

Copyright Contract Law

The provisions on transparency and
contract adjustments of the Draft Directive

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Draft Directive on Copyright in the Digital Single Market

Chapter 3

Fair Remuneration in contracts of authors and performers

- ✓ Art. 14 – Transparency obligation
- ✓ Art. 15 – Contract adjustment mechanism
- ✓ Art. 16 – Dispute resolution mechanism



- 1. Assessment of the Draft Directive's provisions on copyright contract law**
 - A. A first step in the right direction
 - B. Critical evaluation
- 2. Proposals to further improve the contractual situation of creative people**
 - A. Remuneration
 - B. Duration



- ✓ Only individual copyright contract
- ✓ between creative people (authors and performers)
- ✓ and publishers, producers, broadcasters = primary contractual counterparts
- ➔ Agreements with CMOs excluded
- ➔ Sub-licenses excluded





A first step in the right direction

1. Issue of copyright contract law for the first time addressed at European level

- ✓ Need to improve the bargaining position of authors and performers
- ✓ Legislative competence of the European Union in the field of copyright contract law



2. Structural imbalance between creative people and publishers & producers

- ✓ Copyright contract law = one of the pillars of modern copyright law
- ✓ Body of mandatory rules for the protection of creative people in their contractual relationships
- ✓ Freedom of contract illusory if contracting parties have disproportionate bargaining power



3. Transparency obligation

Art. 14.1

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



3. Information asymmetry

- ✓ Transparency obligation proportionate and effective
- ✓ Excluded if costs are disproportionate in relation to the revenues generated by the exploitation (art. 14.2)
- ✓ Excluded in case of insignificant contribution (art. 14.3)
- ✓ Reporting obligations already imposed on publishers and producers in most EU Member States

E.g.: § 32d & § 32e German Copyright Act: “right to information and accountability” enforceable against the contracting partner and the sub-licensee



4. Contract adjustment mechanism

Art. 15

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



4. Bestseller clause

- ✓ Many Member States already provide for a bestseller clause
- ✓ Claim for additional remuneration in case of a disproportion between the remuneration agreed upon and the revenues generated from the exploitation of the work/performance
- ✓ May be brought against the author/performer's contracting party, but also against third parties to whom rights have subsequently been granted (D, NL)



5. Dispute resolution mechanism

✓ Art. 16

Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.

- ✓ Procedure to improve the enforcement of both proposed mechanisms (Art. 14 & 15) to ensure a “fair remuneration” to creative people



Evaluation

1. Only *ex-post* mechanisms

- ✓ Original contract should in the first instance provide for “appropriate” remuneration
- ✓ Structural problem of unequal bargaining power not addressed

2. Lack of mandatory enforcement mechanisms

- ✓ Dispute resolution mechanism only on a voluntary basis
- ✓ Risk of being blacklisted (virtual boycott) not addressed



Proposals to further improve the contractual situation of creative people

A) Remuneration

- ✓ Mandatory rules for the agreement on remuneration (clause in the initial contract) = *ex ante* control
- ✓ Basic principle of contract law = free negotiation of the price of a good or a service
- ✓ Limitation of the freedom of contract to compensate the structural imbalance in bargaining power



1. Remuneration has to be proportional to the revenues generated from the exploitation of the work/ performance (Belgium, France, Greece, Italy, Portugal, Spain)
2. Remuneration has to be fair/equitable (Germany, Netherlands)
 - ✓ Fairness requirement \neq mere statement of general policy
 - ✓ Fair price required for the validity of a copyright contract
 - ✓ Concrete and effective enforcement mechanism
 - ✓ Claim for contract adjustment enforceable before the court



Definition of the appropriate remuneration

- ✓ = customary and fair, having regard to the nature and scope of the rights granted, in particular duration, frequency, extent and moment of the exploitation (Germany)
- ✓ Lump sum payment not sufficient if rights granted unlimited in time and scope
- ✓ Key issue = to make sure that creative people adequately participate in the revenues generated from the exploitation of their works or performances = principle of participation (*Beteiligungsgrundsatz*)



Further potential mandatory rules on remuneration

- ✓ Separate remuneration for each use in case the same work/ performance is used several times (ex: publication of a newspaper article in different regional editions)
- ✓ Separate remuneration for each mode of exploitation (France, Belgium)



Collective agreements

- ✓ Need to reflect the specificities of every single sector (publishing, music, audiovisual sector)
- ✓ Need for flexibility as for employment legislation
- ➔ Collective agreements between trade unions and employers' associations or individual employers
- ➔ Assessment of the appropriateness of the remuneration agreed upon by the contracting parties



- ✓ **Germany:** remuneration deemed appropriate if determined in accordance with “common remuneration standards” established by representative organisations of authors/ performers and producers/publishers.
- ✓ Approach based on collectively negotiated remuneration agreements is inefficient
 - ✓ Unwillingness of publishers & producers to negotiate such standards
 - ✓ Lack of representative associations of authors and performers in many branches



- ✓ **Netherlands:** mechanism of government approval of collectively agreed remuneration schemes
- ✓ **France:** collective agreements on remuneration negotiated between organisations representing creative people and publishers or producers may be made mandatory within each sector for all parties by order of the Minister for Culture



B) Duration

- ✓ Creative people forced to grant extensive licenses/to transfer all their rights for the entire duration of the copyright = practice of acquiring rights ahead (*Rechteeinkauf auf Vorrat*)
- ✓ Extensive assignments or licenses often exceed the needs of publishers/producers, who do not make use of all rights granted
- ✓ Emergence of new business models or economic changes
 - > derogation to the *pacta sunt servanda* rule needed to renegotiate or terminate such contracts under certain conditions



1. Renegotiation outside the bestseller clause

- ✓ Clause providing for a periodic review of the financial conditions of the transfer of rights (ex: publishing contracts for e-books in France)

2. Revocation for failure to exploit

- ✓ Statutory reversion right/ “right to recall” (*Rückrufsrecht*) because of insufficient exploitation
- ✓ Rather inefficient in practice:
 - ✓ Serious harm to the legitimate interests of the author or performer
 - ✓ Obligation to compensate the contracting party



2. Revocation for failure to exploit

- ✓ Duty of the publisher or producer to exploit the work/ performance for which he has been granted the copyright
- ✓ Failure to fulfil this obligation = non-performance
 - ✓ action for breach of contract before the court
 - ✓ automatic termination (France)
- ✓ Duty to exploit each right granted for each significant mode of exploitation -> “use it or lose it” clause



3. Termination right

- ✓ no condition of insufficient exploitation
- ✓ no compensation of any lost of the contracting party
- ✓ **Germany:** in case of exclusive licenses, authors are entitled to exploit the work after 10 years, the first licensee retaining a non-exclusive license for the residual length of the primary grant (§ 40a)
- ✓ **France:** termination right of both parties to a book publishing contract because of commercial flop (*clause de sortie*)

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