

An effective and comprehensive contractual protection of creators and performers

Copyright in the Digital Single Market

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CONTRACTUAL
ARRANGEMENTS APPLICABLE
TO CREATORS : LAW AND
PRACTICE OF SELECTED
MEMBER STATES

STUDY

EN

2014



IVIR, *Remuneration of authors and performers*, European Commission, 2015-2016

CREATE, *UK Authors' revenues and contracts*, 2019

Report for the French Ministry of Culture, *L'auteur et l'acte de création*, 22 January 2020

The median revenue of EU creators is below the minimal revenue and includes non-creative jobs

- Multiplicity of creations

- Focus on copyright waiver / license by main author(s) aiming at putting a work on the market

- Multiplicity of economic and cultural sectors

- Focus on cultural and entertainment sectors

- Multiplicity of legal regimes

- Focus on DSM Directive provisions

Comprehensive and undifferentiated
treatment by DSM directive

MARKET



Contractual
bargain: access
to markets –
assignment of
copyright

Weaker position
of creators

Role of
remuneration

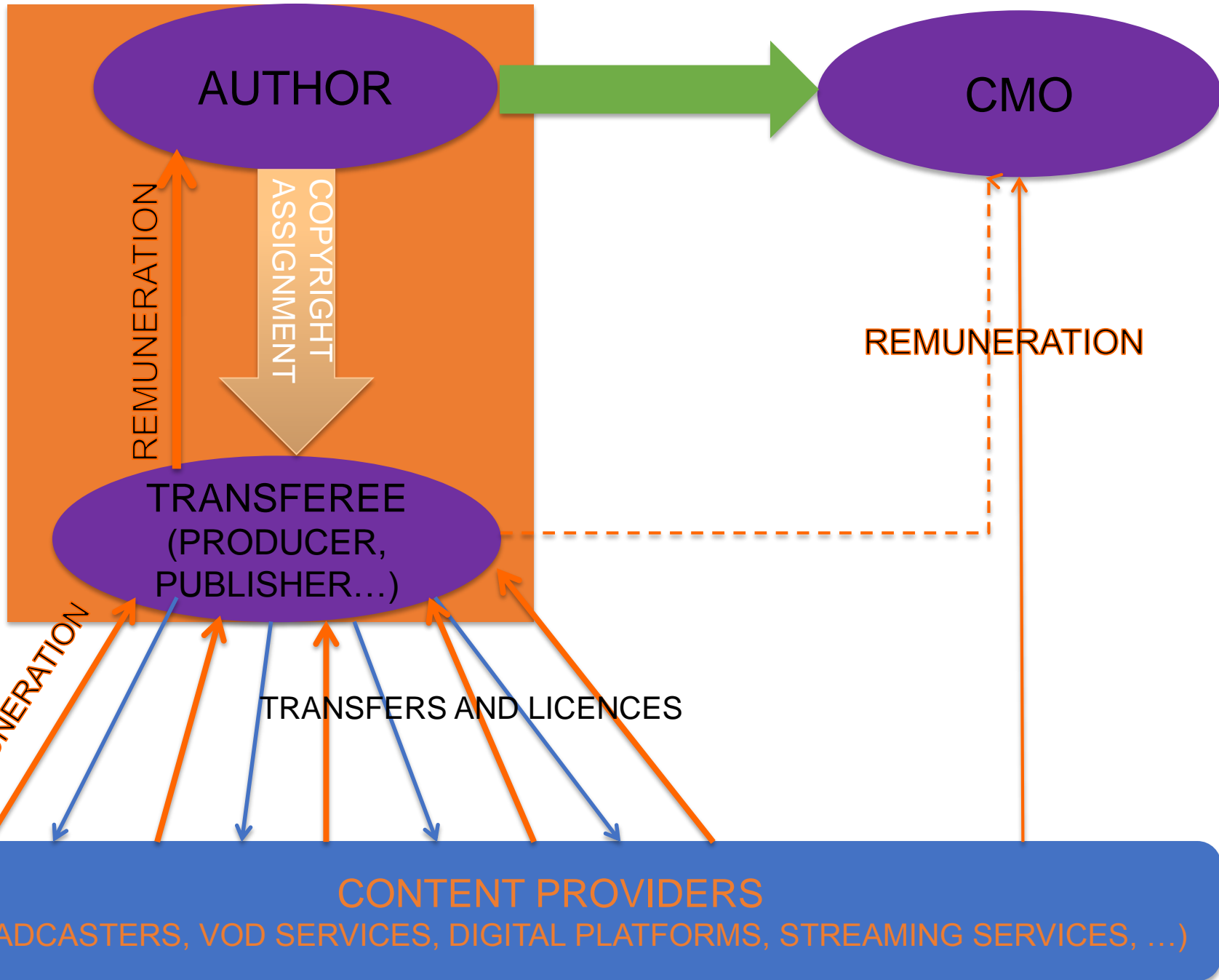
**The
contract**

Different
sectorial
practices

Life of contract:

- From negotiation to enforcement
- Dynamic environment and forces

**Contractual protection in
copyright law**



Usual copyright law protections (in EU)

- Restrictions as to the form of transfer
 - Assignments/licences
- Form requirements
 - Written form (validity or evidence effect)
- Scope of rights transferred
 - Assigned/licensed rights and modes of exploitation
 - Geographical scope and duration
 - Prohibition to transfer some rights of remuneration or moral rights
 - Future works
 - Unknown modes of exploitation
- Determination of remuneration
 - Determination of its amount or type (lump-sum, proportional)
 - Best seller clause
 - Legal right of adequate remuneration

Usual copyright law protections (in EU)

- Obligations
 - Exploitation obligation
 - Reporting and transparency
- Interpretation of contracts
 - In favour of author
- Termination of contracts
 - Reversion or revocation (rare)
 - Term of protection directive (art. 3.2a): performers
- Transfer of contract
- Rules for specific contracts
 - Employment, commissioned works
 - Publishing contracts, audiovisual production

No EU harmonisation

Protection of authors



contractual freedom

Contractual protection in the DSM Directive

- Protecting authors and performers
 - But not for computer programs (art.23(2))
 - But not when contractual counterpart is an end user (rec. 72)
- Mostly mandatory provisions
- Role of collective bargaining
- Right to remuneration
- Contractual bargain: lack of exploitation could lead to exit
- Obligation on non contractual counterparts

- Not all stages of contractual process
 - Nothing on negotiation phase
 - Execution and termination
- No real consideration of digital exploitation

Art. 18 – Principle of an appropriate and proportional 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.

Appropriate and proportionate remuneration

- Authors and performers are entitled to receive appropriate and proportionate remuneration
- Licences and transfers
- Appropriate and proportionate to the **actual or potential economic value** of the licensed or transferred rights
- Role of collective bargaining

- But freedom of contract (art. 23(1))
- Uncertainty as to “appropriate”, as to economic value
- On revenues or benefits ?
- Lump sum is admitted (not the rule)
- Not an unwaivable right of remuneration ?
- New modes of revenues, incl. subscriptions, advertising ?

Art. 19 – Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.
2. Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1.
(...)
3. The obligation set out in paragraph 1 shall be proportionate and effective in ensuring a high level of transparency in every sector. (...)

Transparency obligation – Art. 19

- Scope of obligation
 - at least once a year
 - relevant and comprehensive information on the exploitation
 - Up-to-date: access to recent data
 - Comprehensive: all sources of relevant revenues, incl. merchandising
 - in particular as regards modes of exploitation, all revenues generated and remuneration due
- From licensees / transferees
 - Also from sublicensees when contractant does not have all information, and upon request
- Accommodations open to Member States (19(3) to 19(5))

- No contrary contractual provision (art. 23(1))
- How to ensure comprehensive information from all exploiters
- All financial flows? What about refunds, advertising revenues, ...
- Applicable law: place of transferee or author/performer ?

Art. 20 – Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, 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.

2. (...)

Contract adjustment mechanism - art.20

- Right to additional, appropriate and fair remuneration, when disproportion between the agreed upon remuneration and revenues derived from actual exploitation
- Adjustment as to real economic value
- Assistance by representatives of authors/performers

- No contrary contractual provision (art. 23(1))
- Dynamic nature of contract, but high burden for authors/performers
- What is real economic value ? New modes of exploitation ?
- Risk of black-listing ?

Article 21 – Alternative dispute resolution mechanism

Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure.

Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.

Alternative dispute resolution – Art. 21

- disputes concerning the transparency obligation and the contract adjustment mechanism
- voluntary, alternative dispute resolution procedure
- Right of action of representative organisations of authors and performers

- No contrary contractual provision (art. 23(1))
- Other disputes?
- How to avoid black-listing (reduced risk) ?

Art. 22 – Right of revocation

1. Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter.
2. Specific provisions for the revocation mechanism provided for in paragraph 1 may be provided for in national law, taking into account the following:
 - (a) the specificities of the different sectors and the different types of works/performances;
 - (b) where a work or other subject matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer.

(...)
3. Member States shall provide that the revocation provided for in paragraph 1 may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights. The author or performer shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights.
4. Paragraph 1 shall not apply if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy.

(...)

Right of revocation – art. 22

- Revocation in whole or in part of the licence or the transfer of rights
- If lack of exploitation
- After a reasonable period of time
- May be limited by Member States (type of works, time frame, only revocation of exclusivity)

- Can be contracted out (art. 23(1))
- Any exploitation would be enough ?
- Different formats of exploitation?
 - French solution for publishing contract: exploitation in paper and in ebooks
 - New modes of exploitation

Application in time

- Only for works and performances protected by copyright on or after 7 June 2021 (art. 26 (1))
- Without prejudice to any acts concluded and rights acquired before 7 June 2021 (art. 26(2))
- Application of transparency obligation as from 7 June 2022 (art. 27)

An overall assessment – Contract as a bargain

- Importance of remuneration
 - Contract is key but not enough
 - Fair allocation of revenues, particularly in new platform economy
 - Separate exclusive rights (exploitation) and unwaivable rights to remuneration
- Scope of transfer of rights
 - An obligation to transfer only the rights needed for normal exploitation ? (v. all-encompassing contracts)
- Revocation if lack of exploitation
 - Risk of blacklisting
 - Why not regular revision of contract based on evolving economic conditions instead ?

An overall assessment – Long life of contract

- Best seller clause is useful
- Regular revisions of contract would be too

An overall assessment – Third parties

- Economic role of secondary exploiters, incl. platforms
- Collective bargaining and professional agreements and best practices
- Distinct rights to remuneration and direct claims from authors/performers and CMOs against some exploiters

“We have no idea what we're signing, in an act of legendary mental deficiency.”

Morrissey, Autobiography

Thanks for your attention

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