuneration subject to collective management (mandatorily, if necessary) and paid by users/licensees remain the best mechanism to secure effective fair remuneration for Authors and Performers, especially in the audiovisual and music sectors. Residual remuneration rights, retained by Authors and Performers after transferring their exclusive rights to producers, are in compliance with EU acquis and international instruments. They neither “duplicate” the transferred exclusive right nor “substitute” it for a statutory license. Residual remuneration rights are “merely” a statutory mechanism to secure that Authors and Performers receive fair remuneration for the transfer of their exclusive rights to Producers, especially when dealing with specific means of exploitation which - due to contractual and/or factual circumstances - are not conducive to provide fair remuneration for them.

The principle of fair remuneration in Art.18 CDSM not only confirms the important role of national legislators in securing that goal, but obliges them to explore and implement the full potential of these several mechanisms, adjusting them to different sectors as necessary. National legislators must now successfully complete the important task started by the Directive.

Sumario

La Directiva (UE) 2019/790, de 17 de abril de 2019, sobre derechos de autor y derechos afines en el mercado único digital [Directiva CDSM] ha dado un paso significativo hacia la mejora de la remuneración equitativa de autores y artistas

intérpretes o ejecutantes en toda la UE, al establecer un conjunto de principios obligatorios armonizados y de derechos para fortalecer su posición contractual. Ahora, corresponde a los Estados miembros completar este trabajo, implementándolos en las leyes nacionales.

Los Estados miembros deben garantizar que los autores y artistas intérpretes o ejecutantes obtengan efectivamente una remuneración equitativa por la explotación de sus obras y actuaciones. A tal fin, los Estados miembros cuentan con una variedad de mecanismos a su disposición. Las normas contractuales (que ya existen en la mayoría de las leyes nacionales) son necesarias, pero no suficientes. La negociación colectiva sectorial, cuando esté disponible, puede ayudar a definir esquemas de remuneración mínima, así como otras reglas para hacer cumplir las disposiciones de transparencia, ajuste contractual, resolución alternativa y revocación exigidas por la Directiva CDSM. Sin embargo, las condiciones para una negociación y ejecución exitosa de los convenios colectivos son solo una realidad en unos pocos países y para sectores específicos y, aun así, con alcance limitado (sólo en beneficio de afiliados y de nuevas producciones).

Los derechos de remuneración residual otorgados por ley como derechos irrenunciables (e inalienables) a recibir remuneración sujeta a gestión colectiva (obligatoriamente, si es necesario) y abonada por los usuarios / licenciatarios siguen siendo el mejor mecanismo para asegurar una remuneración justa y efectiva para los autores y artistas intérpretes o ejecutantes, especialmente en los sectores audiovisual y musical. Los derechos de remuneración residual, retenidos por los autores y los artistas intérpretes o ejecutantes al ceder sus derechos exclusivos a los productores, cumplen con el acervo de la UE y los instrumentos internacionales. No “duplican” el derecho exclusivo transferido ni lo “sustituyen” por una licencia legal. Los derechos de remuneración residual son “meramente” un mecanismo legal para asegurar que Autores e Intérpretes reciban una remuneración justa por la cesión de sus derechos exclusivos a los Productores, especialmente cuando se trata de medios de explotación que, debido a circunstancias contractuales y / o del mercado, no son propicios para proporcionar la debida remuneración justa.

El principio de remuneración justa en el artículo 18 CDSM no solo confirma el importante papel de los legisladores nacionales para lograr ese objetivo, sino que les obliga a explorar e implementar todo el potencial de estos diversos mecanismos, ajustándolos a los diferentes sectores según sea necesario. Corresponde ahora a los legisladores nacionales completar con éxito la importante labor iniciada por la Directiva.

Título: *El principio de remuneración adecuada y proporcionada de Autores y Artistas en el Art.18 Directiva sobre Derecho de Autor en el Mercado Único Digital: Algunas ideas para la implementación nacional.*

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1. Introduction*

Authors and Performers¹ often fail to obtain *fair* remuneration for the exploitation of their works and performances. Remuneration of Authors and Performers substantially relies on the contracts they sign to transfer² their exclusive rights to producers, publishers and other contractual counterparts for the exploitation of their works and performances. Usually being the weaker party in any contractual agreement, they tend to assign their exclusive rights to producers in exchange for a single payment (or a lump-sum amount); further remuneration fees are rarely contractually agreed.³ Full contractual “buy-outs” (transferring all rights and means of exploitation) in exchange for a lump-sum, are often the norm in some sectors.⁴ The problem is especially acute in the audiovisual and musical sectors. **Authors and Performers are cut-off from the exploitation chain**, failing to obtain any further (let alone, proportional) remuneration for the whole chain of exploitation. Having little information (if any) regarding exploitation revenues and out of fear of being blacklisted, they are unwilling to challenge the agreed contractual terms. In recent years, the problem is becoming more apparent, as growing digital markets generate new economic revenues, but Authors and Performers do not benefit from them.

The problem is **especially acute for Performers** because, unlike some Authors (in some countries) who contractually retain some exclusive rights to be entrusted to CMOs for

* Contact details: Raquel Xalabarder, rxalabarder@uoc.edu.

¹ The term Author usually refers to the person who creates the work; while the term Performer includes any person who acts, sings, delivers, declaims, plays or otherwise performs literary or artistic works (including works of folklore), as well as – in some countries- other performers. Authors and Performers tend to be protected under separate instruments: Authors’ rights (Copyright) laws and Neighbouring (related) rights laws. See WIPO (1980) Glossary of Terms of the Law of Copyright and Neighbouring Rights (WIPO PUBLICATION No. 816 (EFS) ## 17 and 179; available at https://www.wipo.int/edocs/pubdocs/es/wipo_pub_816.pdf

² In this paper, we will use the term “transfer” to include any form of transfer, assignment or license of exclusive rights towards producers, as applicable according to national laws and contractual forms.

³ See IVIR (2015) *Remuneration of Authors...*, p.94: “Only a few authors and performers with substantial bargaining power will be able to secure proportional remuneration for the transfer of their rights, with the majority transferring their rights in return for a lump-sum payment.”

⁴ Several reasons may explain this practice: the existence of multiple creative contributions, the difficulty to foresee means of exploitation and territorial markets that will be available in the future, and the need to identify production costs and calculate investment recoupment.

remuneration,⁵ Performers tend to exclusively rely on the contractually agreed remuneration.⁶ Despite facing common challenges, this paper will focus on Performers.⁷

Copyright contract law has never been a topic for international instruments, primarily aimed at securing a minimum ground of protection to Authors and Performers beyond their countries of origin. So far, the EU *acquis* had not paid much attention to copyright contractual issues, either. Leaving aside a few very specific measures,⁸ copyright contract law has never been addressed – on general terms – by EU *acquis*. Several reasons may explain the lack of EU harmonization in this area. On the one hand, it was generally agreed that contractual issues did not fundamentally affect the functioning of the internal market and that its harmonization was either unnecessary or premature.⁹ On the other, not all national laws are equally sensitive about the need to regulate contracts; many of them strictly relying on contractual freedom to secure fair remuneration of Authors and Performers.

However, Directive (EU) 2019/790, adopted by the European Parliament and the Council on 17 April 2019, on copyright and related rights in the Digital Single Market [hereinafter, CDSM] has taken a first and promising step towards a deeper harmonisation of EU copyright law, by adopting a few general rules applicable to copyright and related rights contracts. The goal is clear: to strengthen the contractual position of Authors and Performers so as to help them obtain appropriate remuneration for the exploitation of their works and performances.

⁵ Most notably, music composers (authors) in audiovisual and phonogram productions have traditionally entrusted the exercise of some exclusive rights to collective management, after contractually retaining them from the transfer of exclusive rights to audiovisual and phonogram producers. This may be explained for historical reasons as well as by the specific strength of music composers' CMOs in certain countries (i.e. France). More and more countries secure for audiovisual authors, at least for directors and writers, statutory remuneration rights to be paid directly by licensees and managed by CMOs. See XALABARDER (2018) and CISAC (2018) *AV International Legal Study*.

⁶ See AEPO-ARTIS (2018) *Performers' Rights*, p.8: "In practice, ... the producer (usually a record company or TV/film studio) will insist that performers transfer all of their exclusive rights to them before they sign a contract with the performer. Accordingly, at the time that the performer makes a recording or gives a performance, he/she is entirely reliant on the terms of the contract that he/she has signed with the producer. Such contracts usually make provision for the payment to the performer of an overall lump sum, which is often derisory or sometimes even without remuneration. Due to these commercial realities, very few performers' collective management organisations ("CMOs") are able to exercise exclusive rights on behalf of performers."

⁷ For a Study regarding the situation of Audiovisual Authors, see CISAC (2018) *AV International Legal Study*.

⁸ The unwaivable and equitable remuneration right retained by Authors and Performers after transferring their rental right to Producers (Art.5 RLD) and two specific rights granted to phonogram Performers regarding the extension of the term of protection for phonograms (introduced by Directive 2011/77/EU, of 27 September 2011, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights): an unwaivable right to terminate a contract with a phonogram producer, for the extended term, complying with a few cumulative conditions (the "use it or lose it" clause, Art. 3(2a) Directive 2006/116/EC), and the right to request from phonogram producers "any information which may be necessary in order to secure payment" of 20% of revenues set as supplementary remuneration during the extended protection term (Art.3(2.c) Directive 2006/116/EC).

⁹ See, for instance, EU Commission's (1988) *Green Paper on Copyright and the Challenge of Technology*, COM(88)172 final (07.06.1988) and Communication on Management of Copyright and Related Rights in the Internal Market, COM(2004) 261final (16.04.2004).

A few rules dealing with contractual issues may be identified across national laws; these rules vary from one country to another, subject to a variety of conditions and applicable to different sectors.¹⁰ For instance, in some countries, the principle that Authors and Performers are entitled to receive fair remuneration for the exploitation of their works and performances is accompanied by a rule of “proportional” remuneration in the exploitation revenues, lump-sum payments being allowed only in specific cases. In some sectors (most notably, publishing contracts), Authors are granted a right to revise the agreed remuneration when it becomes “disproportionate” to the proceeds from exploitation (commonly known as “best-seller clause”). Often, the assignment of rights for unknown or unforeseen means of exploitation is declared to be null and void, or allowed only as long as proportional remuneration has been agreed (e.g. Germany). A principle of restrictive interpretation of licences or transfers is generally set by law or decided by case law.¹¹ And last, not least, some national laws provide for detailed rules regarding information on exploitation and revenues (notably for publishing contracts) and the possibility to terminate transfers for a variety of reasons such as lack of exploitation.

In practice, these well-intended provisions have a **very limited impact on improving remuneration of Authors and Performers**, at large.¹² Insufficient legislative solutions ensuring contractual transparency and a weaker position of Authors and Performers in bargaining and enforcing their contracts often result in full contractual “buy-outs” (transferring all means of exploitation) that Authors and Performers “are unwilling to challenge ...for fear of possible consequences”.¹³ In recent years, this is becoming more apparent, as growing digital markets generate new economic revenues, but Authors and Performers fail to benefit from them.¹⁴

The Public consultation on the review of the EU copyright rules conducted by the EU Commission in 2014, identified the need for a deeper harmonization in this area. Authors and Performers do not question the need for the transfer of their rights ... but “they do argue that their weaker bargaining position in the market often leads to unfair contractual terms in their initial contracts... and see a need for EU intervention in this area.”¹⁵

¹⁰ See also CRIDS/KEA (2014) *Contractual Arrangements*, IVIR (2015) *Remuneration of Authors*, BENTLY / KRETSCHMER (2017) *Strengthening the Position*, and GUIBAULT / HUGENHOLTZ (2002) *Study on the conditions applicable to contracts*. A valuable source of information may be found in the national reports prepared for the 2015 ALAI Bonn Congress available at <https://www.alai-deutschland.de/bonner-konferenz-2015.html> [last accessed 20/08/2020]

¹¹ “Courts tend to construe implied terms of a license narrowly, as covering only acts that are necessary to give business efficacy to the agreement.” See IVIR (2015) *Remuneration of Authors*, p.35.

¹² For an overview of the problem, see EU Commission Staff Working Document (2016), *Impact Assessment on the modernization of EU copyright rules*, SWD(2016) 301 final, 14.09.2016, *Accompanying the Proposal for a Directive on Copyright in the Digital Single Market*, COM(2016) 593 Final (14.09.2016), p.173-177; available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF> [last accessed 20/08/2020] [hereinafter, Impact Assessment]

¹³ *Ibid*, p.176.

¹⁴ See IVIR (2016) *Remuneration of Authors of Books*; IVIR (2015) *Remuneration of Authors and Performers*; CRIDS/KEA (2014) *Contractual Arrangements*; AEPO-ARTIS (2018) *Performers’ Rights*; SAA (2015) *White Paper*.

¹⁵ See *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules* (July 2014), p.78-79; available at <https://ec.europa.eu/digital-single-market/en/news/modernisation-eu-copyright-rules-useful-documents>.

As already reminded by Recital 10 ISD “if authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work.” However, as acknowledged by the EU Parliament, “the ISD was not successful in securing appropriate remuneration for the majority of authors and performers.”¹⁶ Copyright laws should do more and better to protect the interests of Authors and Performers in their contractual assignment / transfer of exploitation rights.

The **EU Digital Single Market initiative** seemed like the perfect vehicle to tackle this issue. Seeking to achieve “a well-functioning market place for copyright where rightholders can set licensing terms and negotiate on a fair basis with those distributing their content,”¹⁷ the CDSM Directive addresses two distinctive “value-gaps”: one resulting from “problems faced ‘upstream’ by rightholders when trying to license their content to online service providers”, another from problems “faced ‘downstream’ by creators when negotiating contracts to transfer rights for the exploitation of their works (fair remuneration in contracts of authors and performers).”¹⁸ Interestingly, the label “value-gap” has been repeatedly used to refer only to the former set of problems (with online service providers) leading to the much-debated Art.17 CDSM, while the latter measures were referred to as “fair remuneration in contracts.”

The opportunity for the EU to address the issue of contractual fair remuneration was justified on the grounds of its “significant European dimension”: to the extent that production and exploitation of works and performances in the EU market takes place across-borders, differences existing in national laws may create legal uncertainty.

Title IV, Chapter 3 CDSM Directive introduces **five mandatory provisions aimed at securing a “Fair remuneration in exploitation contracts of authors and performers”**: a principle of appropriate and proportionate remuneration (Art.18), transparency obligations (Art.19), a contract adjustment mechanism (Art.20), a voluntary dispute resolution mechanism as an alternative to judicial proceedings (Art.21) and a revocation right (Art.22). This paper will focus only on the principle of appropriate and proportionate remuneration (Art.18 CDSM),¹⁹ to assess options for its implementation into national law.

¹⁶ EPSC (2015) *Review of the EU copyright framework - The implementation, application and effects of the “InfoSoc” Directive (2001/29/EC) and of its related instruments*, p.14; available at <https://op.europa.eu/en/publication-detail/-/publication/a6fa5899-7ed0-11e5-b8b7-01aa75ed71a1/language-en>

¹⁷ See (2016) *Impact Assessment*, p.10.

¹⁸ Ibid.

¹⁹ Other papers examine the implementation of the remaining fair remuneration provisions. See, for instance, ECS (2020), *Comment of the European Copyright Society Addressing selected Aspects on the Implementation of Articles 18-23 of the Directive on Copyright in the Digital Single Market*: <https://europeancopyrightsociety.org/>; DUSOLLIER, S. (2020) «The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition», *Common Market Law Review* (upcoming); MINERO ALEJANDRE, G. (2020) «La armonización europea de la obligación de remuneración equitativa y proporcionada de autores y artistas por la cesión de derechos como paso “sine qua non” para su verdadera tutela efectiva en el territorio europeo» *Cuadernos jurídicos Instituto Autor – 15 aniversario*. <http://www.institutoautor.org/es-ES/SitePages/corp-estapasando.aspx>; SAIZ GARCÍA / EVANGELIO ROCA, dir. (2019), *Propiedad Intelectual y Mercado Único Digital Europeo*, tirant lo blanch,

Despite all the turmoil and debate generated by the Directive, these fair remuneration provisions were among the less controversial ones. This fact does not make them less important. On the contrary, the fate of Authors and Performers and their chances of receiving effective fair remuneration in current and upcoming exploitation markets will be decided by the specific mechanisms and strategies adopted by EU Member States when implementing these mandatory provisions into their national laws.

The five fair remuneration provisions form an EU *acquis* “contractual corpus,” and must be implemented, interpreted and enforced as such. They constitute a “holistic” system placed in the hands of national legislators to strengthen the contractual position of Authors and Performers and to effectively secure fair remuneration for them. Among them, the principle of fair remuneration in Art.18 CDSM stands alone.

These four contractual obligations in Title IV, Chapter 3 CDSM are *ex post* measures²⁰ (to be enforced once the contract has been agreed), aimed at solving specific problems that Authors and Performers may face in their relationship with contractual counterparts (that is, Producers and Publishers). Art.18 CDSM, instead, is mainly an *ex-ante* mechanism with enormous depth and potential: it ultimately justifies all four contractual rights/obligations while, at the same time, is meant to inspire and guide the negotiation and drafting of contracts transferring exploitation rights, as well as their subsequent interpretation and enforcement. Most importantly, Art.18 CDSM serves as a “beacon” to guide national legislators, offering the necessary flexibility to complete and to “supplement” the national implementation of Arts. 19 to 22 CDSM.

The fair remuneration provisions in Title IV, Chapter 3 CDSM should be seen as “communicating vessels”: the further national legislators make use of the full potential allowed under Art.18, relying and developing “other mechanisms” (such as statutory remuneration rights) to secure fair remuneration for Authors and Performers, the less need there will be to rely on the other *ex-post* mechanisms, most notably the contract adjustment and revocation rights.

For instance, the principle of fair remuneration in Art.18 CDSM must guide the implementation of the adjustment mechanism in Art.20 CDSM (commonly referred to as the “best-seller clause”) when the agreed remuneration is “disproportionately low” compared to all the subsequent relevant revenues derived from the exploitation.^{21,22} This disproportion may happen at any time

Valencia; XALABARDER, R. (2020), «The fair remuneration of authors and performers», *Revue Internationale du Droit d'Auteur – RIDA* vol.264 (April 2020) pp.129-162.

²⁰ See LUCAS-SCHLOETTER (2017) p.898.

²¹ According to Art.20 CDSM, Authors and Performers may request additional remuneration “when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.” The name is misleading since not all “best-sellers” would give rise to this contractual adjustment mechanism and, *vice versa*, the adjustment may well apply to works and performances that are not “best-sellers.”

²² Member States have some leeway to define the specifics to implement this obligation. Furthermore, according to the principle of subsidiarity, nothing prevents Member States from implementing further “contractual adjustments” other than a claim for an additional remuneration (Art.20 CDSM), such as a claim to revise the amount and/or format of remuneration (i.e., from a lump-sum to a percentual share); see SAIZ GARCÍA (2019) p.404.

and in any format,²³ but pragmatical reasons and fairness concerns might justify that in some specific areas the contractual adjustment mechanism does not apply, or does so, subject to very specific conditions. This may be the case of complex productions with multiple contributions, such as computer programs (which are already excluded by Art.23(2) CDSM),²⁴ but also movies, phonograms, databases or some collective works, where an individual exercise of the contractual adjustment right might jeopardize the whole exploitation of the production and prejudice the interests of other right-owners. In these cases, the implementation of any mechanisms referred to in Art.18(2) CDSM may help secure an alternative means of fair remuneration: be it, for instance, under *sectorial collective bargained agreements* (where available) offering a “comparable mechanism” to adjust disproportionately low contractual remunerations, or by directly implementing *statutory remuneration rights* securing fair remuneration, on top of what was agreed in production contracts and avoiding any need for contractual adjustment.

In summary, the “mechanisms” allowed under Art.18 CDSM may counterbalance any necessary derogations or restrictions of the contractual obligations provided for in Arts.19-22 CDSM, in order to secure effective fair remuneration for Authors and Performers.

A similar example of this “balancing relationship” between *ex-ante* and *ex-post* measures, may be found in Directive 2011/77/EU, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights:²⁵ the extension of the term of protection of phonogram performances was accompanied by either a revocation right for lack of exploitation²⁶ (an unwaivable right to terminate the contract with a phonogram producer, so that the rights for the extended term revert to the Performer) or, alternatively, a statutory remuneration scheme (a supplementary remuneration of 20% of revenues) set for the extended term of protection. This is not meant to advise national legislators to implement specific percentual remuneration fees in national laws; quite the contrary, to the extent that freedom of contract must be safeguarded, national implementations should refrain from setting specific remuneration fees and rather leave them for individual negotiation and/or sectorial collective bargaining, as available. Instead, the comment above is only meant as an example of **the inherent relationship** between the provisions in Arts.18-22 CDSM and of how legislative action must make use of them all as **an integrated whole**.

²³ See Recital 78 CDSM: “Certain contracts for the exploitation of rights are of long duration, offering few opportunities for authors and performers to renegotiate them with their contractual counterparts or their successors in title in the event that the economic value of the rights turns out to be significantly higher than initially estimated.”

²⁴ According to Art.23(2) DSDM: “Member States shall provide that Articles 18 to 22 of this Directive do not apply to authors of a computer program within the meaning of Article 2 of Directive 2009/24/EC.”

²⁵ In this example, an alternative choice between a contractual revocation right and a statutory remuneration right for the extended term of protection.

²⁶ Complying with a few cumulative conditions, such as the “use it or lose it” clause, see Art. 3(2a) Directive 2006/116/EC.

2. Art.18 CDSM: An Obligation to Secure Appropriate and Proportionate Remuneration for Authors and Performers

Art.18 CDSM states:

Article 18 Principle of appropriate and proportionate remuneration

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

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

A binding provision (an obligation) to secure fair remuneration of Authors and Performers, mandatorily imposed on Member States, but leaving plenty of options and mechanisms for its implementation into national laws.

According to Recital 73 CDSM Directive: “Member States should be free to implement the principle of appropriate and proportionate remuneration through *different existing or newly introduced mechanisms*, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.” (emphasis added)

Art.18 made a rather late arrival to the CDSM. Despite being there “in spirit” from the very beginning, the principle of fair remuneration was not formally included among the provisions set in the initial Commission’s Directive proposal.

The Impact Assessment on the modernisation of EU copyright rules which accompanied the proposal for a Directive on Copyright in the Digital Single Market,²⁷ focused on the **lack of transparency**²⁸ and the need for a more effective monitoring of exploitation revenues: Authors and Performers are “unable to effectively monitor the use, measure the commercial success and assess the economic value of their works”²⁹ and are unwilling to challenge these contractual

²⁷ See EU Commission Staff Working Document (2016), *Impact Assessment on the modernization of EU copyright rules*, SWD(2016) 301 final, 14.09.2016, *Accompanying the Proposal for a Directive on Copyright in the Digital Single Market*, COM(2016) 593 Final (14.09.2016); available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF> [hereinafter, Impact Assessment]

²⁸ See (2016) *Impact Assessment*, p.173: “Authors and performers face a lack of transparency in their contractual relationships as to the exploitation of their works and performances and as to what remuneration is owed for the exploitation.”

Lack of transparency is more poignant when based on an “information asymmetry” (the information required to ensure transparency is, in fact available to publishers and producers, but not shared with authors and performers); see *ibid* p.175-176. Most national laws impose transparency obligations but they are either too generic or only applicable to specific sectors.

²⁹ See (2016) *Impact Assessment*, p.176.

terms for fear of possible consequences.³⁰ Presented in these terms, the Commission explained that “transparency measures would rebalance contractual relationships between creators and their contractual counterparties by providing the creators with the information necessary to assess whether their remuneration is appropriate in relation to the economic value of their works and if the remuneration is deemed inappropriate, a legal mechanism in order to seek out a renegotiation of their contracts.”³¹ Accordingly, the initial Draft released by the EU Commission on September 14th 2016, only contained three provisions: transparency obligations (Art.14, current Art.19), a contract adjustment mechanism (Art.15, current Art.20), commonly known as “best-seller clause,” and a voluntary dispute resolution mechanism as an alternative to judicial proceedings (Art.16, current Art.21).

However, the EU Parliament soon realized that these provisions alone (no matter how good) would not suffice to effectively secure fair remuneration for Authors and Performers. Reinforcement came with the principle of appropriate and proportionate remuneration (Art.18) and a revocation right (Art.22), introduced by the Parliament in its first reading adopted on Sept.2018. It was the result of a long and winding parliamentary road.

The Parliament’s *Draft report* prepared on March 2017 by rapporteur Comodini, for the Committee on Legal Affairs (JURI) made a shy first attempt to introduce a general principle of “equitable remuneration”, as an amendment to the “best-seller” adjustment provision, with the following text: “*Member States shall ensure that authors and performers are entitled to equitable remuneration for the exploitation of their works.*” The amendment was justified to “recognise their right to an equitable remuneration for the exploitation of their works.”³²

The *Final report* drafted by rapporteur Voss, submitted to the Parliament in June 2018³³ and adopted in September 2018,³⁴ proposed (Amendment 80) its introduction as a self-standing principle, with more complete wording:

Amendment 80: Principle of fair and proportionate remuneration

1. Member States shall ensure that authors and performers receive fair and proportionate remuneration for the exploitation of their works and other subject matter, including for their online exploitation. This may be achieved in each sector through a combination of

³⁰ See (2016) *Impact Assessment*, p.175-176.

³¹ See (2016) *Impact Assessment*, p.190.

³² See Amendment 63, DRAFT REPORT on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), drafted on behalf of the Committee on Legal Affairs by Rapporteur: Therese Comodini Cachia (10.03.2017).

³³ 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(2016)0593 – C8-0383/2016 – 2016/0280(COD)), presented on behalf of the Committee on Legal Affairs by Rapporteur Axel Voss (29.06.2018).

³⁴ 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(2016)0593 – C8-0383/2016 – 2016/0280(COD)), adopted by the European Parliament on 12 September 2018 (Ordinary legislative procedure: first reading).

agreements, including collective bargaining agreements, and statutory remuneration mechanisms.

2. Paragraph 1 shall not apply where an author or performer grants a non-exclusive usage right for the benefit of all users free of charge.

3. Member States shall take account of the specificities of each sector in encouraging the proportionate remuneration for rights granted by authors and performers.

4. Contracts shall specify the remuneration applicable to each mode of exploitation. (emphasis added)

Despite the principle of fair remuneration proposed by the Parliament did not seem to be among the list of challenged provisions to be further discussed by the EU Council, Parliament and Commission (at the so called “Trialogue”), the finally adopted text of Art.18 CDSM slightly differs from it.³⁵ Despite its formal differences, Art.18 CDSM responds the exact same goal and scope proposed by the Parliament’s Amendment 80. We will have the opportunity to revisit the Parliament’s text in the following chapters, since it may provide significant information to better understand the principle of fair remuneration in Art.18 CDSM.

3. Art.18(1) CDSM: The Principle of Fair Remuneration of Authors and Performers

Art.18(1) CDSM introduces an EU principle aimed at securing “appropriate and proportionate remuneration” for Authors and Performers and obliges Member States to implement it in their national laws.

Article 18 Principle of appropriate and proportionate remuneration

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

In order to better assess its scope, we will examine its several elements separately.

3.1. Remuneration for the license or transfer of exclusive rights of exploitation

It is a remuneration, **not a compensation**. Although the terms remuneration and compensation are often used interchangeably by national and international legislators, the name should matter.³⁶ A compensation is directed to “compensate ... adequately” damage caused to the right

³⁵ Necessary compromises between the Council and the Parliament, under the “double reading process” may account for it.

³⁶ For instance, see the express distinction between compensation and remuneration regarding limitations for private copying and public lending in Recital (13) Music Online Directive: “This Directive does not affect the possibility for Member States to determine by law, by regulation or by any other specific mechanism to that effect, rightholders’ fair compensation for exceptions or limitations to the reproduction right provided

holder (i.e., in the case of a limitation of an exclusive right).³⁷ Instead, a remuneration is not restricted to compensate any damages. The remuneration is due for the exploitation of the work or performance, usually conducted by Producers and Publishers (directly or indirectly, through other rightsholders), on the basis of the exercise of Authors' and Performers' exclusive rights.

Despite Art.18 CDSM is meant to apply to **EU-harmonized exclusive rights**,³⁸ Member States may choose – based on the principle of subsidiarity and as long as it does not interfere with the functioning of the internal market - to extend the principle of fair remuneration beyond its mandate, to also cover the transfer of other non-harmonized exploitation rights. If only for the sake of national law internal coherence, Member States would be expected to do so.

3.2. Appropriate and Proportionate

EU Parliament's Amendment 80 referred to "fair and proportionate remuneration;" the final text in the adopted Directive is "appropriate and proportionate."

a. *Appropriate*

We do not know the reasons behind this compromise, one possible explanation might be that in EU *acquis* the term "fair" is usually linked to "compensation" (e.g. fair compensation in reprography and private copying in Art.5.2(a) and (b) ISD), while the meaning of "equitable" is linked to "remuneration" (e.g. the residual equitable remuneration right in Art.5.3 RLD) and is commonly used in international instruments (e.g. Art.15 WPPT and Art.12 Beijing Treaty). Instead, the term "appropriate remuneration" was recently used in the CRMD 2014/26/EU regarding licensing fees. From an EU *acquis* perspective, since Art.18 CDSM refers to remuneration (not compensation) and provides for a general principle that goes beyond statutory remuneration rights, it makes sense that "appropriate" was retained, instead of "fair" or "equitable." At the end of the day, however, "fair" and "appropriate" should mean substantially the same.³⁹

According to Recital 73 CDSM, "appropriate and proportionate" should relate "to the actual *or* potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other

for in Directive 2001/29/EC ... and rightholders' *remuneration* for derogations from the exclusive right in respect of public lending provided for in Directive 2006/115/EC ... applicable in their territory as well as the conditions applicable for their collection."

³⁷ Recital 35 ISD: "fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question."

³⁸ See Recital 72 CDSM refers to "the rights harmonised under Union law" (which makes perfect sense from an EU *acquis* perspective).

³⁹ Interestingly, the Finish version of the CDSM seems to substitute "appropriate" for "fair" and retain "proportionate" remuneration (*Asianmukaisen ja oikeasuhteisen korvauksen periaate*).

circumstances of the case, such as market practices or the actual exploitation of the work.”⁴⁰ It is important to bear in mind that the use of “or” should not be read as a disjunctive, as offering an alternative choice, but rather as cumulative in the sense of inclusion: actual *and* potential economic value.

Art.16.2 CRMD establishes the following criteria to set an “appropriate remuneration”:

“...Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.”⁴¹

Let’s not forget that these criteria are binding for Member States and apply to any remunerations negotiated by CMOs for all categories of works and rights.

Scholarly literature has also been assessing these concepts. For instance, when analysing “equitable remuneration” under Art.15 WPPT, von Lewinski states:

“what is considered ‘just’, ‘fair’ or ‘reasonable’ may not only be left to the determination of the debtor of the remuneration. ... the frequency and intensity of use must be taken into account. The ‘equitable’ amount may be established according to different criteria, such as in relation to the cost of living, advertising, subscription income..., profits ...; the amounts may also be considered in relation to the amounts paid under licenses to authors of works, or to those paid to performers and phonogram producers in other countries.”⁴²

Referring to German law, Lucas-Schloetter explains:

“According to German copyright law for example, a remuneration is deemed *appropriate* if it conforms to what is regarded as *customary and fair* in business relations, having regard to the nature and scope of the rights granted, in particular the duration (Dauer), frequency (Häufigkeit), extent (Ausmaß) and moment (Zeitpunkt). If the rights granted are unlimited in time and scope, a lump sum payment will usually not be sufficient.”⁴³

Thus, “appropriate” may require calculating the remuneration on the basis of revenues generated by the exploitation and taking into account the extent of the use made and the

⁴⁰ Similarly, but less detailed, Recital 17 SCD 93/83/EC, explains that in determining the fee for the license cleared at the country of uplink, “the parties should take account of all aspects of the broadcast such as the actual audience, the potential audience and the language version”.

⁴¹ Art.16.2 CRMD.

⁴² See REINBOTHE / VON LEWINSKI #8.15.19-21; see also *ibid* #9.12.36, referring to the concept of “equitable remuneration” under Art.12 Beijing Treaty on Audiovisual Performances.

⁴³ See LUCAS-SCHLOETTER (2017) p. 898

contribution of each author or performer to the whole work or recording.⁴⁴ “Appropriate” would also require that the remuneration is adjusted to cultural and economic circumstances of each country and market, and to the different markets and means of exploitation. Setting a separate remuneration for each exploitation right transferred and means of exploitation may also contribute to achieving an “appropriate and proportionate” remuneration. Which leads us to the second adjective.

b. Proportionate

Art.18 CDSM may be clearly intended to ban “buy-out” contracts, in general. A “buy-out” is a contractual transfer or assignment of all exploitation rights in exchange for a lump-sum remuneration. This is a practice often imposed on Authors and Performers by stronger contractual parties and repeatedly considered by the Commission’s *Impact Assessment* accompanying the Directive proposal. Already in 2012, the EU Parliament stressed that “it is essential to guarantee authors and performers remuneration that is *fair and proportional to all forms of exploitation of their works*, especially online exploitation, and therefore calls upon the Member States to *ban buyout contracts*, which contradict this principle.”⁴⁵

Yet, aiming at banning “buy-outs” as a general practice does not mean that transfers of all exploitation rights and “lump-sums” should be banned, too. In specific cases, a transfer of all exploitation rights may be necessary to allow for the exploitation of the work or performance, but it should not be the rule: the scope of a transfer should be restricted to what is strictly necessary. Similarly, as confirmed by Recital 73 CDSM: “(a) lump sum payment can also constitute *proportionate remuneration* but it should not be the rule.” At least, it should not be the only means to obtain remuneration. Similarly, a transfer of *all* exploitation rights may be necessary in certain circumstances and productions, but Authors and Performers should not be forced to do so in exchange for one *only* payment. This is where other mechanisms (as reminded by Art.18.2 CDSM), such as *statutory residual remuneration rights*, should be available (see *infra* IV.3).

Sometimes, lump-sums may be the best way to secure “appropriate and proportionate remuneration.”⁴⁶ Lump-sums are often applied by national laws to remunerate for the transfer of rights in commissioned works, or when exploitation circumstances make it difficult to identify revenues for the work or performance, or when the work is “accessory” or a small contribution, or in the case of commissioned translations, etc. Member States are entitled “to define specific cases for the application of lump sums, taking into account the specificities of each sector” (Recital 73 CDSM); but they are not obliged to do so or to do so in an exhaustive manner.

A Member State may, for instance, prefer to introduce the general principle of “appropriate and proportionate” remuneration in its national law, and leave it for **sectorial collective bargaining agreements and/or market customs** to agree on other (lump-sum) remuneration formats (see

⁴⁴ This is also required by the proportionality element (see *infra*).

⁴⁵ See EU Parliament (2012) *Report on the online distribution*, #46

⁴⁶ See DUSOLLIER (2020) #4.3.2, p.1023: “... in some cases, a lump sum is better for the author or performer concerned due to transactions costs that a proportional share of the revenues could entail for a limited contribution...”.

infra IV.2); others may choose to identify “with caution... duly justified”⁴⁷ specific cases where lump-sums are allowed. In any case, the possibility of lump-sum remunerations in specific cases, either set by national laws or agreed by sectorial collective bargaining, should not be confused with depriving authors and performers from the general principle of fair remuneration. Lump-sums (where applicable) still need to secure “appropriate and proportionate remuneration” for authors and performers.

Let’s also bear in mind that the principle of fair remuneration is not meant to disregard the fact that Authors and Performers do not usually bear any **financial production and exploitation risks**. These risks are usually born by producers and publishers and this must be necessarily taken into account when assessing what is an “appropriate and proportionate” remuneration. In many cases, where it is not certain that a work may generate any revenues from its exploitation, Authors may prefer to obtain a lump-sum payment for their contribution, rather than a percentual share in uncertain exploitation revenues. Yet, the principle in Art.18 CDSM also aims at achieving that one does not exclude the other, and that all of them are taken into account to assess what constitutes a fair (appropriate and proportionate) remuneration. Contractual freedom and a “fair balance of interests” have an important role to play in this assessment and, in identifying the best applicable mechanisms to secure that goal.

In short, “proportionate” refers to some sort of “proportionality to (the) economic value (of the work or performance)”.⁴⁸ It might be argued that “proportionate” does not necessarily mean “proportional” to revenues generated by exploitation⁴⁹ but beyond some subtle differences, both terms should bear the same meaning for purposes of this Directive. Specially so when a few official translations of the Directive formally use the word “proportional” instead of “proportionate.”⁵⁰ Ultimately, for purposes of harmonization,⁵¹ Member States must abide to a uniform interpretation of the principle of “appropriate and proportionate” remuneration, regardless of the terms used for its implementation.

3.3. License or Transfer

The provisions in Title IV - Chapter 3 CDSM will apply to any contracts (license or transfer) of exploitation rights entered by Performers as “*natural persons*” as long as done “*for the purposes*”

⁴⁷ See ECS (2020) #2.1, p.15.

⁴⁸ Ibid.

⁴⁹ Certainly, “proportionate” implies a qualitative meaning in terms of being competent, adept to achieve a goal or purpose, while “proportional” has rather a quantitative, mathematical, meaning that the former lacks. A proportional remuneration (such as a percentual share) may certainly be “appropriate and proportionate,” especially when set for specific means of exploitation that allow for an easy percentual calculation of revenues. Agreeing on a mathematically “proportional” remuneration should be the desirable outcome, as already mandated in many countries, but it should not be the only rule. For instance, scaled flat remuneration fees (and, as we said, even lump-sums) should also be allowed in specific markets and means of exploitation, as long as leading to an “appropriate and proportionate” remuneration of Authors and Performers. Again, in this endeavour, sectorial bargaining agreements may be very helpful – where available.

⁵⁰ For instance, France (Principe de rémunération appropriée et proportionnelle), Greece (Αρχή της δέουσας και αναλογικής αμοιβής), Rumania (Principiul remunerării adecvate și proporționale) and Sweden (Principen om lämplig och proportionell ersättning).

⁵¹ It is not unlikely that the CJEU will be at some point interpreting this “autonomous concept of EU law.”

of exploitation in return for remuneration.” They will also apply to contracts conducted “*through their own companies*”⁵² (Recital 72 CDSM). What is decisive is that “*those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law*” (Recital 72 CDSM).

Consequently, these provisions will not apply when Performers have licensed or transferred their rights for free, without remuneration (for instance, with a *Creative Commons* license).⁵³ Yet, the strengthening of Authors and Performers’ contractual position may indirectly cast its light also for the interpretation of licenses and transfers agreed for free (beyond the formal scope of the CDSM Directive).

They will not apply, either, when “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” (Recital 72 CDSM). Notice the word “some”: not all employment contracts are “exempted” from complying with these obligations. They will apply to employment contracts when the two conditions mentioned above are met: that is, when the transfer of rights is agreed in return for a remuneration and the Performer is in need for protection. This may be the case of many audiovisual and musical performances, delivered under employment contracts.

The principle of appropriate and proportionate remuneration applies to **any license or transfer** of exploitation rights, whether granted in **exclusive or not**,⁵⁴ and **regardless of its form**: be it by means of contracts or by means of *statutory presumptions of transfer*, such as the ones often provided for by national laws to secure that the exclusive rights in a work or performance produced by under employment (by an employee author or performer) will be transferred to the employer, unless the parties have agreed otherwise. This is very often the case in audiovisual and musical sectors. In these scenarios, Authors and Performers have little freedom to negotiate the conditions for the transfer of rights and even less freedom to intervene in the exploitation of their works and performances. It is precisely in these scenarios that other mechanisms - such as *statutory residual remuneration rights*- offer optimal results for all parties involved (see infra IV.3).

⁵² This must be construed *stricto sensu*. Collective licenses granted by CMOs and IMEs are not affected by the provisions in Title IV, Chapter 3 CDSM.

⁵³ Authors and Performers are free to grant licenses for free, including “public licenses” (see Recital 82), but this «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 licenses, notably to circumvent the protective provisions of the directive.» See ECS (2020), *Comment on Articles 18-23*, # 1.3.3.

⁵⁴ A transfer or license of rights “in exclusive” entitles the transferee/licensee to be the only one exercising these exploitation rights within the scope (territorial, means of exploitation, term) designed in the contract.

3.4. Safeguarded from contractual override

Art.18 CDSM is not expressly safeguarded against contractual override⁵⁵ by Art.23(1) CDSM.⁵⁶ However, this fact does not make it less binding and mandatory for Member States. On the one hand, because being a principle (an *ex-ante* contractual measure), it does not need to be safeguarded from contractual override. On the other, because failing a correct implementation by Member States, the principle in Art.18 CDSM – being “**unconditional and sufficiently clear and precise**” – would have a *direct effect* and might be “directly invoked” before any national courts.⁵⁷

3.5. Applicable to new and old productions

Art.18 CDSM is meant to apply, as all other provisions in the Directive, “in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021” (Art.26(1) CDSM), as well as to any new ones. Only the transparency obligation (Art.19 CDSM) will apply “as from 7 June 2022” to agreements for the licence or transfer of rights of authors and performers (Art.27 CDSM). This seems to confirm (*a contrario*) that Art.18 CDSM, as well as the other contractual obligations (namely Art.20-22 CDSM), will indeed apply to pre-existing agreements.

However, according to Art.26(2) CDSM, the Directive shall apply “without prejudice to any acts concluded and rights acquired before 7 June 2021.” This should not be construed as a derogation from the general applicable time set in Art.26(1) CDSM, to support that Arts.18, 20, 21 and 22 will only apply to new contracts and agreements concluded after that date.⁵⁸ Such an interpretation would substantially reduce the scope of the harmonising effort for several generations of Authors and Performers and, basically, render the goal to secure them fair remuneration ineffective.

In any case, as far as Art.18 CDSM, to the extent that statutory residual remuneration rights do not affect the enforcement of any pre-existing contracts transferring rights (in fact, they depend on their existence and validity – see below # 4.3),⁵⁹ it would be easy to justify that any national

⁵⁵ And according to Recital 81 CDSM, this applies to “contracts between authors, performers and their contractual counterparts, or ... agreements between those counterparts and third parties, such as non-disclosure agreements.” (Recital 81 CDSM).

⁵⁶ According to Art.23(1) CDSM, rules on transparency (Art.19 CDSM), contract adjustment mechanisms (Art.20 CDSM) and alternative dispute resolution (Art.21 CDSM) cannot be derogated by contract: “*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.*” Neither is the revocation right (Art.22 CDSM), but Member States may choose to significantly restrict its contractual derogation only to agreements based on collective bargained agreements.

⁵⁷ The *principle of direct effect* of EU law has been developed by the CJEU overtime: a Directive may have a direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU country has not transposed the directive by the deadline; see CJEU of 4 Dec. 1974 (*Van Duyn*).

⁵⁸ As pointed by the ECS, such a wrong interpretation of Art.26(2) might be prompted when read in conjunction with the transitional provision in Art.27, in the sense that only the transparency mechanism applies to “existing contracts” as of 7 June 2022. See ECS (2020) *Comment on Articles 18-23*, #1.6.

⁵⁹ Equally, a contractual termination or reversion of the transferred rights to the Performer would automatically put an end to the entitlement to the residual remuneration; see below # 4.3.

implementation of remuneration rights is done “without prejudice to” any pre-acquired rights and pre-existing contracts that will continue to be effective and enforceable.

4. Art.18(2) CDSM: Mechanisms to Implement the Principle of Fair Remuneration

Following upon the mandatory principle of fair remuneration, the EU legislator reminds Member States of their obligation to secure its effectiveness by any necessary mechanisms. According to Art.18(2) CDSM:

*In the **implementation in national law** of the principle set out in paragraph 1, Member States shall be free to use **different mechanisms** and take into account the **principle of contractual freedom** and a **fair balance of rights and interests**.*

In other words, a **verbatim implementation of the principle** in Art.18 CDSM is not enough. Member States are expected and obliged to go further **implementing, as necessary, “different mechanisms”** to effectively secure fair remuneration of Authors and Performers.

According to Recital 73 CDSM “Member States should be free to implement the principle of appropriate and proportionate remuneration through *different existing or newly introduced mechanisms*, which could include collective bargaining and other mechanisms, *provided that such mechanisms are in conformity with applicable Union law.*”

The text initially proposed by the Parliament was more specific:

*This may be achieved in each sector through **a combination of agreements**, including collective bargaining agreements, **and statutory remuneration mechanisms**.*⁶⁰

The Parliament directly pointed at the winner strategy, according to evidence submitted over the years by EU countries, CMOs and expert reports: a combination of agreements (individual or collective agreements) and statutory remuneration rights. These mechanisms are discussed below in more detail.

4.1. Statutory contractual rules

Member States are free to introduce or maintain in their national laws specific contract rules aimed at securing fair remuneration. For instance, national laws may request “proportional” remuneration either as general rule or for specific sectors. They may also identify specific instances or reasons where lump-sum remunerations are allowed (or leave it to sectorial collective bargaining – where available). They may even require that a different remuneration fee be agreed for each right and means of exploitation transferred.⁶¹ Member States may also

⁶⁰ See Amendment 80, EU Parliament’s *Report* (A8-0245/2018), 29.6.2018, Committee on Legal Affairs (JURI), Rapp. Voss.

⁶¹ This was formally proposed by the Parliament: “4. Contracts shall specify the remuneration applicable to each mode of exploitation”; see Amendment 80, EU Parliament’s *Report* (A8-0245/2018), 29.6.2018, Committee on Legal Affairs (JURI), Rapp. Voss.

exclude unknown and unforeseen means of exploitation from the scope of a license/transfer of rights⁶² (granting authors and performers the chance to renegotiate the contract when/if any new means develop) or allow them only if a percentual remuneration has been agreed (as happens in Germany). They may also impose a “limited duration of contracts of copyright transfer or licence with an option of renewal (accompanied by a possible renegotiation).”⁶³

Any measures adopted must -to the extent possible- safeguard contractual freedom and respond to a balanced assessment of all the interests at stake (Art.18(2) CDSM). Thus, for instance, for the sake of contractual freedom, while the setting of statutory percentages should be avoided as a general rule, collective bargaining agreements and sectorial customs may certainly help set these numbers. Similarly, the need to balance the several interests at stake also requires taking into account the risk assumed by producers, rather than by Authors and Performers. Each party involved in a production makes an investment (of different nature) and they all must be taken into account when setting “appropriate and proportionate” remunerations.

As we know, statutory contractual rules will only take us that far. Most European national laws already provide for these (or some of these) measures (at least, for specific sectors) and, they have not substantially improved, in practice, the remuneration of Authors and Performers. Evidence shows that **general principles of fair remuneration and contract rules play a very limited role in securing remuneration for authors.**⁶⁴

Improving contract law rules is **absolutely necessary**, but as current experience shows this improvement alone **will hardly suffice to secure fair remuneration for Performers**. Despite all the legal safeguards, Authors and Performers easily find themselves assigning their rights in conditions (including remuneration) that are far from “appropriate and proportionate” and are sometimes plain unfair.⁶⁵

Beyond mere principles and statutory contract rules, national legislators should go further to secure that appropriate and proportionate remuneration is a reality for all Authors and Performers. In specific cases, national legislators are expected, rather obliged, to implement other mechanisms.

⁶² As proposed by IVIR (2015) *Remuneration of Authors*, p.9. See also ECS (2020) *Comment on Articles 18-23*, #2.6.

⁶³ Ibid.

⁶⁴ See IVIR (2015) *Remuneration of Authors*, p.4: “the general provisions of contract law play a very limited role in granting support to authors and performers in the negotiation of exploitation agreements and the determination of the level of remuneration. General contract law may affect the way a contract is interpreted or executed, but in general it does not influence the outcome of the negotiation on the transfer of rights or on the remuneration to be paid.”; Ibid p.51. “authors and performers are not always able to negotiate different types of remuneration per line of exploitation, including digital media ... and have so far been unsuccessful in trying to reap the benefits of digital media.”

See also CRIDS/KEA (2014) *Contractual arrangements*, p.13: “The existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions.”

⁶⁵ And even then, Authors and Performers do not challenge them due to their weaker bargaining position and for fear of being blacklisted.

4.2. Collective bargaining

Sectorial collective bargaining agreements certainly have a significant role to play in securing remuneration for Authors and Performers. In fact, sectorial collective bargaining is best positioned to identify specific standards, formats and amounts of remuneration, and even instances where lump-sums may apply. Collective bargaining is also meant to play an important role in the national implementation of the rest of contractual provisions in Arts.19-22 CDSM.

In practice, however, its Achilles' heel is willingness of parties to negotiate them⁶⁶ and, of course, availability: the conditions for collective bargaining to take place, succeed and be subsequently enforced do not exist in all countries and in all sectors.

For instance, in **Germany**, collective negotiations are generally accepted in copyright law to agree on "common standards of remuneration" but so far only a few agreements have been signed.⁶⁷ As proposed by Lucas-Schloetter, Member States should have the possibility to make collectively negotiated remuneration agreements *mandatory* for all parties concerned within a specific sector.⁶⁸

Promoting the authors' ability to negotiate (individually or collectively) is, in theory, the best way to maximize the value of authors' exclusive rights⁶⁹ and the one that is more in accordance with the exclusive nature of their rights. In practice, however, not all countries and sectors offer the structural conditions for successful collective bargaining. Collective negotiations require the existence of strong trade unions, guilds or CMOs capable of negotiating a minimum level of remuneration for their members (i.e., Authors and Performers) with producers and publishing companies. These conditions are only a reality in a handful of countries (i.e., the United Kingdom and most notably, in the USA) and only for very specific sectors (i.e., specific audiovisual productions or session musicians).⁷⁰

Furthermore, even when successfully negotiated, these collective agreements need to be subsequently honoured by individual contracts and enforced by parties. In many countries, collectively negotiated minimum remunerations are directly trumped by individual agreements (i.e., production contracts). For instance, in **Spain**, minimal exploitation revenue percentages

⁶⁶ See LUCAS-SCHLOETTER (2017) p. 898: "the mechanism of 'common standards of remuneration' provided in Sec. 36 of the German Copyright Act has proven to be quite ineffective, notably due to the unwillingness of publishers and producers to negotiate such standards."

⁶⁷ Once remuneration rules have been agreed upon, they are presumed to be equitable and fair for purposes of complying with the "appropriate" requirement in S.36 UrhG. See LUCAS-SCHLOETTER (2017) p. 898.

⁶⁸ Ibid.

⁶⁹ See EU Commission (2011) *Green Paper on the online distribution*, p.16: "...to promote authors' ability to undertake negotiations individually or collectively. This could be seen as the best way to maximize the value of authors' exclusive rights, especially as the making available right could prove to be one of their most valuable negotiating assets in the future."

See also EU Parliament (2012) *Report on the online distribution*, #50: "Maintains that the best means of guaranteeing decent remuneration for rights-holders is by offering a choice, as preferred, among collective bargaining agreements (including agreed standard contracts), extended collective licences and collective management organisations."

⁷⁰ See IVIR (2015) *Remuneration of Authors*, p.44.

are usually agreed by collective bargaining to be paid on top of the salary of audiovisual performers; in practice, this minimal revenue is usually deducted from their salary.⁷¹

One last challenge faced by collective bargaining is that it only benefits Authors and Performers who are Trade Union's or CMO's members⁷² and that it only applies to new contracts (covered by the collective agreement). Collective bargaining, when successful, fails to secure new revenue streams for non-members and pre-existing productions.

Collective bargaining for specific sectors may fine tune and even complete national implementation of the contractual obligations in Arts.19-22 CDSM Directive, but it is hardly a feasible mechanism to secure fair remuneration for Authors and Performers in an imminent and effective manner across the EU.⁷³

4.3. Statutory remuneration rights.

The text approved by the Parliament⁷⁴ formally referred to *statutory remuneration rights* as one of the mechanisms available to Member States to secure "fair and proportionate remuneration" for Authors and Performers. The final text of the Directive did not retain this language, but this should not be read to disqualify statutory remuneration rights as one of these mechanisms.⁷⁵ Such a reading would not only lack any formal support within the CDSM legislative process, but also contradict the very goal of Art.18 CDSM and the pre-existing EU *acquis*, itself.

Nothing in the CDSM prevents Member States from implementing statutory remuneration rights to secure fair remuneration of Authors and Performers. Similarly, despite we will not deal with it here, **Extended Collective Licensing** (ECL), available in some Nordic countries, may also be a mechanism to secure fair remuneration for Authors and Performers.⁷⁶

⁷¹ As reported by AISGE, see IVIR (2015) *Remuneration of Authors*, p.95.

⁷² See, regarding remuneration for rental, AEPO-ARTIS (2018) *Performers rights*, p.70: "In the United Kingdom, on the other hand, lump sum payments could be obtained via collective bargaining agreements in the audiovisual sector for video on demand. It has to be noted however, that this set up only benefits those performers who are members of the trade union subject to this agreement. This means generally that performers based in other Member States do not benefit from these agreements and lose out on remuneration which is rightly payable to them."

⁷³ Collective bargaining is currently an unrealistic option in most EU countries, lacking the structural conditions for its successful negotiation and enforcement.

⁷⁴ See Amendment 80, *REPORT on the proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market* (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)). Committee on Legal Affairs (JURI). Rapporteur: Axel Voss (A8-0245/2018), 29.6.2018.

⁷⁵ See MINERO (2020) p.20 complaining that statutory remuneration rights and CMOs have not been given more "protagonism" in the CDSM and encouraging Member States to examine *residual remuneration rights* as a mechanism to improve remuneration of Authors and Performers.

⁷⁶ For instance, in Sweden, remuneration of audiovisual authors may benefit from several extended collective licenses (ECL) for educational uses, private copy, retransmissions of broadcasts and copying of broadcasting. Recent legislation has introduced an extended collective license scheme for radio and TV companies for programmes made available at the request of individuals, via the Internet, which apparently applies to audiovisual authors and performers. See Copyswede <https://www.copyswede.se>

Statutory remuneration rights have proven to be the most effective manner to secure remuneration for Authors and Performers in specific sectors.⁷⁷

Remuneration rights (A) and, specifically, *residual* remuneration rights (B) are nothing new in copyright laws: they have been endorsed and applied over time by international instruments (C), EU *acquis* (D) and national laws (E) as an effective means to secure remuneration of Authors and Performers (as well as other Rightholders).

a. Remuneration rights

Remuneration rights are usually defined by opposition to “exclusive rights.”⁷⁸ Commonly referred to as “*other economic rights*,”⁷⁹ “*other rights*” (i.e., Spanish Copyright Act) and “*rights to special remuneration*” (i.e., Swedish Copyright Act), “*a mere right to equitable remuneration*” (Art.11bis(2) Berne Convention) or a “*single equitable remuneration*” (Art.12 Rome Convention), remuneration rights have an **inherent economic component and are intrinsically related with the scope of the exploitation rights granted to authors**. However, they have a different “*raison d’être*”: to secure an economic income, rather than to exercise any control (authorizing or prohibiting) over the exploitation of the work.⁸⁰ Whether these common traits are enough (or not) to consider them an autonomous category of rights granted to authors -in addition to the “moral” rights and the exclusive exploitation rights- remains an interesting academic debate, with little practical implications. Although a thorough analysis of the nature of remuneration rights exceeds the scope of this paper, we must point at some basic features so as to understand the concept of residual remuneration rights (see below # 4.3.b).

Ficsor distinguishes at least three types of “remuneration rights”:⁸¹

- as a *mere* right of remuneration (i.e. the resale right in art.14ter BC)⁸²
- as a remuneration for a “restriction” of an exclusive right (i.e., art.9(2) BC concerning the right of reproduction);
- as a *residual* remuneration right that “survives” the transfer of an exclusive right (i.e., art.5(1) RLD).

⁷⁷ See, for instance, AEPO-ARTIS (2018) *Performers’ rights*, SAA (2015) *White Paper*, showing that across EU countries the most significant revenue streams for Authors and Performers (e.g., for rental and making available online) result from statutory residual remuneration rights, paid by users and managed by CMOs.

⁷⁸ Authors’ rights of exploitation are said to be “exclusive” in the sense that no other person can exploit the work without the author’s authorization, except in certain cases explicitly permitted by law. The author has the power to authorize or prohibit any acts of exploitation subject to exclusive rights. Remuneration rights do not confer that power.

⁷⁹ See, for instance, J.A.L. Sterling (1998) *World Copyright Law*.

⁸⁰ To the extent that *remuneration rights* confer no “control power,” they are precious legislative tools to achieve proportionality, either in favour of the public (exceptions, limitations, statutory or compulsory licensing) or in favour of Authors and Performers (residual remuneration rights). A healthy copyright law should integrate both exclusive rights and (non-exclusive) remuneration rights in a balanced manner, so that public and private interests of different kind are duly secured, beyond contract and market impositions.

⁸¹ See FICSOR (2006) p.42.

⁸² Notice that the Resale Right Directive 2001/84/EC avoids calling it a “remuneration right”, and refers to it as a “royalty” (art.1.1) or as “an economic interest” (recital 1).

This last type of remuneration rights is the relevant one for purposes of Art.18 CDSM.

Notice that despite labelling them all as “remuneration rights,” they are very different. The first two types (*ex Fictor*) convey a remuneration right in specific circumstances where the law *restricts* the exercise or *derogates* the full scope of the exclusive right. The act of exploitation is directly authorised by the statute, granting Authors and Performers “only” a remuneration or compensation for it. This is the case of specific acts permitted under Exceptions and Limitations, the resale right (as a result from the “exhaustion” of the distribution right upon the first sale of the tangible copy), but also the equitable remuneration right granted “instead of” an exclusive right (Art.11bis(2) BC)⁸⁵ and the equitable remuneration shared by Performers and Phonogram producers following the statutory authorization of secondary acts of communication to the public (Art.12 RC).⁸⁴

These remuneration rights respond to a **statutory derogation or restriction** and are justified for the protection of other external market interests (i.e., art markets, broadcasting markets, etc) and further public interests (i.e., on account of other fundamental rights such as freedom of expression, access to information, access to culture, principle of non-discrimination, etc).

The third type of remuneration rights (*ex Fictor*) rely on the *exercise* of exclusive rights and are justified by the general principle that Authors and Performers are entitled to receive fair remuneration for the exploitation of their works and performances. The *residual* remuneration right is a statutory mechanism aimed at securing fair remuneration in specific contexts; the legislator intervenes to secure revenues for Authors and Performers that they might not otherwise obtain from the sole exercise (transfer) of their exploitation rights (i.e., lack of bargaining power, complex exploitation markets, fear of being black-listed, etc). The name “residual” relates to a part of the exclusive right that “remains” with the Author or Performer, after its transfer to the producer: a *residual remuneration right* to obtain statutory (non-contractual) remuneration from the subsequent exploitation of the work or performance. Residual remuneration rights “survive” the transfer of exclusive rights; in fact, they depend on it.

In summary, remuneration rights based on a statutory **derogation or restriction** of an exclusive right are very different in nature and justification from residual remuneration rights based upon the **exercise** (contractual transfer) of an exclusive right.

⁸⁵ Art.11 and Art. 11bis BC grant a “right to broadcast, with the possibility that a Contracting State may provide for a *mere right to equitable remuneration* instead of a right of authorization;” see WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

⁸⁴ “This provision seeks to strike a balance between the interests of broadcasters, who may not be required to obtain authorization from performers and phonogram producers (and thus be confronted with a possible refusal to broadcast these programs), on the one hand, and the necessary financial compensation for performers and phonogram producers for such use, on the other.” See *Concise European Copyright Law*, p.157.

b. Residual remuneration rights

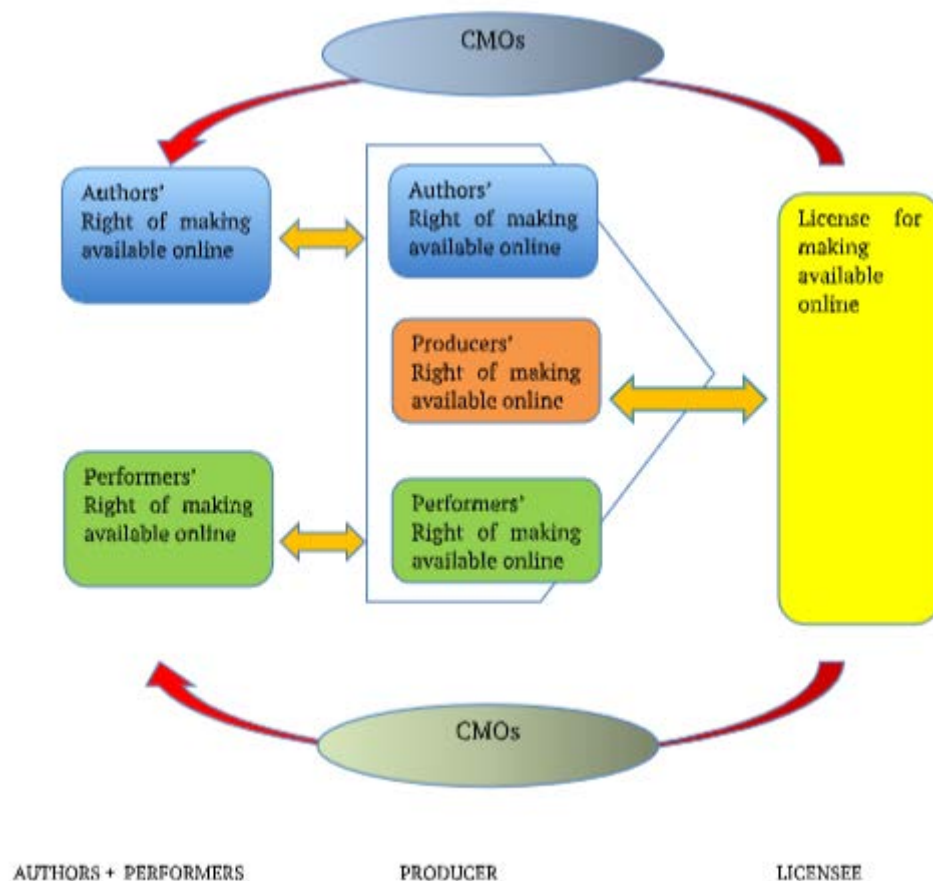
Residual remuneration rights rely on the **existence and exercise of exclusive rights**. They operate on the basis of two steps: a transfer (by the Author or Performer) of the exclusive right and a subsequent license (by the Producer or rightholder) authorizing the exploitation of that right. Only then, remuneration will be due. If the transfer of the exclusive right does not take place, the Author or Performer will have no *residual* remuneration right because she will still enjoy the full scope of the exclusive right. If licensed exploitation does not take place, the residual right will produce no remuneration for the Author or Performer.

Residual remuneration rights **require legislative intervention**: a statutory enactment. Some scholars explain the nature of residual remuneration rights as a **statutory “contractual insurance”**: remuneration for the contractual transfer of an exclusive right is “insured” through a direct payment (collected by CMOs) from the exploitation (paid by the user/licensee). Legislative action is also required because the remuneration claim extends beyond the contractual obligation that triggered it (authors / producers): a third person (the user / licensee) will be paying for it.⁸⁵

Despite the necessary legislative intervention, residual remuneration rights **do not duplicate any rights**: Authors and Performers are being remunerated for the exclusive right/s transferred to the producer and subsequently licensed by him (or his rightholders). Similarly, the residual statutory mechanism does not turn exclusive rights into statutory licenses: Authors and Performers decide whether or not to exercise (transfer) their exclusive rights. Thus, by definition, **residual remuneration rights neither substitute for nor duplicate exclusive rights** that have been transferred; residual remuneration rights only operate upon a transfer of exclusive rights, to secure a non-contractual remuneration (directly from the licensee) in exchange for that transfer.

The following image shows an example of residual remuneration rights for Authors and Performers for the transfer of their right of making available online to Producers:

⁸⁵ Barta/Markiewicz refer to them as “executable creditors’ claims,” consisting of “royalties due pursuant to any contractual transfer of license of rights under which a work has already begun to be exploited, as well as the right itself subject to the transfer or license, to the extent of the author’s consent”. See *International Copyright Law and Practice* (Geller/Nimmer), Chapter 33: Poland, #4[3][c].



Residual remuneration rights ensure that Authors and Performers will be fairly remunerated for the exploitation of the works and performances, regardless of what was agreed in their production contracts. They apply on top of any contractual remuneration agreed with Producers (or via collective bargaining agreements, where available).

Residual remuneration rights do not disturb the assignment of rights done for the production and exploitation and contracts do not need to be revised (e.g. to renegotiate remunerations for new markets of exploitation). The exercise of exclusive rights (*ius prohibendi*), licensing process and revenue streams remain in the hands of **Producers**, adding no management costs to secure fair remuneration of Authors and Performers (remuneration will be managed by CMOs, in an efficient manner, across territories). Residual remuneration rights allow a constant and direct flow of remuneration for different means of exploitation to **Authors and Performers**, as long as revenues are generated from the exploitation of their works and performances.

Residual remuneration rights are convenient when production and/or exploitation circumstances are not conducive for the enforcement of contractual remunerations, such as in the case of audiovisual and music productions with multiple contributions, and in complex and rapidly evolving markets, such as online markets. Statutory remuneration rights are especially useful to secure remuneration for unknown or unpredictable means exploitation once the exclusive rights have been transferred to the producer (i.e., by contract, a rebuttable statutory presumption or a *cessio legis*): fees (based on the exploitation revenues done by licensees, not on profits made by producers) will be negotiated and enforced by CMOs and may be constantly adjusted to new and evolving markets, as licensed by producers and rightsholders.

Last, not least, residual remuneration rights have proven to be a most effective mechanism to secure fair remuneration for Authors and Performers, when they are unwaivable (and inalienable), paid by the user/licensee and managed by CMOs.⁸⁶

An important part of the residual remuneration rights' success to secure fair remuneration results from the fact that they are subject to collective management. In general, **collective management** is fundamental for an efficient remuneration of Authors and Performers.⁸⁷ CMOs offer them a better position to negotiate fees with users/licensees. In a few countries, market and cultural conditions may exist to ensure the development of collective management of remuneration rights based on voluntary mandates; in many others, its development may benefit from some legislative "help" requiring compulsory management by CMOs. Remuneration rights are most effective when subject to *mandatory* collective management. Mandatory collective management does not turn residual remuneration rights (let alone, the exclusive rights they are meant to remunerate for) into statutory licences.⁸⁸ Mandatory collective management facilitates efficiency by allowing CMOs to act *ex lege*, without any need to obtain individual mandates and provide evidence of them.⁸⁹ As a last silver-lining, residual remuneration rights may help legitimise the copyright system as a whole by "putting Authors and Performers first," securing fair remuneration for them.

c. *Remuneration Rights in International Instruments*

International conventions have always acknowledged remuneration rights as a mechanism to secure remuneration of Authors and Performers.

As far as **Authors**, and leaving aside remunerations resulting from the "resale right" (Art.14ter BC)⁹⁰ and to compensate for limitations and exceptions (Art.9.2 BC and 10 WCT),⁹¹ the Berne Convention (Art.11 and Art. 11bis) grants Authors of audiovisual works a right of public performance and communication to the public, with the possibility that a Contracting State may

⁸⁶ See evidence (under different chapters) in AEPO-ARTIS (2018) *Study: Performers' Rights*.

⁸⁷ As explained by WIPO: "CMOs provide appropriate mechanisms for the exercise of copyright and related rights, in cases where the individual exercise by the rightholder would be impossible or impractical. Collective management is an important part of a functioning copyright and related rights system, complementing individual licensing of rights ... CMOs can provide a bridge between rightholders and Users, facilitating both access and remuneration... CMOs provide a mechanism for obtaining permission to use copyright materials, as well as for paying the corresponding fees or remuneration for certain uses of such materials, through an efficient system of collection and distribution of license fees and/or remunerations." See WIPO (2018) *WIPO Good Practice Toolkit for CMOs*, p.5: <https://www.wipo.int/publications/en/details.jsp?id=4358>

⁸⁸ On the other hand, the fact that remuneration is unwaivable and subject to collective management does not mean that Authors and Performers will be forced to cash it in; they may choose to claim any revenues from CMOs.

⁸⁹ In that sense, mandatory collective management leads to similar results as Extended Collective Licensing (ECL).

⁹⁰ Authors of works of art to obtain a share (usually a percentage) in the proceeds (gross sales price) of each public sale of a work of art.

⁹¹ In order to comply with the three-step-test, an "unreasonable prejudice to the legitimate interests of the author's" may be deactivated by means of a remuneration. See RICKETSON / GINSBURG (2006) *International Copyright*, #13.25.

provide, instead, for *a right to receive equitable remuneration*. Notice that this refers to a remuneration right granted “instead of” an exclusive right (that is, when the act of communication to the public is authorized by law, e.g. under a “statutory license”). Beyond these instances, nothing in international instruments prevent national legislators from implementing residual remuneration rights for Authors regarding any rights of exploitation, as long as they do not substitute for an exclusive right but, rather, remunerate for its exercise (transfer and exploitation). As a token of this fundamental distinction, notice that Art.8 WCT expanded the public communication right to include the interactive making available to the public, and despite it said nothing regarding the “conditions to exercise” and the possibility of providing for remuneration rights, several national legislators have correctly implemented a residual remuneration mechanism in exchange for the transfer of this right. Similarly, the exclusive rental right granted to Authors (Art.7 WCT) did not prevent **the EU legislator from granting a residual remuneration mechanism in exchange for the transfer of the exclusive rental right, envisioned in Art.5 RLD.**⁹²

International instruments for the protection of **neighbouring rights** have been even more prone to endorse remuneration rights⁹³ and *residual* remuneration rights. The single equitable remuneration right shared by Performers and Producers “for broadcasting or for any communication to the public” of a phonogram (Art.12 Rome Convention and Art.15 WPPT)⁹⁴ is among the economically most important rights of performers and phonogram producers.⁹⁵ More recently, in addition to an equivalent single equitable remuneration right for broadcasting and communication to the public shared with producers (Art.11.2 BT), the **Beijing Treaty on Audiovisual Performances (2012)** allowed Member States to grant a general right of equitable remuneration for “any use” of audiovisual performances (Art.12.3 BT), which is clearly intended to also cover online exploitation. According to Art.12.3 BT:

Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 [that is, making available online] and 11 [that is, broadcasting and communication to the public].

The “equitable remuneration right” set by “national laws” is offered as an alternative to “royalties” set by “individual, collective or other agreements.” Accordingly, this remuneration right is not mandated as conventional minima (States may or may not implement it). Nevertheless, Art.12.3 BT acknowledges -for the first time, in an international instrument- and on equal footing, the two most efficient mechanisms to secure remuneration of Performers:

⁹² A residual remuneration right does not turn an exclusive right into a remuneration right: it simply secures remuneration for it. For the same reasons, subjecting residual remuneration rights (not exclusive rights) to mandatory collective management, as necessary, would not contradict Art.11bis BC either.

⁹³ Historically, divergent national laws on the protection of related rights made it difficult to achieve any conventional agreement on minimum exclusive rights, beyond authorizing the first fixation and broadcasting of performances and recordings.

⁹⁴ For a comparison of Art.12 RC and Art.15 WPPT, see FICSOR (2002) *The Law of Copyright and the Internet*, # PP15.03-06

⁹⁵ See REINBOTHE / VON LEWINSKI (2015) *The WIPO Treaties on Copyright*, p.379. And, despite so, States may reserve its application, by restricting its scope or simply by denying it (see Art.16 RC and Art.15 WPPT).

statutory remuneration rights (i.e., residual remuneration rights under EU *acquis*), and contractual royalties (i.e., audiovisual residuals agreed in the USA).⁹⁶ At all times, Art.12.3 BT is safeguarding exclusive rights (“independent of the transfer of exclusive rights”)

As long as the scope of exclusive rights set as minimal international obligations is respected, residual remuneration rights enacted by national legislators to secure effective and fair remuneration of Authors and Performers are fully compatible with international instruments, especially so, when they take the form of *residual* remuneration rights upon the transfer of the exclusive rights, which neither duplicate nor substitute for exclusive rights but simply “secure” remuneration upon their transfer.

d. Residual Remuneration Rights in EU acquis

Remuneration rights have been hardly harmonized in EU *acquis*; but EU *acquis* has consistently integrated residual remuneration rights (as well as remuneration rights, at large) and has encouraged Member States to implement this mechanism even beyond the harmonized scope. Art.18(2) CDSM is the latest and most visible example, but not the only one.

Leaving aside other remuneration rights granted by EU *acquis* (namely, the harmonization of the resale right by Directive 2001/84/EC,⁹⁷ and the fair compensation for any exceptions and limitations allowed under Art.5 ISD⁹⁸ in compliance with the three-step-test in Art.5.5 ISD),⁹⁹ residual remuneration rights have been part of EU *acquis* since introduced for the rental right in the 1992 Directive on Rental and Lending.

i. The precedent: Art.5 RLD

Art.5 RLD 92/100/EEC (current Directive 2006/115/EC) instructed Member States to implement an ‘unwaivable right to obtain an equitable remuneration’ *retained* by Authors and Performers upon transferring their exclusive **rental right** to the producer.¹⁰⁰

⁹⁶ See, for instance, residuals in the Screen Actors’ Guild Basic Agreement: <http://www.sagaftra.org/production-center/documents>

⁹⁷ Despite not relevant for purposes of this Study, the resale right is a right of remuneration (art.1.1 refers to “royalty” and recital 1 to “an economic interest”) set as unwaivable and inalienable; Member States may choose to subject it to mandatory collective management.

⁹⁸ And Exceptions and Limitations harmonized under previous Directives (i.e., Computer programs, Databases and Rental & Lending Directives).

⁹⁹ Only a few limitations in Art.5 ISD specifically require “fair compensation” (i.e., reprography, private copying and copies of broadcasts by certain institutions) but despite the silence national laws may choose to require it for other E&L (see Recital 36 ISD); fair compensation may be necessary to comply with the Three-Step-Test (Art.5.5).

¹⁰⁰ The initial Commission’s proposal COM (90) 586 final — SYN 319 (13 December 1990) convey the same idea with a more neutral title “Authorization of rental and lending” but more complex wording: “If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2(1) *shall retain* the right to obtain an *adequate part of the said payment*, notwithstanding any assignment of the rental or lending right or granting of licences. This right to obtain an adequate part of the payment *cannot be waived*, but its *administration may be assigned* [apparently, to CMOs]”

Article 5 Unwaivable right to equitable remuneration

1. Where an author or performer has **transferred or assigned** his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall **retain the right to obtain an equitable remuneration for the rental**.

2. The right to obtain an equitable remuneration for rental **cannot be waived** by authors or performers.

3. The administration of this right to obtain an equitable remuneration **may be entrusted to collecting societies** representing authors or performers.

4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration **may be imposed**, as well as the question **from whom this remuneration may be claimed** or collected.

As its title indicates, this provision establishes an “unwaivable right to equitable remuneration” that is *triggered* by a transfer or assignment of the rental right to the producer; the mechanism that we now call a *residual remuneration right*.¹⁰¹

The **transfer or assignment** of the exclusive right may be done in any manner or form, individually or collectively, in production contracts, labour contracts or any commissioning contract. The transfer may also operate by virtue of a statutory rebuttable presumption, for instance, by signing a production contract. In fact, the RLD already established a mandatory presumption of transfer of the rental right of audiovisual performers¹⁰² and allowed Member States to implement the residual remuneration right for it.¹⁰³ Thus, if a Member State so chooses, the presumption of transfer will automatically trigger the unwaivable right to equitable remuneration (residual remuneration right).

Remuneration must be *equitable*, in RLD language; “appropriate and proportionate,” in CDSM language.

Beyond that, Art.5.3 RLD granted Member States a lot of flexibility to implement the residual remuneration right for rental. The remuneration “cannot be waived,” but since nothing was said in Art.5 RLD regarding its assignability, the “equitable remuneration may be paid on the basis of one or several payments any time on or after concluding the contract” (Recital 16 RLD). On top of that, Member States were allowed to regulate “from whom” it may be claimed or collected

¹⁰¹ Apparently, this “innovative combination” of an exclusive right and an equitable remuneration subject to collective management was “invented” by prof. von Lewinski when working as an expert to the European Commission. See VON LEWINSKI (2012) “Collectivism and its role...” pp.117-127.

¹⁰² According to Art.3.4 RLD, by signing the (individual or collective) film production contract, the performer’s exclusive rental right is presumed to be transferred to the producer unless parties agreed to the contrary.

¹⁰³ Art.3.6 RLD states that as far as audiovisual performers “Member States may also provide that this paragraph [a presumption of transfer of the rental right accompanied by a residual remuneration right] shall apply *mutatis mutandis* to the rights included in Chapter II.”

(Art.5.4 RLD).¹⁰⁴ And, last but not least, the residual remuneration right may be entrusted to collective management (Art.5.3 RLD), it may be even imposed (mandatory collective management, Art.5.4 RLD), but Member States are not obliged to do so. Time has proven these to be **poor policy choices**, that have resulted in very little harmonization and have failed to secure effective remuneration for Authors and Performers.

As shown by AEPO-ARTIS (2018) report,¹⁰⁵ the residual remuneration for rental is managed by CMOs in only 10 EU countries (Spain, Slovakia, Romania, Poland, Lithuania, Italy, Hungary, Greece, Germany, Czech Republic), subject to mandatory collective management (except Germany) and paid by the user/licensee. Some national laws permit the assignment of the remuneration right to the producer in exchange for a one-flat rate paid at the time of entering the production contract (e.g., Netherlands and Romania).¹⁰⁶ In other countries, CMOs have failed to obtain the mandates necessary to effectively manage this remuneration right.

The **unwaivability and inalienability of residual remuneration rights** is another essential element for their effectiveness. This is precisely the issue that motivated the CJEU ruling in *Luksan*.¹⁰⁷ The CJEU concluded that despite national legislators are free to establish a rebuttable presumption of transfer in favour of a producer (or an employer), this must be done in accordance to EU *acquis* that deems directors as authors (or, at least, co-authors) of audiovisual works, as a result, any remuneration rights granted to directors/authors (i.e. fair compensation for a limitation) should not be affected by that presumption of transfer¹⁰⁸ or by any other contract signed by the author, because **remuneration rights are not only unwaivable, but also inalienable**:

The proposed remuneration right must be *unwaivable and inalienable*. Both conditions are *essential to ensure the remuneration's effectiveness*, particularly due to the specific circumstances of audiovisual production contractual practices. *Remuneration can neither be waived by authors nor transferred or assigned to producers or third parties*.¹⁰⁹

It is true that *Luksan* deals with one specific remuneration right (compensation for the private copying exception under Art.5(2)(b) ISD), but the CJEU's strong conclusion must also have an impact on other remuneration rights, including residual remuneration rights implemented in national laws. For purposes of EU *acquis* consistency, unwaivable remuneration rights (including residual remuneration rights) granted to Authors and Performers should all be also deemed inalienable, as concluded by the CJEU in *Luksan*.

¹⁰⁴ However, national laws must unambiguously determine the debtor from whom the remuneration will be claimed and collected; See CJEU *Commission v. Portugal* (C-61/05).

¹⁰⁵ See AEPO-ARTIS (2018) *Performers' rights*, pp.123-132.

¹⁰⁶ *Ibid.*

¹⁰⁷ See CJEU, *Luksan v. Van der Let* (C-277/10).

¹⁰⁸ In that particular case, a *cessio legis* of exploitation rights in favor of the audiovisual producer.

¹⁰⁹ See CJEU, *Luksan v. Van der Let* (C-277/10) #99.

- ii. Residual remuneration mechanism applied to other rights.

Despite its shortcomings, the residual remuneration right of Art.5.3 RLD remains a powerful EU *acquis* mechanism applicable not only to the rental right, but also to other exclusive rights granted to Authors and Performers. In 1993, Art.4.3 SCD already stated so: Member States may apply the residual remuneration mechanism and the presumption of transfer set for the rental rights *mutatis mutandis* to satellite broadcasting rights granted to Performers.¹¹⁰

Member States are free to expand the residual remuneration mechanism to the transfer of other exclusive rights. Scholars even encourage so “for the sake of consistency.”¹¹¹ Over the years, a few EU Member States have done so in their national laws (see *infra* IV.3.E).

Now, Art.18(2) CDSM (and its legislative process) confirms this outcome.

Two European Parliament Committees -on Culture and Education (CULT) and on Industry, Research and Energy (ITRE)- formally proposed the introduction of an **unwaivable residual remuneration right for Authors and Performers for the making available online** of their works and performances, in exchange for the transfer of the exploitation right to the producer, with the following texts:¹¹²

The CULT Opinion of 14 July 2017 proposed the following Amendment 92:

Article 14a - Unwaivable right to fair remuneration for authors and performers

1. Member States shall ensure that where authors and performers transfer or assign the right of making available to the public their works or other subject-matter for their use on information society services that make available works or other subject-matter through a licensed catalogue, those authors and performers retain the right to obtain fair remuneration from such use.

2. Member States shall proscribe the waiving of the right of an author or performer to obtain fair remuneration for the making available of his or her work as described in paragraph 1. Paragraph 1 shall not apply where an author or performer grants a free non-exclusive right for the benefit of all users for the use of his or her work.

3. The administration of the right to fair remuneration for the making available of an author's or performer's work shall be entrusted to the respective collective management organisation. That collective management organisation shall collect the fair remuneration from information society services making works available to the public.

4. Where the right to fair remuneration has been already provided for in agreements relating to audiovisual works or in collective agreements, including voluntary collective management

¹¹⁰ See also Recital 26 SCD.

¹¹¹ See WALTER / VON LEWINSKI (2010) *European Copyright Law*, #6.2.55

¹¹² See Amendment 56, Opinion of the Committee on Industry, Research and Energy (ITRE), 01.08.2017; and Amendment 92, Opinion of the Committee on Culture and Education (CULT), 04.09.2017.

agreements, between the author or the performer and his or her contractual counterparty, the provisions in this Article shall be deemed to have been complied with.

The ITRE Opinion of 1 August 2017 proposed the following Amendment 46:

Article 14 a - Unwaivable right to fair remuneration for authors and performers

1. Member States shall ensure that when authors and performers transfer or assign their right of making available to the public, they retain the right to obtain a fair remuneration derived from the exploitation of their work.

2. The right of an author or performer to obtain a fair remuneration for the making available of their work is inalienable and cannot be waived.

3. The administration of this right to fair remuneration for the making available of an authors or performers work shall be entrusted to their collective management organisations, unless other collective agreements, including voluntary collective management agreements, guarantee such remuneration to authors, audio-visual authors and performers for their making available right.

4. Collective management organisations shall collect the fair remuneration from information society services making works available to the public.

These proposals followed the residual remuneration mechanism of Art.5 RLD and overcame all its shortcomings: the unwaivable (and, ex *Luksan*, inalienable) remuneration right is subject to mandatory collective management (“*shall be entrusted to the respective collective management organisation*”) and paid directly by the licensees (“*information society services making works available to the public*”).

Despite not making it into the final text of the Directive,¹¹³ these proposals may certainly provide guidance for national legislators when implementing statutory remuneration rights as a mechanism to secure fair remuneration of authors and performers in specific sectors and means of exploitation.

e. Residual Remuneration Rights in National Laws and Practice.

Statutory remuneration rights are well known in EU national laws. Some national laws have historically granted Authors and Performers residual remuneration rights, even before Art.5 RLD set it for the rental right.¹¹⁴ Let’s see a few of them in more detail.

¹¹³ It may be understood that, given the very broad aim of the Directive, such a specific provision would have been out of place; another plausible explanation is that not all countries would have agreed to it. However, Amendment 80 finally adopted by the Parliament implicitly endorsed these proposals, by formally mentioning “*including for their online exploitation.*”

¹¹⁴ For instance, in Spain, since 1966 (Act 17/1966) Authors of cinematographic works were granted a remuneration right (box office share) that survived into the LPI of 1987, and was then complemented with another remuneration right for public communication without an entrance fee.

Of course, EU national laws grant Performers a **residual remuneration right for rental**, but in practice (because of the leeway left to Member States under Art.5 RLD), the resulting picture is far from harmonized and has failed to secure fair remuneration for Authors and Performers.

“National laws stipulate that remuneration is due either by the user (e.g. as in Croatia, the Czech Republic, Germany, Greece, Hungary, Lithuania, Poland, Slovakia, Spain and Switzerland), or by the producer (e.g. Denmark, the Netherlands, Norway, Sweden and the United Kingdom).

Some countries have made it compulsory for this remuneration right to be administered by collective management organisations. This is the case, for instance, in the Czech Republic, Slovakia, Spain and Switzerland. In Germany there is no compulsory intervention of collective management organisations, but a performer can only assign his remuneration right to a collective management organisation (and not to the producer). In practice, the collective management organisation GEMA is administering this remuneration right also on behalf of performers. In Denmark, Sweden and the United Kingdom, remuneration is negotiated via collective bargaining agreements by the respective unions in the audiovisual field.”¹¹⁵

In practice, the rental remuneration is most effective “where it is payable by the user and administered by collective management organisations. This is the case in the Czech Republic, Germany, Spain, and Switzerland.”¹¹⁶ Interestingly, in Slovenia, “rental” of a work is deemed to include also video on-demand platforms or TV archives that provide temporary access to a work for the purpose of direct or indirect economic benefit.¹¹⁷

As far as the **right of making available online**, residual remuneration rights in national laws are even fewer and less harmonized. Despite online markets are growing fast, the amount collected in 2017 for making available amounted to just 2% of performers’ overall collection (while collection for broadcasting and communication to the public amounted to on average 67% of overall collection).¹¹⁸

“The reason for this economic situation is that the exclusive making available right is generally transferred to producers under contractual agreements. Only a few famous performers manage to negotiate directly the payment of royalties for the exploitation of their performances. ... The EU law designed to protect and adequately reward performers has therefore failed. If performers are to actually receive remuneration for the making available of their performances via the rapidly growing on-demand services market,

¹¹⁵ See AEPO-ARTIS (2018) *Performers’ Rights*, p.122

¹¹⁶ See AEPO-ARTIS (2018) *Performers’ Rights*, p.127. “In Denmark, Sweden and the United Kingdom, in accordance with collective agreements signed between producers and the actors’ union with regard to the rental right of performers, the producer shall pay an amount to the union for further distribution to the rightholders.” Ibid.

¹¹⁷ See AEPO-ARTIS (2018) *Performers’ rights*, p.68.

¹¹⁸ See AEPO-ARTIS (2018) *Performers rights*, p.74

current legislation needs to be adapted. Failing this, the making available right will remain purely theoretical for most performers.”¹¹⁹

According to AEPO-ARTIS, in 2017, collection of revenues for the making available online was only significant in 8 of the 26 countries covered:

“... this was largely as a result of either extended collective agreements (e.g. Denmark, Finland), the introduction of new legislation (Spain), or where performers have mandated their collective management organisation to administer their exclusive right to making available (e.g. the Czech Republic). These remain the exception rather than the rule and overall collection of remuneration remains very low.

In the United Kingdom, on the other hand, lump sum payments could be obtained via collective bargaining agreements in the audiovisual sector for video on demand. It has to be noted however, that this set up only benefits those performers who are members of the trade union subject to this agreement. ...

Collection in Denmark increased very significantly... due to the fact that a payment was made in respect of digital use covering a 3-year period (2015-2017) through tv-distributors from Copydan.

The country with the second highest collection was Germany ... The reason for the increase was that GVL were able to conclude a new broadcasting agreement which covered payments for podcasting.”¹²⁰

We will now take a closer look at a few of these national experiences.

Italy grants audiovisual Authors and Performers unwaivable residual remuneration rights (retained upon transferring the exclusive rights to the producer) for *any acts of exploitation* of their works and performances (thus, including, the making available online), paid by users/licensees, and subject to collective management (Art.46bis(2) and Art.84). Yet, collection of revenues by SIAE is not significant.

In **Germany** Art.20b(2), Authors and Performers who have transferred their exclusive cable retransmission rights to a broadcasting organization or to a phonogram or film producer *retain* an unwaivable right to equitable remuneration for cable retransmission -which, following Art.9 SCD, can only be asserted through collective management (CMOs).¹²¹

A few other countries grant unwaivable residual remuneration rights to Authors and Performers (most notably, in audiovisual and phonograms productions) *for specific acts of exploitation* such as rental, and several forms of communication to the public, including by online means (i.e., **Spain and Poland**), paid by users/licensees and subject to mandatory collective management.

¹¹⁹ Ibid.

¹²⁰ See AEPO-ARTIS (2018) *Performers rights*, p.70.

¹²¹ See WALTER / VON LEWINSKI (2010) *European Copyright Law*, #Germany, p.479.

In **Spain**, Performers of phonograms and audiovisual recordings are entitled¹²² to a **residual equitable remuneration right for rental** (Art.109.3(2) TRLPI) and a **residual equitable remuneration right for the making available online** (Art.108.3 TRLPI).

Audiovisual Performers also receive **equitable remunerations for any form of public communication** (Art.108.5(II) TRLPI), including communication by broadcast retransmission (Art.20.2(f) TRLPI) and in publicly accessible places (Art.20.2(g) TRLPI) - (Art.108.5(I)TRLPI). All these residual remunerations are unwaivable, paid by users/licensees, subject to mandatory collective management (Art.108.6 TRLPI) and apply “in addition to” any other compensation contractually agreed.

Phonogram Performers, instead, enjoy a **single and equitable remuneration right** for any other form of communication to the public, shared with producers (50% unless otherwise agreed) (Art.108.4 TRLPI, Art.116.2 TRLPI). Rather than a “residual” remuneration right, this single equitable remuneration shared with producers derives from Art.12 Rome Convention. Hence, the distinction between online acts of making available to the public (under a residual remuneration right) and other online acts of communication to the public (under a single non-residual remuneration right shared with producers) is paramount for phonogram performers.

Yet, despite the historical tradition of residual remuneration rights in Spain, CMOs have not always found it easy to effectively secure them. SGAE and DAMA (for audiovisual Authors) and AIE and AISGE (for phonogram and audiovisual Performers) had to sue a few online platforms that refused to pay for the residual remuneration right for the making available online.¹²³ Spanish courts have had the opportunity to conclude that statutory residual remuneration rights granted to Performers for the making available online are in compliance with EU *acquis* and international law, and “do not result in a double payment”.¹²⁴

A similar experience is found in **Poland**, where audiovisual Authors and Performers enjoy an unwaivable equitable remuneration right for communication to the public which, despite not formally referring to it, is meant to include digital means. The exercise of these remunerations appears to be difficult in practice because of the “yet unfamiliar concept of being confronted with parallel claims on the basis of the exclusive rights held by the producer and the remuneration right exercised by the collective management societies.”¹²⁵ Certainly, straightforward statutory language and even mandatory collective management do not always translate into effective remuneration for Authors, but it certainly facilitates its way towards it.

¹²² Similarly, Authors of audiovisual works enjoy several unwaivable rights to obtain equitable remuneration for several acts of exploitation, directly paid by licensees and subject to collective management: for rental (Art.90.2 TRLPI), theatrical exhibition (Art.90.3 TRLPI), as well as exhibition without an entrance fee, broadcast and communication to the public, including online interactive making available online (Art.90.4 TRLPI). See SGAE, Tarifas Generales 2016; <http://www.sgae.es/> ; See also DAMA, Tarifas Generales 2016: http://www.damautor.es/pdf/DAMA_Tarifas.pdf

¹²³ A few weeks ago, AISGE announced an agreement with NETFLIX to pay and collect remuneration (Art.108.3 TRLPI) from the end of 2015 to the end of 2018, on the basis of the revenues generated by the service provider in Spanish territory.

¹²⁴ See SAP Madrid (Sec.28) n.64/2015, 2 March 2015 (*Buongiorno*) p.9; confirmed -appeal denied- STS (civil) n.1712/2017, 12 July 2017. See also SAP Madrid (Sec.28) n.285/2020, 26 June 2020 (*iTunes*).

¹²⁵ See WALTER / VON LEWINSKI (2010) *European Copyright Law*, # Poland p.373.

These few examples show the diverse and unharmonized scope of remuneration rights in Europe, but they also identify the important role that statutory residual remuneration rights and CMOs play in securing fair remuneration for Authors and Performers. Leaving aside the very few countries and sectors where collective bargaining of contractual terms has been successful in achieving fair remuneration for Authors and Performers (i.e., in audiovisual sectors in the UK and a few Nordic countries), residual remuneration rights granted by law have proven to be an effective statutory mechanism to secure fair remuneration for Authors and Performers. Especially efficient when dealing with uniform remuneration rights across different countries, unwaivable (and inalienable), paid by users/licensees and entrusted by law to collective management (if necessary, mandatorily). As concluded by AEPO-ARTIS:

“If performers are to actually receive remuneration for the making available of their performances via the rapidly growing on-demand services market, current legislation needs to be adapted. Failing this, the making available right will remain purely theoretical for most performers.”¹²⁶

With the implementation of Art.18 CDSM, Member States now have an opportunity (an obligation) to introduce *residual remuneration rights* in their national laws, so as to secure fair remuneration of Authors and Performers thus, successfully completing the job started by the EU legislator.

5. Residual Remuneration Rights: Compliance with EU law and International Instruments

The decision of what specific mechanisms are best to secure an appropriate and proportionate remuneration for Authors and Performers under Art.18 CDSM remains a matter for national law, “provided that such mechanisms are in conformity with applicable Union law” (Recital 73 CDSM). In this chapter, we will examine the reasons why residual remuneration rights are in compliance with EU law and international instruments.

As we have seen, statutory remuneration rights have proven to be the most efficient mechanism to secure “secondary” revenues for Authors and Performers, especially when they are set as unwaivable (and inalienable) and subject to mandatory collective management.¹²⁷ Residual remuneration rights neither duplicate nor substitute exclusive rights; they are part of the exclusive right. A part (of remuneration) that remains with Author and Performer (“retained”, hence *residual*) once the exclusive right has been transferred to the producer. Residual remuneration rights granted by law do not disturb the exploitation of the work (which remains in the producer’s hands) and avoid the need to renegotiate pre-existing contracts. They are very effective in cases of complex productions (with multiple contributions and heavy investments that need to be raised and recouped) and technologically evolving markets (which contracts did not foresee), because they provide contractual stability needed to build production and secure

¹²⁶ See AEPO-ARTIS (2018) *Performers’ rights*, p.74.

¹²⁷ Directive 2014/26/EU, of 4 February 2014, on music online and collective rights management, already established a uniform ground to facilitate collective management (including mandatory collective management) of remuneration rights across EU countries.

exploitation, while at the same time provide a constant flow of remuneration for Authors and Performers as market exploitation unfolds.¹²⁸

5.1. Principle of Subsidiarity

Harmonization of national copyright laws in the EU regularly operates on the basis of the **principle of subsidiarity**. Harmonization is justified as long as it is necessary to overcome substantial differences that create legal uncertainty for the functioning of the internal market: to secure the free movement of goods and services. Thus, while waiting for an EU regulation on Copyright (ex Art.118 TFEU), copyright protection in the EU remains a matter for national laws.

The inherent tension between national copyright laws and internal market freedoms has been resolved by distinguishing between the *existence* of an IP right and its *exercise*.¹²⁹ When differences in national laws regarding the *existence of rights* may become an obstacle for the proper functioning of the internal market, harmonization is justified. As explained in Recital 3 Term Directive 2006/116/EEC:

There are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services and to distort competition in the common market. Therefore, with a view to the smooth operation of the internal market, the laws of the Member States should be harmonised so as to make terms of protection identical throughout the Community.

But even then, once an IP right has been harmonized, its *exercise* must still abide to internal market freedoms (see infra).

According to the principle of subsidiarity, Member States are free to apply *mutatis mutandis* the “EU *acquis* sanctioned” mechanism of Art.5.3 RLD to other exploitation rights, as long as it does not interfere with the functioning of the internal market. In fact, some scholars defend it “for the sake of consistency.”¹³⁰

5.2. Differences in National Laws are not *per se* Contrary to EU principles.

Always under the principle of subsidiarity, copyright harmonization relies on national copyright laws which are only partially harmonized, as necessary for the functioning of the internal market. Accordingly, differences among national laws do not necessarily amount to a restriction of the internal market freedoms. On the contrary, differences among national laws are allowed and expected; in fact, Art.18 CDSM, they are even encouraged.

¹²⁸ As far as audiovisual Authors, see XALABARDER, R. (2018) «The equitable remuneration of audiovisual authors: a proposal of unwaivable remuneration rights under collective management», *Revue Internationale du Droit D’auteur (RIDA)* vol. 255, pp.5-71.

¹²⁹ Another fundamental distinction applies between goods and services, only the former being subject to the principle of EU-wide community exhaustion. See CJEU, *Deutsche Grammophon* (C-78/70).

¹³⁰ See WALTER / VON LEWINSKI (2010) *European Copyright Law*, #6.2.55.

By granting Member States wide flexibility to implement the principle of fair remuneration through a variety of mechanisms, Art.18 CDSM implicitly fosters national differences and accepts that these will not necessarily be incompatible with the internal market and contrary to EU *acquis*.

The CJEU, in *C-More Entertainment*,¹⁵¹ explained it as follows:

(29) the objective of that directive [ISD] is to harmonise copyright and related rights as far as is necessary for the smooth functioning of the internal market. It follows from that recital that the objective of that directive is not to remove or prevent differences between the national legislations which do not adversely affect the functioning of the internal market. Thus, and as is also clear from the heading of that directive, the EU legislature has harmonised copyright and related rights only in part.

In other words, as a result from the national implementation of Art.18 CDSM, the existence of different national residual remuneration rights is not necessarily contrary to the internal market freedoms.

Of course, the impact on the internal market of different residual remuneration rights implemented in national laws may vary. When dealing with acts of exploitation that take place territorially, within a “national” market (i.e., theatrical release, rental, etc), the existence of different national solutions may have little impact on the internal market. Instead, when residual rights remunerate for acts of exploitation that have a wider “supra national” territorial scope, differences among national applicable laws may have an impact on the internal market. Even then, *having an impact* on the internal market does not amount to *disturbing* it.

The EU Commission is already aware of the *existence* of different residual remuneration rights in national laws and has not felt the need to overcome it. For instance, the public consultation opened in 2011 by the EU Commission regarding online distribution of audiovisual works¹⁵² specifically asked about granting audiovisual Authors statutory remuneration rights for online uses.¹⁵³ Responses provided evidence of different national solutions.¹⁵⁴ The Commission neither challenged them at court nor felt the need to overcome them with harmonization – not even in 2019, by the CDSM.

¹⁵¹ See CJUE, *C-More Entertainment v. Linus Sandberg* (C-279/13).

¹⁵² See EU Commission (2011) “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market” COM(2011) 427 final (13.07.2011).

¹⁵³ Ibid. Questions asked included: 16. Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for online uses of their works after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies? 17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works? 20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?

¹⁵⁴ See EU Commission (2011) “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market” COM(2011) 427 final (13.07.2011), #4.2.

The fact that several European countries (i.e., Spain, Italy, Poland) have enacted over the years a variety of residual remuneration rights for Authors and Performers, including for the making available online, and that none of them has been declared contrary to the EU *acquis* confirms this conclusion.

By expressly delegating to national legislators the effective implementation of the principle of fair remuneration of Authors and Performers, Art.18 CDSM is opening the door to accepting different national solutions.

5.3. Residual Remuneration Rights do not Extend the Scope of Harmonized Rights against EU *acquis*

In *Svensson*, the CJEU concluded that Member States cannot unilaterally “extend the scope of rights” harmonized by EU *acquis*:

*Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.*¹³⁵

Member States cannot “add more acts” within the scope of a right that has been harmonized. Thus, the scope of the right of communication to the public must be uniformly interpreted and applied in all Member States as an “autonomous concept of EU law.” However, as explained above (see supra IV.3.B), granting a residual remuneration right (retained by Authors and Performers upon the transfer of the exclusive right to the producer) can hardly qualify as “giving a wider protection” or including “a wider range of activities” within the scope of that exclusive right.¹³⁶ Despite referred to as residual remuneration *rights* retained by authors, they **neither confer any new rights nor enlarge the scope of the exclusive right they remunerate for.**

The EU *acquis*-sanctioned residual mechanism is a statutory measure partially regarding the *exercise* of an exclusive right that has been transferred (by imposing a format for its remuneration); the residual mechanism does not affect the *existence* and scope of the right, or the rest of its *exercise*. It could even be argued, despite unnecessarily, that residual remuneration rights amount to a **contractual mechanism**, and that copyright contract law -beyond the specific provisions in Arts.18-22 CDSM- remains a matter for national laws. Spanish courts have had the opportunity to conclude that residual remuneration rights “do not result in a double payment... but are just a mechanism to secure economic participation of Performers in the acts of exploitation”.¹³⁷

Furthermore, even when disregarding the previous statement as valid, let’s not forget that related rights have been less harmonized than authors’ rights and that: **“Member States may provide for more far-reaching protection for holders of rights related to copyright than**

¹³⁵ See CJEU, *Svensson* (C-466/12).

¹³⁶ See CJEU, *Svensson* (C-466/12), ##33-41.

¹³⁷ See SAP Madrid (Sec.28) n.64/2015, 2 March 2015 (*Buongiorno*) p.9; confirmed -appeal denied- STS (civil) n.1712/2017, 12 July 2017. See also SAP Madrid (Sec.28) n.285/2020, 26 June 2020 (*iTunes*).

that required by Article 8 of Directive 92/100/EC.” The CJEU confirmed so in *C-More Entertainment*, as far as the harmonized right of making available to the public in Art.3(2) ISD:

(31) However, neither Article 3(2) of Directive 2001/29 nor any other provision thereof states that the EU legislature sought to harmonise and, in consequence, prevent or remove any differences between the national legislations as regards the extent of the protection which the Member States may grant to the holders of the rights referred to in Article 3(2)(d) with regard to certain acts, such as those at issue in the main proceedings, which are not expressly referred to in that provision.¹³⁸

5.4. Member States may apply EU *acquis* mechanisms *mutatis mutandis* to non-harmonized areas.

The same subsidiarity principle would also entitle Member States to apply *mutatis mutandis* the instrument of Art.5.3 RLD to the transfer of other exploitation rights, as long as it does not interfere with the functioning of the internal market.¹³⁹

The CJEU has availed the *mutatis mutandis* application of EU *acquis* sanctioned mechanisms, to other exclusive rights. Namely, as confirmed by the CJEU in *Luksan*,¹⁴⁰ the two mechanisms provided for the rental right in Art.3(4) and (5) RLD (a presumption of transfer to the audiovisual producer and the residual remuneration right) might be applied *mutatis mutandis* to the rights of communication to the public and making available online.¹⁴¹

Several European countries have enacted a residual remuneration right for the making available online of audiovisual works. Despite some initial difficulties for its enforcement (partly due to the fact that these rights are not uniformly granted across the EU), their compliance with EU law has never been questioned. Spain is one of these countries. The Spanish Supreme Court had the opportunity to confirm that the granting of residual remuneration rights to Phonogram Performers for the making available to the public (online) [Art.108.3 TRLPI] was in compliance with EU *acquis*.¹⁴² Previously, the Supreme Court had also rejected submitting a request for a CJEU preliminary ruling regarding the residual remuneration right of Audiovisual Performers for any acts of communication to the public (other than making available online) [Art.108.5 TRLPI], concluding that despite Art.8(2) RLD only referred to the single equitable remuneration shared among *Phonogram* Performers and Producers, recital 16 RLD formally accepted that Member

¹³⁸ See CJEU, *C-More Entertainment* (C-279/13).

¹³⁹ Scholars defend it “for the sake of consistency;” see WALTER / VON LEWINSKI (2010) *European Copyright Law*, #6.2.55

¹⁴⁰ See CJEU, *Luksan* (C-277/10), #86: “a presumption of transfer mechanism, such as that laid down originally, as regards rental and lending right...in Article 3(4) and (5) of Directive 2006/115, must also be capable of being applied as regards rights to exploit a cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public).”

¹⁴¹ Notice that even though they are often implemented together, these are independent mechanisms. A statutory remuneration right (retained after the transfer of an exclusive right) does not require a statutory presumption of transfer; it suffices that the right has been transferred, in any manner.

¹⁴² See SAP Madrid (Sec.28) n.64/2015, 2 March 2015 (*Buongiorno*); confirmed -appeal denied- by STS (civil) n.1712/2017, 12 July 2017. See also SAP Madrid (Sec.28) n.285/2020, 26 June 2020 (*iTunes*).

States may “provide for more far reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.”¹⁴³

5.5. Residual Remuneration Rights are not Contrary to the Freedom to Provide Services (Art.56 TFEU)

Residual remuneration rights implemented by national laws do not confer any *ius prohibendi*, but “only” a residual remuneration right that, despite being territorially applicable, do not become an obstacle for the functioning of the internal market.

But even assuming that different **territorial remuneration rights** might become an obstacle for the functioning of the EU internal market, such a restriction would still be justified for the purpose of securing fair remuneration for Authors and Performers. The CJEU has accepted restrictions to the internal market freedoms, as long as they are **justified, accurate and restricted** to its goal; copyright protection may be one of these justified restrictions.¹⁴⁴ Residual remuneration rights, granted by law, are only aimed at securing fair remuneration of Authors and Performers and do not go beyond “what is necessary to achieve this objective: Authors and Performers only “retain” a right to receive remuneration through CMOs, from the user/licensee, that will be territorially enforced as applicable. Spanish courts have so concluded: the residual remuneration right granted to Performers for making available online (Art.108.3 TRLPI) is not contrary to the freedom to provide services (Art.56 TFEU).¹⁴⁵

More specifically, the CJEU has expressly endorsed in several cases that an act of communication to the public may generate several **independent, territorial payment obligations** in different countries, without restricting the functioning of the internal market.¹⁴⁶ For instance, in *Basset v. SACEM*, the CJEU validated the remuneration claimed in France by the French CMO for mechanical reproduction of phonograms that had been commercialized and acquired in another country which did not provide for such a remuneration; the CJEU concluded that this was neither an arbitrary discrimination nor a restriction to the internal market.¹⁴⁷

And last, not least, residual remuneration rights do not generate **additional transaction costs** derived from the need to obtain a new license, in addition to that obtained by the producer. Any transactional costs generated by residual remuneration rights are the natural and direct result of the principle of territoriality and the application of as many national laws as countries of exploitation.¹⁴⁸ On the other hand, transaction costs may be substantially reduced when residual

¹⁴³ See STS n.543/2010, 15 Sept. 2010 (*Via Digital*). See also STS n.541/2010, 13 Dec. 2010 (*Canal Satélite Digital*).

¹⁴⁴ See CJEU *Coditel I* (62/79), *Musik Vertrieb* (55/80 y 57/80), *Phil Collins* (C 92/92 y C 326/92), *Christiansen* (C-158/86), *FAPL* (C-403/08 y C-429/08), *Sky Osterreich* (C-283/11).

¹⁴⁵ See SAP Madrid (Sec.28) n.285/2020, 26 June 2020 (*iTunes*), FJ2, p.22.

¹⁴⁶ See CJEU, *Basset v. SACEM* (C-402/85). See also CJEU, *Ministère Public* (C-395/87), *SACEM v Debelle* (C-110/88, C-241/88, C-242/88) and *Lagardère* (C-192/04).

¹⁴⁷ See CJEU, *Basset v. SACEM* (C-402/85).

¹⁴⁸ It goes without saying that, being subject to collective management, any transaction costs to claim remuneration rights will be smaller than transactions costs to obtain authorization for the exclusive rights.

remuneration rights are subject to mandatory collective management. Once the producer has licensed it, CMOs claim the applicable residual remuneration in an efficient manner.

5.6. Residual Remuneration Rights do not turn Exclusive Rights into Statutory Licenses.

When a statutory residual mechanism is imposed for the remuneration of specific rights transferred by Authors and Performers to producers, the exercise of the exclusive right remains in the hand of Authors, Performers and Producers: the former, when deciding its transfer to the producer and the later authorizing or prohibiting exploitation of the work, performance or recording.

Mandatory collective management of a residual remuneration right does not affect the exercise of the exclusive right that gives rise to it, either. Often used by EU *acquis* and national laws, mandatory collective management simply facilitates remuneration by allowing CMOs to act *ex lege* instead of requesting mandates from Authors. Mandatory collective management also provides Authors and Performers a better bargaining position to negotiate fees with users/licensees, and facilitates enforcement of remuneration. Of course, when circumstances in a specific country and sector already facilitate a voluntary mandate of rights to CMOs (i.e., France and, most notably, for music composers) there may be no need to impose mandatory collective management. Instead, in other countries and sectors, mandatory collective management results in higher and more efficient collection of revenues (indirectly fostering the development of CMOs).

5.7. Mandatory Collective Management is not Contrary to EU *acquis*

As necessary as it has proven to be for the effectiveness of remuneration rights,¹⁴⁹ collective management, as well as mandatory collective management, are especially sensitive issues within the internal market.

Residual remuneration rights may be entrusted to CMOs on a voluntary basis or, if necessary, under mandatory collective management. This decision is to be made by each national legislator, depending on specific circumstances of each country and sector (such as market conditions or CMO development). Leaving aside a few specific countries and sectors, mandatory collective management has proven to be the most effective manner to increase remuneration of Authors and Performers across the EU.

Although collective management has been only marginally regulated in the EU *acquis*, **mandatory collective management has been endorsed** (and even imposed) by several EU Directives. For instance, Art.5 RLD allows residual remuneration rights to be entrusted to collective management (Art.5.3 RLD) and, specifically, to mandatory collective management (Art.5.4 RLD). Art.9 SCD imposes mandatory collective management for the statutory license of cable redistribution. And Recital 26 ISD reminds us of the importance of collective management. Even the CRMD 2014/26/EU (music online and collective management) confirms -except for the

¹⁴⁹ The need for mandatory collective management also follows naturally from the unwaivable (and inalienable) nature of remuneration rights.

licensing of music online- the territorial nature of CMOs and their territorial licensing structure, doing nothing to prevent mandatory collective management.

In its turn, the CJEU has also justified mandatory collective management in OSA:¹⁵⁰

*(72) legislation such as that at issue in the main proceedings – which grants a collecting society, such as OSA, a monopoly over the management of copyright in relation to a category of protected works in the territory of the Member State concerned – must be considered as suitable for protecting intellectual property rights, since it **is liable to allow the effective management of those rights and an effective supervision of their respect in that territory.***

Mandatory collective management cannot be deemed contrary to the **fundamental right to freedom of assembly and of association**, recognized in Art.12.1 EU Charter of Fundamental Rights (2010/C 83/02)¹⁵¹ and Art.11.1 European Convention of Human Rights (1950).¹⁵² Mandatory collective management does not oblige Authors and Performers to join the CMO managing the remuneration. Precisely, this is the aim behind mandatory collective management: the CMO will manage the residual remuneration right, by legal mandate, regardless of Authors and Performers mandating their rights to it. As a silver lining, mandatory collective management reduces management costs and may even increase voluntary mandates towards the CMO; none of which would be contrary to the fundamental right.¹⁵³

Under Art.16 EU Charter of Fundamental Rights (2010/C 83/02),¹⁵⁴ the **freedom to conduct a business** must be assessed “in accordance with Union law and national laws and practices is recognised.” Residual remuneration rights neither contravene nor affect this fundamental freedom because exclusive rights remain in the hands of producers (or their subsequent rightsholders). They are the ones deciding how and who to license; CMOs will subsequently collect remuneration rights from licensees. Furthermore, according to the **principle of proportionality**, the freedom to conduct business must be balanced with the objective to secure fair remuneration of Authors and Performers.¹⁵⁵ For instance, in *Sky Österreich*, the CJEU reminded us that “the freedom to conduct a business is not absolute, but must be viewed in relation to its social function.”¹⁵⁶

¹⁵⁰ See CJEU, *OSA v. Léčebné lázně Mariánské Lázně* (C-351/12).

¹⁵¹ Vid http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

¹⁵² Vid <http://www.echr.coe.int/>

¹⁵³ Spanish courts have confirmed the compatibility of mandatory collective management with the freedom of assembly and association; See SAP Madrid (Sec.28) n.64/2015, 2 March 2015 (*Buongiorno*); confirmed - appeal denied- STS (civil) n.1712/2017, 12 July 2017.

¹⁵⁴ Vid http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

¹⁵⁵ . See CJEU *Promusicae* (C-275/06), *Painer* (C-145/10) #132, *Padawan* (C-620/10) #43, *Netlog* (C-360/10), *Scarlet Extended* (C-70/10), *Sky Österreich* (C-283/11)

¹⁵⁶ See CJEU, *Sky Österreich GmbH v. Österreichischer Rundfunk* (C-283/11) #45; In this case, the CJEU concluded that the freedom to access information should cast a limitation upon the exclusive exercise of copyright and validated a provision imposing on copyright owners an obligation to provide other broadcasters access to their contents, in exchange for a fee that could not exceed marginal costs, because “the disadvantages resulting from that provision are not disproportionate in the light of the aims which it

5.8. A Bottom-up Harmonization in Favour of All

Leaving the implementation of residual remunerations rights to national law has several advantages. On the one hand, implementation at national level offers more flexibility in deciding the scope and acts of exploitation that require residual remuneration rights (to better fit the needs of each national market) and in regulating the specific circumstances for its enforcement (uses, fees, mandatory collective management, etc).

On the other, national implementation might lead to a bottom-up harmonization in the long run by means of the conventional principles of national treatment and *lex loci protectionis*. Based on the principle of non-discrimination in Art.18 TFEU, European Authors and Performers will benefit from any residual remuneration rights implemented in national laws within the EU market.¹⁵⁷ As far as **non-EU Authors and Performers**, if the Advocate General's Opinion in the *RAAP v. PPI* case (C-265/19, 02.07.2020) is confirmed by the CJEU, any national residual remuneration rights implemented in national laws would also benefit non-EU Performers, under the principle of national treatment (Member States cannot require reciprocity to exclude, for instance, US Performers). This expansive effect will be even wider where residual remuneration rights are subject to mandatory collective management, benefiting all Authors and Performers (national and foreign) regarding any mandate of exclusive rights.¹⁵⁸

Uniform rules within the internal market would certainly be the preferred outcome, but they should not be so at the expense of denying Authors and Performers their right to receive fair remuneration. At this stage, quantity should be preferred over uniformity.

6. Conclusions

As acknowledged by the EU Commission, Authors and Performers obtaining appropriate remuneration in return for the transfer of their rights is “a prerequisite for a sustainable and functioning marketplace of content creation, exploitation and consumption.” Granting them exclusive rights, but failing to secure appropriate and proportionate remuneration for their exploitation is as much as granting them no rights at all.

Securing fair remuneration for Performers in the EU remains a matter for national laws. Now EU Member States have been formally invited (in fact, obliged) to secure fair remuneration for them. Member States are advised to do a close (if not *verbatim*) implementation of the principle of fair remuneration in Art.18(1) CDSM so as to facilitate further harmonization by the CJEU of this “**autonomous concept of EU law.**” But Member States should not be satisfied with that; they must go further to **secure for them effective fair remuneration.**

pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case.”

¹⁵⁷ Any residual remuneration rights implemented in national law should equally benefit national as well as other EU-national Authors and Performers.

¹⁵⁸ This is the case in Spain, where it has been confirmed by caselaw: see SAP Madrid (Sec.28) n.285/2020, 26 June 2020 (*iTunes*), FJ3, p.25.

Member States are encouraged to enact further **specific statutory contract rules**, as necessary, to render this principle effective. This may include setting proportional remuneration as a general or sectorial rule, requiring that separate remunerations apply to each means of exploitation, and even identifying specific instances where “lump-sums” may be set or deferring it to specific sectorial bargaining agreements. Hopefully, these statutory contract rules will strengthen Authors and Performers bargaining position to negotiate their contracts with publishers and producers, and to enforce them afterwards.

However, contracts (and statutory contract rules) should not bear all the pressure to secure “appropriate and proportionate remuneration.” Previous experience shows that **statutory contract rules *per se* are not enough**. Member States must use “different mechanisms” to achieve that goal always taking into account the “principle of contractual freedom and a fair balance of rights and interests” in different sectors (Art.18(2) CDSM).

Collective bargaining, in sectors and countries where available, has an important role to play especially when regarding the implementation of the contractual obligations in Arts.19-22 CDSM. It may help identify and supplement statutory contract rules and even improve (when successfully enforced) remuneration conditions of Performers in their future contracts. However, lacking the structural conditions for its successful negotiation and enforcement, collective bargaining alone will not suffice to secure effective remuneration of Performers in all sectors and countries.

Instead, unwaivable (and inalienable) **statutory residual remuneration rights**, granted by law to Authors and Performers, upon transferring their rights to the producer, paid by users/licensees and subject to collective management have proven to be the most effective mechanism to secure appropriate and proportionate remuneration for them. This is specially so when dealing with complex productions (with multiple contributors) such as in the audiovisual and musical sectors, as well as with long, complex and rapidly evolving markets, such as the digital and online markets. Residual remuneration rights may apply to secure fair remuneration of Performers for the transfer of *any* exploitation rights: such as the rental and lending rights, the right of making available to the public or, more generally, to any means of exploitation under the rights of distribution and communication to the public.

As reported by AEPO-ARTIS, 90% of performers’ collections stem from *remuneration rights* subject to collective management, which is most effective where *compulsorily* managed by performers’ collective management organisations.¹⁵⁹

Accordingly, AEPO-ARTIS is advising Member States to introduce the following text into their national laws:

¹⁵⁹ See AEPO-ARTIS (2018) *Performers’ Rights*, p.162-164. The role of residual remuneration rights under collective management in securing fair remuneration for Authors and Performers is especially efficient when statutory remuneration rights are harmonized, unwaivable (and inalienable), paid by users/licensees and managed only by CMOs.

“Where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have the right to obtain an equitable remuneration to be paid by the user for the making available to the public of his fixed performance. The right of the performer to obtain an equitable remuneration for the making available to the public of his performance should be unwaivable and collected and administered by a performers’ collective management organisation.”¹⁶⁰

The language in this proposal **overcomes the several “shortcomings” of Art.5 RLD**. It is a residual remuneration right retained by Performers upon the transfer of their making available right to producers, which is unwaivable, subject to collective management, and clearly “paid by the user.” It is understood that the residual mechanism will apply to all forms of transfer, assignment or license (also those operating by means of a statutory rebuttable presumption) and that it is safeguarded from any “agreed terms” (meaning that it will not be affected by any other contractual remunerations or terms). Although not expressly mentioned in the proposal, it is understood that the remuneration will be equitably shared between the categories of rightholders concerned.¹⁶¹

Similar proposals were made, regarding **audiovisual Authors**, by the SAA (for online making available)¹⁶² and by CISAC (for any exploitation rights).¹⁶³

Residual remuneration rights secure a **constant flow of revenues** for all Authors and Performers (regardless of nationality), for current as well as future means of exploitation, with **no need to revise / renegotiate production contracts**. They **neither disturb the exercise and enforcement of exclusive rights, nor the chain of exploitation**, which remains in the hands of producers and rightholders. They **relieve pressure on producers** from Authors and Performers claims of fair remuneration, by means of non-contractual (statutory) remuneration directly to Authors and Performers, **efficiently managed by CMOs** and paid by users/licensees. Despite being statutorily granted on the basis of a transfer of exclusive rights, residual remuneration rights **neither duplicate nor substitute for the exclusive rights**. They simply

¹⁶⁰ See AEPO-ARTIS (2019) *Political Guidelines for the implementation of Article 18 of the 2019 Copyright Directive*.

¹⁶¹ See AEPO-ARTIS (2018) *Performers’ Rights*, p.164.

¹⁶² See SAA (2015) *White Paper*, p.38 proposing the following text: “1. When an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain the right to obtain an equitable remuneration. 2. This right to obtain an equitable remuneration for the making available of the author’s work(s) cannot be waived. 3. The administration of this right to obtain an equitable remuneration for the making available of the author’s work(s) shall be entrusted to collective management organizations representing audiovisual authors, unless other collective agreements already guarantee such remuneration to audiovisual authors for their making available right. 4. Authors’ collective management organizations shall collect the equitable remuneration from audiovisual media services making audiovisual works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.”

¹⁶³ See CISAC (2018) *AV Remuneration Study*, p.4: “Without prejudice of any other agreements or regimes that guarantee remuneration to audiovisual authors, the authors of an audiovisual work will retain, in exchange for the transfer of exclusive rights to the producer, an unwaivable and inalienable right to receive equitable remuneration for any acts of exploitation of their works, under collective management, and paid directly by the users.”

secure an extra-contractual means of remuneration, enforced via CMOs, for the exploitation right transferred to and subsequently licensed by the producer.

National legislators have the opportunity, and obligation, offered by EU *acquis* to explore and use the full potential of the residual remuneration right mechanism (as originally set for the rental right in Art.5.3 RLD) to secure remuneration for other means and markets of exploitation. When doing so, we should learn from previous national experiences and remember that residual remuneration rights are most effective when set as unwaivable (and inalienable), managed by CMOs (mandatorily, if necessary) and paid by the user/licensee (not the producer).

Last, but not least, the further a national legislator goes, making use of the full scope of mechanisms allowed under Art.18 CDSM, the less need there will be for Authors and Performers to turn to the *ex-post* mechanisms in Arts.19-22 CDSM which – as evidence across the EU shows – have failed to secure fair remuneration for Authors and Performers, at large.

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Abbreviations:

CDSM - Directive (EU) 2019/790, adopted by the European Parliament and the Council on 17 April 2019, on copyright and related rights in the Digital Single Market

CRMD - Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

CMO – Collective Management Organization

ISD - Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

RLD - 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)

SCD - Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission