

STUDY

Requested by the JURI Committee



Buyout contracts imposed by platforms in the cultural and creative sector



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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, provides an analysis of buyout contracts imposed by platforms in the cultural and creative sector in EU law. The study provides a detailed analysis of buyout practices and assess their economic and cultural impact on the creative sector. Policy recommendations are formulated in relation to EU creators' protection, in light of EU and member states' implementations.

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LIST OF ABBREVIATIONS

AGESSA	Association for the Management of Authors' Social Security / Association pour la Gestion de la Sécurité sociale des Auteurs France
CE	Board of State / Conseil d'État (France)
CCI	Creative and Cultural Industries
CCS	Creative and Cultural Sectors
CISAC	International Confederation of Societies of Authors and Composers (France)
CNC	National Centre of Cinematography
COE	European Audio-visual Observatory
CCS	Cultural and creative sectors
CMO	Collective management organisation
DSM	Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market
ECSA	European Composer and Songwriter Alliance
FERA	Federation of European Film Directors
FSE	Federation of Screenwriters in Europe
GEMA	Society for musical performing and mechanical reproduction rights (Germany)
GMR	Global Music Rights
IPC	Intellectual Property Code
INFOSOC	Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society
OCSSP	Video-on-demand services
SABAM	Belgian Association for Authors (Belgium)
SACEM	Society of Authors, Composers and Publishers of Music (France)
SGAE	Spanish Society of Authors and Publishers (Spain)

SIAE	Italian Society of Authors and Publishers (Italy)
SMAD	Directive 2010/13/EU, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive)
STIM	Swedish Performing Rights Society (Sweden)
SODRAC	Society for Reproduction Rights of Authors, Composers and Publishers in Canada
SVOD	Subscription video on demand
TFEU:	Treaty on the Functioning of the European Union
TVOD	Transactional Video on Demand
USPA	Audio-visual Production Union/ Union Syndicale de la Production Audiovisuelle (France)
ZAIKS	Society of Authors/ Stowarzyszenie Autorów (Poland)

EXECUTIVE SUMMARY

(A) Background: buyout contracts and the protection of European creators

The issue of buyout practices, which appear to be increasingly widespread in Europe, presents a considerable risk of hindering creators' ability to receive fair compensation and retain control over their intellectual property. Large digital platforms often impose contracts that leave creators with limited room for negotiation. Ensuring fair treatment for creators requires the enactment of legislation that counterbalances the overwhelming market influence exerted by these online platforms. The European Union's Digital Single Market (DSM) Directive, adopted in 2019, represented an important step towards addressing these concerns. It emphasised the importance of appropriate remuneration for creators, linked to the use of their work and proportionate to the economic value of their rights. However, difficulties persist in effectively implementing these fundamental rights.

Faced with these challenges, the European Parliament has expressed its concern regarding these dominant practices. It called for a comprehensive assessment of these practices and the implementation of measures aimed at guaranteeing a fairer sharing of values and a more equitable distribution of income for the benefit of creators.

Its proposal, advocating for the establishment of a "European status of the artist," aims to create a framework more protective of the professional interests of creators working within the member countries of the European Union. The resolution highlights the vital role of member states in safeguarding artistic freedom and calls on the European Commission to impose strict measures against states that fail to meet their commitments in this critical area.

(B) The importance of the creative and cultural sector for Europe

The cultural sector plays a vital role in the European economy, contributing significantly to Europe's GDP, employment, innovation, social cohesion and global competitiveness. In 2019, the cultural and creative sectors represented 4.4% of EU GDP, with an annual turnover of €643 billion and a total added value of €253 billion. The creative and cultural industries employ more than 7.6 million people in Europe and have an annual growth rate of 2.6%, exceeding the European Union average of 2%. Additionally, in 2017, these sectors recorded a trade surplus of €8.6 billion, strengthening the European Union's position as a global leader in the global cultural and economic landscape.

The COVID-19 pandemic has highlighted the precarious nature and structural challenges facing the cultural sector (containment measures, closure of cultural venues, cancellations of performances, significant drops in income, etc.). The crisis also highlighted that states were often unable to identify the creators most precarious by the crisis because of a lack of strong professional status.

Today, it is in this fragile post-COVID context that new contractual changes are being pointed out by actors in the creative sectors as having negative repercussions on these already vulnerable creative workers.

Beyond the creators' economic rights, centred around the commercial exploitation of their works, it is also their moral rights that are threatened. Indeed, these complete buyout practices can jeopardise the personal and sacred connections that creators have with their works.

(C) Identification of buyout practices

This study delves deeper into the conceptualisations and practicalities of a phenomenon commonly referred to as buyout practices. These practices involve creators giving up all rights to their creative work in exchange for a one-time lump sum payment, thus eliminating any chance of benefiting from the revenue generated by their work. Interviews conducted as part of this research reveal the growing

prevalence of these practices in the creative industries. Additionally, the study highlights other practices that are less condemned but ultimately lead to the same result. This is the case for authors who, initially remunerated proportionally, ultimately does not benefit from the revenue linked to the exploitation of their work due to insufficient exploitation.

The result is that many authors receive advances in the form of lump sums, which are never amortised due to insufficient exploitation of their works, effectively transforming the payment structure into a total waiver of their rights.

To gain insight into contractual buyout practices, it was essential to allow each interviewee the freedom to explain how they identified the criteria qualifying these practices. While we did receive some examples of contract clauses, the widespread use of confidentiality clauses posed a significant challenge during the interviews. This systematic inclusion of confidentiality clauses could have been a substantial barrier to discussing specific contracts at the time of the interviews. This limitation further underscores the complexity of the issue. The very nature of these practices often leads to them being shrouded in secrecy, hindering a comprehensive understanding of their impact and prevalence. Similarly, creators themselves are frequently restricted from discussing these practices due to their obligation of confidentiality.

The study presents provisions contained in so-called audiovisual production contracts between authors and producer, examples between the executive producer, making a program on behalf of a platform in the audiovisual sector, examples of contractual provision between a producer and a screenwriter and examples of contractual provisions used in the United States (work for hire contracts).

After outlining criteria to define buyout practices and offering specific examples of contract clauses, the report delves into the legislative framework of the European Union.

(D) The importance of the 2019 DSM Directive

Through the DSM Directive, the European Union legislator has taken preliminary steps toward standardising contractual copyright law. The primary goal is to rectify existing imbalances in the relationships between creators and operators. Chapter 3 of the Directive primarily aims to ensure authors and artists receive fair and proportional compensation for the utilisation of their protected works. Although some of the methods chosen to reinforce this protection may appear conventional and already in place within various national legal systems, certain provisions introduce innovative elements.

The fundamental principle guiding the restoration of contractual equilibrium is the establishment of “appropriate and proportional remuneration” (Article 18). Transparency plays a pivotal role in achieving this objective. Article 19 command transparency, offering authors and artists clear insights into how their works are being utilised. This transparency not only empowers creators but also enables them to request additional compensation and effectively utilise the contract adjustment mechanism, outlined in Article 20. Furthermore, Article 22 introduces the right of revocation for authors or performers in cases where they have granted an exclusive license or transferred their rights, yet their work or performance remains unused.

The study then addresses the specific measures taken by the member countries of the European Union to implement this contractual right of copyright resulting from Chapter 3 of the directive. These national measures are the means by which member countries translate the requirements and standards of the EU directive.

(E) Assessment of the impact of buyout contracts

The report attempts to assess the impacts of buyout clauses on the EU creative sector. Buyout contracts, whereby creators relinquish all rights to their work for a fixed sum, raise concerns about the violation of authors' moral rights. Buyout practices lead to a form of standardisation and normalisation of creative markets. The stakeholders interviewed fear in particular that these practices limit cultural diversity.

In the audiovisual sector, buyout agreements are widespread, particularly with non-EU streaming platforms, leading to complete control and appropriation of exploitation rights. These practices impact creators, pushing them into precarious economic situations and compromising the quality of their work. Overproduction and pressure on content further exacerbate the problem. Producers believe that the European framework could succeed in prohibiting buyback practices. They see these practices decreasing due to competition in the streaming sector. But the challenge arises when platforms act as delegated producers and somehow manage to circumvent the protective right, which requires special attention and a clearer right to protect creators.

Opinions among creators' unions on buyout practices vary. Some downplay the risks, citing rare cases, while others, particularly those representing professional creators, highlight serious threats. Buyout contracts, particularly in the audiovisual sector, have become common practice, creating challenges for screenwriters and directors who often have no choice but to accept them, leading to precarious working conditions and a reduced visibility.

Although moral rights are significantly impacted by buyout contracts, the EU legislator has yet to harmonise these rights at the European level. However, there is a growing realisation that the cultural aspect of copyright needs to be considered by EU lawmakers. The disregard for authors' moral rights should serve as a catalyst for action to safeguard the interests of European creators.

(F) Recommendations

1. Necessity to change positive law.

Creators and stakeholders, including producers, highlight the urgent need to review the existing legal framework encompassing copyright law and directives such as the DSA Directive and the Audiovisual Media Services Directive. Buyout practices hamper the production of European content. The modification of positive law is essential to protect authors and performing artists, by guaranteeing appropriate and fairer remuneration, freedom of creation and the preservation of cultural diversity.

Producers and broadcasters, however, have a different point of view. They oppose the amendments, citing the recent nature of the DSM Directive rules and ongoing compliance processes. Some stakeholders suggest waiting until the transposition of the directive is completed to assess its impact, deeming the current investigation premature.

2. Voluntary Agreements

The current consensus among stakeholders, both in Europe and America, does not support a soft law approach to addressing the copyright challenges faced by authors. Voluntary agreements, particularly those observed in France, tend to reflect existing legal provisions rather than strengthening the protection of authors. The power imbalance in negotiations, particularly evident in buyout contracts, makes individual negotiations ineffective. To resolve this problem, two approaches could lead to fair compensation.

Collective bargaining under standard contract law aims to ensure appropriate remuneration aligned with the value of the rights transferred. Collective bargaining involving creative unions should ensure

a broader perspective, leading to minimum pay standards and fairer remuneration for creatives working in the creative industries. Collective bargaining, however, implies profound reforms within the creative sectors which are not very inclined to this way of creating standards.

If the directive favours a mode of regulation by referring regularly to collective agreements signed by organisations representing creators and operators, the problem that we have identified is that all the organisations of authors do not have enough means to defend themselves. It is therefore necessary to carry out a study on the right of creators to be collectively represented in order to better negotiate collective agreements.

3. Importance of Collective Bargaining

Collective management organisations have a role to play, as they can balance bargaining power. In this sense, the harmonisation of collective management practices in Europe will strengthen the protection of authors. Implementing an inalienable right to fair remuneration for authors and performers within the framework of compulsory collective management, as seen in some European countries, would allow authors to continually derive income from the exploitation of their works on various platforms. This legal provision would ensure additional income for creators and prevent circumvention attempts.

The involvement of collective management organisations, as well as collective bargaining strategies tailored to different creative sectors, are essential to achieve fair remuneration and protect copyright in the evolving creative industry landscape.

4. Protecting European creators: International Private Law issues

The question of private international law, particularly with regard to applicable law and jurisdiction, is crucial. Key points are addressed in this study. The issue of conflict of laws and jurisdiction is considered.

The French example is also studied because it suggests imposing the relationship between program producers and platforms in accordance with the law of the program's initial country of operation within the EU, thus preventing the application of non-compliant laws.

If uncertainty exists as to compatibility with the Rome I and Brussels I bis Regulations. Some suggest European legislation to protect European creators. The study then recommends a modification of the directive aimed at prohibiting the circumvention of the principles of appropriate and proportional remuneration and thus guaranteeing EU competence for contracts closely linked to EU territories.

The study also plans to modify the Rome I regulation, by introducing the article "Contracts of authors and performing artists," giving priority to the legal system of the habitual residence of the creator. It also proposes revisions to the Brussels I bis Regulation to counter the harmful effects of third-country jurisdiction clauses. These proposed measures aim to protect the rights of authors and performers, particularly in terms of fair remuneration, in international contracts within the creative industry.

5. Implementation of a New Mandatory Legal Status for European Creators within the European Union

The study recommends the establishment of a legal status of public order for creators within the EU, recognising their freedom to organise themselves into professional organisations to strengthen their collective bargaining power. If the European Parliament advocates for financial support for the cultural field, the proposed legislative initiative must prioritise the preservation of decent working conditions, best practices, and enhanced social protection in all EU member states.

The creation of a European artist status necessitates revising administrative requirements and ensuring access to collective negotiations and social protection. While social dialogue and collective rights are crucial, the path to effective collective bargaining often encounters obstacles.

The report strongly advocates for initiating a study on the recognition of a professional status that guarantees the respect of fundamental rights concerning negotiation and collective representation.

1. INTRODUCTION

KEY FINDINGS

The European Parliament is acting to protect the rights of creators in the face of so-called buyout practices that creative actors see appear increasingly. The study focuses on appropriate and proportionate remuneration as well as the impact of other protective measures of the 2019 DSM Directive. The study offers recommendations to strengthen the legal position of European creators with the aim of protecting European creators against unfair practices, preserving the cultural values of the EU and guaranteeing a more equitable and sustainable creative ecosystem.

1.1. Buyout contracts imposed by platforms in the cultural and creative sector: background

The Committee on Legal Affairs (JURI) of the European Parliament has recently undertaken a significant initiative directed towards reinforcing the rights of creators and ensuring equitable compensation within the cultural and creative industries. In light of concerns emerging predominantly from the audio-visual domain, JURI has commissioned the CEIPI to conduct an analytical study with the objective of instituting precise regulatory frameworks to counteract the prevalence of buyout contracts, frequently imposed by non-European Union platforms.

Such contracts, colloquially referred to as buyout agreements, have, in instances, been strategically employed to negate European creators of their intrinsic moral rights and just remuneration. The advent of digital content services necessitates for creators are justly compensated for the utilisation of their content on such platforms. While the Copyright Directive of the EU offers instruments to secure authors and performers their due, allegations have surfaced, notably within the audio-visual sphere, of European creators being coerced into relinquishing either partially or entirely their rights. This is especially prevalent in contracts subject to legal frameworks outside the European jurisdiction, notably the United States, where certain platforms may attempt to circumvent binding European regulations.

Of concern is the contractual stipulation often demanding that creators renounce comprehensively their copyright or author's rights, which then fall under US legal jurisdiction, effectively evading European protective directives. This modus operandi not only subverts the "appropriate and proportionate remuneration" principle enshrined in the 2019 Copyright Directive but also detrimentally impacts European creators' negotiating leverage.

Asserting this as a mere exercise of contractual liberty is misleading. Given the systemic power imbalance between creators and such platforms, it results in an exploitative transference of intellectual property rights to non-European stakeholders. This invariably leads to an erosion of the European creative reservoir, casting deep challenges upon creators and the broader European creative ecosystem. A secondary consequence is the deprivation of creators from future royalties, regardless of the subsequent success of their creations.

From a broad point of view, the European parliament's resolutions stress its commitment and initiatives to strengthen and advocate for Europe's creative realm, all while navigating obstacles that creators

encounter in safeguarding their artistic rights¹. Among these hurdles is the adverse impact of buyout contracts, which can threaten the financial stability of artists and infringe upon their intellectual assets.

1.2. Objectives and methodology of the study

Evaluation of EU measures concerning buyout contracts involved delimiting buyout contracts, especially focusing on their technical nuances and application domains. Preliminary research had focused on elucidating the challenges of inequitable buyout procedures within the cultural sector, leveraging existent research and definitive materials that had been accumulated during the foundational phase. Concurrently, existing EU frameworks that emphasised fair remuneration schemes and their operationalisation faced examination. A juxtaposed analysis concerning the principles of appropriate and proportionate remuneration was realised, specifically encompassing various member states. The study tends to offer a comprehensive review of the then-prevailing EU scenario, thereby enhancing the legal standing of European artists during contractual discussions with US entities. The efficacy of EU strategies, including the 2019 Copyright Directive, need to be assessed in relation to impeding buyout contracts and preserving EU cultural ethos. Additionally, equitable remuneration legislation within the EU and its member states may be assessed, highlighting operational accomplishment and challenges.

Operational evaluation incorporated conducting interviews and disseminating questionnaires to a representative cohort of impacted stakeholders. These structured engagements furnished insights regarding tangible ramifications of buyout contractual provisions within the cultural sector. Insights, even from US stakeholders familiar with such industry contracts, were important to this enterprise. The outcomes from these interactions, blending both qualitative and quantitative data about buyout clauses, merged with preliminary research findings, presenting a comprehensive understanding of challenges faced by European creators.

In formulating policy recommendations, the purpose may be centred on improving the situation of EU creators. Concurrently, the viability of introducing a renewed legal designation for European creators is explored: mandatory application of European laws, importance of collective management, hypotheses of the implementation of a new mandatory legal status for European creators within the European Union, mandatory application of European laws and jurisdiction in European contracts.

1.3. Structure of the study

To achieve the goal already mentioned, the study is structured as follows:

The study begins by addressing, in Section 1, the economic and cultural challenges Europe faces. It examines the general overview of buyout practices and their implications on fair remuneration. Europe's reliance on the economic role of audiovisual platforms and the cultural significance of moral rights are emphasised.

Section 2 clarifies buyout practices, offering definitions and showcasing contractual examples.

In Section 3, the EU's steps to ensure creators receive fair pay are detailed, highlighting legislative measures like Articles 18, 19, and 20. The efficiency of these regulations is emphasised, alongside mechanisms like alternative dispute resolution and rights of revocation.

¹ See also: European Parliament resolution of 11 November 2021 on an intellectual property action plan to support the EU's recovery and resilience (2021/2007(INI)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0453_EN.pdf

Section 4 gives an exhaustive account of how individual EU nations have adopted and integrated the EU directive, shedding light on the distinct approaches and priorities across member states.

Section 5 offers a deep-dive assessment into the effects of buyout clauses on the EU's creative realm. This examination encompasses a general overview, a specific look at the audiovisual sector, and diverse perspectives from different stakeholders.

Finally, Section 6 outlines proposed policy measures at the EU level. This includes a call for legal reforms, an emphasis on voluntary agreements, the role of collective bargaining, and the importance of implementing national regulations uniformly. To safeguard European creators and 2019 legislative innovations, the realm of International Private Law, is crucial. A notable recommendation is the establishment of a mandatory legal status for European creators to ensure their rights and contributions are recognised and protected within the EU framework.

2. ECONOMIC AND CULTURAL CHALLENGES FOR EUROPE

KEY FINDINGS

Europe is dealing with significant challenges related to buyout practices imposed on creators, particularly in the audiovisual and music sectors. In these cultural and creative sectors, contracts are enforced by large online platforms who deprive creators of their rights on appropriate and proportionate remuneration. Despite the adoption of provisions to safeguard creators' rights in the 2019 Digital Single Market Directive, these buyout practices persist and are increasingly prevalent in individual contracts, endangering creators' interests. The post-COVID-19 situation exacerbates the issue, as the pandemic has not only led to the closure of cultural venues but also significant income losses for creators and presenters, thereby threatening Europe's creative capacity.

2.1. Buyout practices and fair remuneration of creators: general overview

Copyright buyouts are a priority issue for creators everywhere and in particular in Europe. Buyouts are so often forced on creators (and performers) by large users whose revenues they are driving - digital platforms, broadcaster, producers, SVOD, TV operators (...). Instead of a regular earning stream, creators are offered a one-off fee often for the transfer of all their copyright, with little freedom to negotiate. Preserving the right of creators to receive income from the exploitation of their works and the effective ability to refuse buy-out clauses that do not suit them to constitute core matters of equitable treatment for all creators. The most effective means of promoting fairness in this regard is through advocating for improved legislation. Equitable laws serve as a counterbalance to the significant market influence wielded by online platforms, thereby mitigating the potential for contract negotiation abuses.

The need to grant all European creators a fair remuneration for the exploitation of their work is essential. That is the reason for the adoption of contractual provision in the DSM Directive. Indeed, there is a necessity to ensure European creators a fair and appropriate remuneration, based on the (commercial) use of their work and proportionate to the economic value of their rights. Online platforms operating in the European Union can, in a way, dictate their rules - such as buy-out contract clauses -, because of their significant market influence, and often their dominant position in the online content market. Therefore, there is a need for creators, which are in a weaker position than online platforms, to be protected. In that perspective, the fair remuneration in exploitation contracts of authors and performers requires the principle of appropriate and proportionate remuneration that implies transparency obligation, contract adjustment mechanism, the possibility of an alternative resolution procedure and a right of revocation, as provided for by the directive DSM, but not only for internal or European contracts, but also for international contracts.

The question of buyout practices is not a new one for the European legislator: in 2012, the European Parliament was recalling 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."²

² Report on the online distribution of audio-visual works in the European Union (2011/2313(INI)), 25/07/2012.

In April 2019, the European Union adopted the Digital Single Market (DSM) Directive, which was designed as a significant stride in safeguarding the concerns of creators and right holders against unjust buyout practices. The transposition of that Directive offers Member States a chance to reassess their domestic legislation, with a particular focus on addressing buyout practices directly. Consequently, it is crucial that the “real” effectiveness of the Directive is guaranteed, particularly regarding provisions that appear likely to address unfair buyout practices.

More recently, in 2021, the question seemed to remain really important in the audio-visual sector. The European Parliament remains “worried about the fact that many artists and creators cannot ensure in this new business model the same amount of revenue as the practice of imposing buy-out clauses by dominant or large streaming platforms deprive authors of their royalties and hinders adequate and proportionate remuneration for creators; asks therefore the Commission to evaluate and to take measures to ensure that revenues are duly and fairly distributed to all creators, artists and right holders”³ and “is concerned, however, about the system of work-for-hire and buy-out contracts often used by these services, which tend to buy the intellectual property rights to a work in return for a one-off payment and thus profit from the revenue generated by the exploitation of these works”⁴. Furthermore, the resolution presented advocates for definitive actions to guarantee the equitable allocation of revenues among creators, artists, and rights proprietors. Pursuant to this objective, the resolution recommends instituting a “European Status of the Artist”, aiming to delineate a harmonised framework detailing work protocols and baseline standards for all EU member nations. In conclusion, the resolution emphasises the responsibility of Member States to support and safeguard artistic liberty and enjoins the Commission to impose appropriate measures against Member States that do not adhere to their respective commitments in this sphere.

2.2. A crucial issue for Europe: the economic importance of audio-visual platforms

The European Parliament has shown its interest and concern about intellectual property rights from a broader point of view⁵. These measures underscore the European Parliament's dedication and endeavour to strengthen and support the European creative domain, simultaneously tackling obstacles encountered by creators in safeguarding their artistic rights. A noticeable concern among these is the detrimental impact of buyout contracts, which have the potential to imperil the financial stability of artists and infringe upon their intellectual assets.

2.2.1. Copyright and economic importance of the cultural sector

Within the European economic landscape, the Cultural and Creative Sectors (CCS) are prominently recognised as dynamic industries. Their significance extends beyond mere economic expansion and employment generation, serving as crucial instruments in promoting societal cohesion and endorsing cultural diversity. The cultural sector plays a vital role in the European economy, contributing significantly to GDP, employment, innovation, social cohesion, and Europe’s global competitiveness. The Creative and Cultural Industries (CCIs) have emerged as prominent employment sectors within Europe, accounting for the engagement of over 7.6 million individuals. In 2019, the CCIs represented

³ European Parliament resolution of 20 October 2021 on the situation of artists and the cultural recovery in the EU (2020/2261(INI)).

⁴ European Parliament resolution of 20 October 2021 on Europe’s Media in the Digital Decade: an Action Plan to Support Recovery and Transformation (2021/2017(INI)).

⁵ European Parliament resolution of 11 November 2021 on an intellectual property action plan to support the EU’s recovery and resilience (2021/2007(INI)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0453_EN.pdf

4.4% of EU GDP in terms of turnover, with annual revenues of €643 billion and a total added value of €253 billion⁶. This figure surpasses the employment numbers of the telecommunications sector by a factor of eight. Since 2013, the growth rate of CCIs has been recorded at 2.6% annually, which is notably higher than the European Union's average growth rate of 2%. Furthermore, in 2017, the CCIs reported a trade surplus amounting to €8.6 billion, reinforcing the European Union's position as a dominant force in the global cultural and economic landscape⁷. Beyond the direct economic benefits, the cultural sector also enables substantial indirect and induced impacts by stimulating spending in related industries. In 2018, the estimated total economic impact of culture was €509 billion annually, equivalent to 5.3% of EU GDP⁸.

The creative industries that make up the cultural sector have proven to be highly innovative, developing new technologies, business models, and creative content. Cultural participation has been linked to skill development, which feeds into greater employability and income potential. Access to arts and culture improves quality of life and social cohesion, providing shared experiences that bring communities together. A vibrant cultural scene and unique local heritage make regions more attractive to live, visit, and invest in. This in turn boosts tourism, urban regeneration, and local development.

When it comes to Europe's global competitiveness, the EU's diverse cultural assets give it an edge in the experience economy, creative services, and the development of creative talent. Europe is the world's leading tourist destination with half of all international tourist arrivals, many drawn by its unparalleled cultural heritage and vibrant contemporary culture. Creative industries account for over 6% of the EU's workforce and continue to grow at over 5% annually, faster than the rest of the economy⁹.

2.2.2. Effect of the pandemic on the cultural ecosystem

Yet despite its significance, the pandemic has underscored the precarious nature and structural challenges facing the cultural ecosystem. COVID-19 confinement measures necessitated venue closures and cancellations, causing steep declines in revenue. A 2020 survey found that over 30% of artists had lost more than three quarters of their income. Museums also faced up to an 80% drop in attendance. This not only jeopardised livelihoods, but risked eroding Europe's creative capacity and the essential contributions of the cultural sector. Public policy and investment must protect the arts, taking a holistic, evidence-based approach to sustain the cultural sector. Support should aim to build resilience, embrace digitalisation, promote innovation, increase access, nurture talent, and recognise culture cross-cutting socioeconomic benefits. The sector's recovery and long-term development will require a coordinated effort between EU institutions¹⁰, member states, local authorities, and an array of stakeholders. There are still gaps in cultural participation related to education, income, and access that must be addressed. We have an opportunity to emerge from the crisis by transforming and strengthening the entire cultural ecosystem. With the proper strategy and resources, Europe's unrivalled cultural sector can continue flourishing, uplifting communities, driving the economy, and solidifying Europe's status as a global cultural leader.

⁶ Eurostat, Culture statistics, 31 August 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Culture_statistics

⁷ Ernst and Young, Rebuilding Europe - The cultural and creative economy before and after the COVID-19 crisis, January 2021.

⁸ Guide to Eurostat culture statistics, 2018 edition, 7 December 2018.

⁹ Eurostat, Culture statistics, 31 August 2022, cited above.

¹⁰ European Parliament, Protecting artists' status and revenues in the EU, 28 oct. 2021: <https://www.europarl.europa.eu/news/en/headlines/society/20211021STO15514/protecting-artists-status-and-revenues-in-the-eu>

To that end, the European Parliament has adopted a resolution on Europe's Media in the Digital Decade.¹¹ The resolution sets forth a strategic approach to enhance the revitalisation and evolution of the audio-visual and news media sectors, which have been profoundly impacted by the COVID-19 crisis. Notably, the resolution advocates for amplified assistance to these sectors, encompassing financial support through multiple schemes within the Multiannual Financial Framework. It further suggests the creation of a continuous EU news media fund, with the objective of helping unbiased news reporting and safeguarding the autonomy of European journalists. Finally, the resolution underscores the imperative to guarantee an equitable competitive environment, especially in relation to online platforms, and to foster cross-border collaborations, aiming to broaden market diversity.

2.2.3. The Impact of AI on the Cultural Ecosystem

Artificial Intelligence (AI) is poised to bring about profound changes to the world of work. The question at hand is what effects can we anticipate in the months and years ahead? To address this query, we must pose another: can creative professions be automated? It is the extent of automation that will determine the impact of Artificial Intelligence.

First and foremost, we must consider the potential loss of activities and income. For instance, book cover design can yield earnings ranging from five hundred to one thousand euros. Services like Mid-journey offer a significantly different alternative. With a subscription cost of around twenty euros per month, users can generate thousands of potential illustrations for book covers, press articles, magazine illustrations, movie posters, and more. These activities are vital for creators who rely on them for their livelihood, as traditional contracts often offer inadequate compensation. Consequently, there is a risk of creators becoming marginalized and financially vulnerable.

Secondly, the ease and speed with which AI can generate text and illustrations has led to an oversaturation of content being sent to publishers. This abundance can be likened to a form of spam. Magazines have responded by discontinuing the acceptance of unsolicited content from external sources, opting to maintain existing collaborations. This overproduction poses a significant challenge to emerging creators.

Thirdly, there is the issue of parasitism and unfair competition. The result is a distortion of the competitive landscape, as AI-driven content creation reduces the market value of creative work. In the near future, it is unlikely that anyone would be willing to pay one thousand euros for a book cover.

In response to these challenges, some authors have started negotiating collectively to secure better working conditions in this rapidly changing landscape. An example of this is the American screenwriters' strike, which had a profound impact on Hollywood. After 146 days, an agreement was reached that addressed the use of artificial intelligence in creative work.

Under this agreement, the use of generative AI for writing or rewriting literary material/content is prohibited. Content generated by an AI system cannot be considered source material as defined in the agreement. This means that AI-generated content cannot infringe upon the credit or rights of a creator.

Furthermore, a creator may utilize an AI system as part of their services, provided the company consents and the creator adheres to the company's established policies. However, companies cannot compel writers to use an AI system as part of their services. Companies also reserve the right to refuse

¹¹ European Parliament resolution of 20 October 2021 on Europe's Media in the Digital Decade: an Action Plan to Support Recovery and Transformation (2021/2017(INI)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0428_EN.pdf

the use of an AI system, particularly if there are doubts about copyright protection or the ability to exploit AI-generated content.

Given these concerns, especially the potential for creators to be pressured into accepting unfavourable terms due to the loss of their livelihoods, we believe it is imperative to initiate a comprehensive study on the impact of AI on creative professions.

2.2.4. The particular resilience of the audio-visual sector due to VOD

Within this context, it appears important to note, “the irrepressible growth of VOD”¹². In 2020, the European¹³ audio-visual sector experienced a decline in revenues amounting to EUR 7 billion. However, 2021 witnessed a commendable resurgence, with revenues escalating by EUR 10 billion, culminating in a total of EUR 123 billion. It is imperative to note that this aggregate recovery masks the diverse trajectories observed within specific market segments. Television advertising revenues reverted to their 2019 benchmarks, while pay television exhibited a modest upward trend. Additionally, after a prolonged period of inertia, there was a noticeable increase in public funding. Conversely, radio advertising revenues remained deficient by 7% compared to 2019 figures. More strikingly, cinema box office revenues languished, registering a substantial 60% deficit relative to pre-crisis benchmarks. The crisis further exacerbated the declining trajectory of physical video sales. Cumulatively, these traditional market segments were still deficient by approximately EUR 4 billion in comparison to 2019 figures. In juxtaposition, on-demand services, predominantly Subscription Video on Demand (SVOD), demonstrated robust growth both during and subsequent to the 2020 crisis. Between 2019 and 2021, revenues from these services surged by nearly 70%, effectively offsetting the declines or stagnation observed in other segments. Analysing a broader timeframe from 2017 to 2021, on-demand service revenues witnessed an augmentation of EUR 11 billion, while traditional segments experienced a contraction of EUR 5 billion¹⁴.

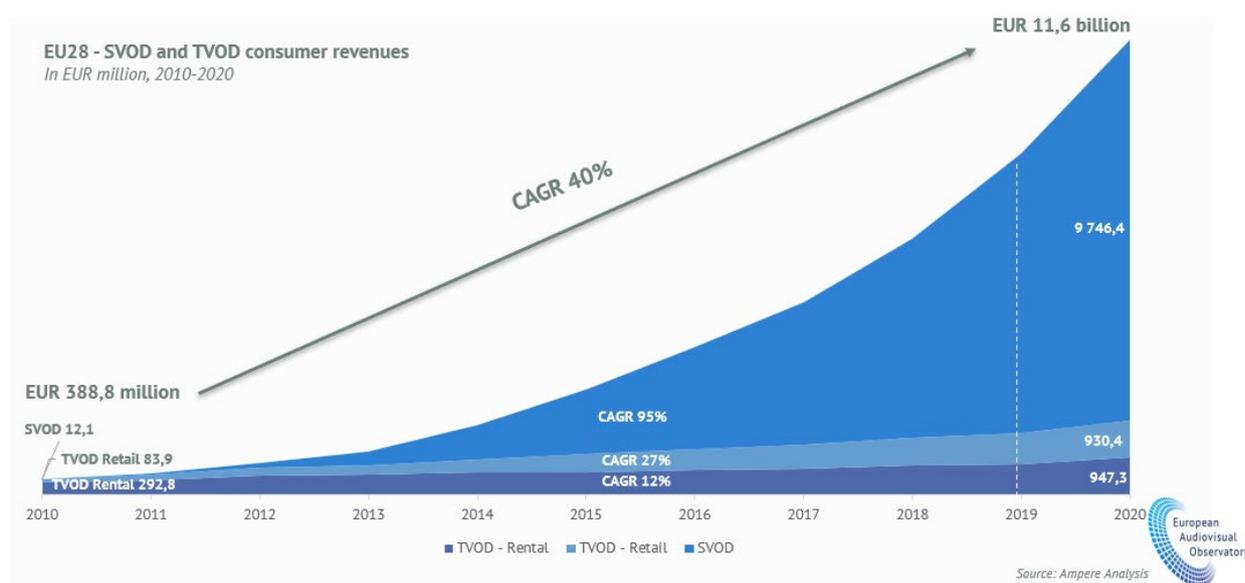
Over the last decade, the paid VOD market, encompassing SVOD and TVOD, witnessed a remarkable surge. Revenues escalated from EUR 388.8 million in 2010 to a staggering EUR 11.6 billion in 2020. This growth was predominantly boosted by a quick rise in SVOD revenues, which jumped from EUR 12 million in 2010 to EUR 9.7 billion in 2020¹⁵.

¹² European Audio-visual Observatory (COE), Yearbook 2022/2023 Key Trends - Television, Cinema, Video and On-Demand, Audio-visual Services, The Pan-European Picture, p. 36.

¹³ In this COE study, Europe refers to the Council of Europe countries.

¹⁴ Ibidem.

¹⁵ European Audio-visual Observatory (COE), European VOD revenues increased 30-fold over the last ten years, 9 February 2021.



In Europe, SVOD is “the most concentrated audio-visual market segment in Europe,” closely followed by pay-tv. The density increased marginally in 2021 in comparison to 2020, primarily attributed to organic expansion rather than mergers and acquisitions. The rise in SVOD was principally because of a surge in subscriptions to major US-based platforms. Specifically, 71% of SVOD subscriptions were collectively allocated to the top three OTT platforms, namely Netflix, Amazon, and Disney+¹⁶.

2.3. Moral rights and cultural importance for Europe

Buyout practices, as they consist in a broad waiver of the entirety of authors' rights or applying a foreign law that does not recognise moral rights, are an impediment to this element of European cultural identity.

In the intricate diversity of European intellectual property regulations, especially pertaining to the cultural and creative domains, moral rights have established themselves as a distinct and indispensable component. These rights, deeply institutionalised in the European legal traditions¹⁷, safeguard the non-monetary, essential connection between creators and their oeuvre. While the economic rights of artists and creators are directed towards the commercial exploitation and remuneration for their works, moral rights serve a more profound purpose: they protect the personal, reputational, and emotional ties a creator has with their artistic expression¹⁸.

The cornerstone of moral rights in European intellectual property traditions is the *droit de divulgation*, which empowers creators with the prerogative to decide when and how their work is made public. Rooted in the notion that artistic creation is an intimate and evolving process, this right recognises the creator's right in determining the appropriate moment for a work's revealing. By doing so, it ensures

¹⁶ European Audio-visual Observatory, *Top players in the European AV industry - Ownership and concentration*, 2022 Edition, January 2023.

¹⁷ Adolf Dietz, « The Moral Right of the Author: Moral Rights and the Civil Law Countries », *Columbia-VLA Journal of Law & the Arts*, 1994, vol. 19, pp. 199-228; Gerald Dworkin, « The Moral Right of the Author: Moral Rights and the Common Law Countries », 1994, n 19, pp. 229-268.

¹⁸ Jacques de Werra, « Moral rights, a view from continental Europe », in *Moral Rights in the 21st Century: The changing role of the moral rights in an era of information overload*, Larcier, Brussels, 2014, pp. 69-82, <https://archive-ouverte.unige.ch/unige:48354>; Gaudrat, Philippe, « Moral Right... and its European destiny », *RIDA*, July 2023, vol. 275.

that artists maintain control over the initial presentation of their creations, safeguarding the authenticity and integrity of their artistic expressions in the public domain.

The right to attribution, which unequivocally entitles creators to be acknowledged as the authors of their creations. Such recognition, in the lively European cultural background, goes beyond mere formality; its instrumental in carving out an artist's identity, professional standing, and legacy. This not only enhances the individual's standing in artistic circles but also ensures that their contributions to the cultural diversity of Europe are always documented and respected.

Simultaneously, the right to integrity is another important aspect of moral rights. This provision ensures that artistic works remain untouchable to any derogatory actions or unauthorised alterations that could potentially misinterpret or tarnish the creator's original vision and intent. As Europe stands at the forefront of dynamic artistic expressions and innovations, this right ensures that as creations explore boundaries, undergo reinterpretations, or inspire new works, their original spirit remains untainted.

Additionally, some European jurisdictions have extended moral rights to include provisions like the right to withdraw a work or the right against forced disclosure of pieces that are still in progress. Such rights underscore the evolving nature of creativity and grant creators of the agency to determine when a work aptly conveys their intended message or vision.

Beyond individual merits, moral rights serve the European collective interest. In a continent-renowned for its diverse and rich cultural heritage, these rights act as guards, preserving the authenticity and integrity of creations. They fortify Europe's reputation as a bastion of creativity where original works are respected, and creators are protected from potential misrepresentations.

3. BUYOUT PRACTICES: DETERMINATION

KEY FINDINGS

This research examines into the conceptualisations and substantive parameters surrounding the phenomenon commonly referred to as buyout practices. These practices imply the comprehensive renunciation of rights on a creative work in exchange for a fixed lump sum payment, thereby precluding creators from a proportional share in the artwork's revenue. Interviewees attest to the growing prevalence of these practices within creative industries. Furthermore, the study highlights akin practices wherein authors (paid hypothetically through proportional remuneration) receive advances (fixed lump sum) whose amortisation will not occur because of an insufficient exploitation of their works. This situation mirrors a lump sum remuneration model, effectively tantamount to a complete surrender of their rights.

3.1. Definition(s)

3.1.1. Proposed definitions

The Legal Information Institute, which is an independently funded project of the Cornell Law School, defines buyout agreement as "a contract that gives rights to at least one party of the contract to buy the share, assets, or the rights of another party given a specific event" and indicates what could be more precise in the context of copyright: "The parties agree that a leaving party will sell their ownership for a specified price to the other parties to the agreement"¹⁹.

The CISAC, in 2020, pointed out that if copyright buyout clauses in the USA are typically used under the "work made for hire" doctrine. "In certain countries/territories, the "buyout" clause contained in copyright contracts refers to the transfer of all rights in a work for the entire duration of its copyright in exchange for a lump-sum payment covering all exploitations listed in the contract. And those exploitations may be listed as broadly as possible".

In the music sector, the Musicians' union defines the "buyout" in those terms:

"A buyout is a type of agreement or contract where the party commissioning the work – the commissioner – pays a single fee for the composition. This is then used to acquire - or "buy out" - the creator's rights and potential royalty income in respect of their work.

In the context of media composing, a buyout involves a commissioner paying you an upfront fee which prevents you from retaining some or all of your intellectual property rights in the work."

More broadly, copyright experts specialised in the audio-visual sector, interviewed for the purpose of the study, agree to say that a buyout is a global purchase contract. It involves the acquisition of all the rights (which will belong to the purchaser) for a sum which is usually a lump sum: there will be no repayment to be made after the event. Thus, the characteristic feature of "buy out" is the lump sum. There are other systems, such as the American system, which provide for compensation through collective bargaining agreements, which are less favourable than those of proportional remuneration. A distinction needs to be made between buyouts imposed by the producing platform and buyouts imposed by the producer on the author. But the producer, in some cases, is the platform itself, which is generally seen as the main problem.

¹⁹ https://www.law.cornell.edu/wex/buyout_agreement [Last updated in June of 2021]

3.1.2. Substantive criteria of buyout practices

The definition to be put forth should be based on several non-cumulative criteria.

Firstly, the use of a lump sum to determine the amount due to the author is characteristic of the contractual practice of the buyout, from a unanimous point of view. It constitutes the main criterion for identifying a "buyout" practice.

Secondly, buyout contracts are characterised by a copyright transfer that "covers any mode of exploitation without any obligation to report to the creator"²⁰, which implies, *de facto*, a withdrawal of moral rights. However, we have to note that this second criterion seems not decisive for all industry stakeholders: some believe that using a flat fee for quasi-global (very broad geographic and temporal coverage) or a single specified mode of exploitation constitutes a buyout practice in its own right.

Thirdly, it is generally acknowledged that these provisions are imposed by a party because of its important bargaining power, often a US operator (from an economic point of view in the VOD sector, see above 1.2.3).

In a nutshell, in the realm of the author's right contracts, "buyout" clauses consist of a comprehensive transfer of all rights associated with a work for their entire duration, in return for a lump-sum payment.

It is also generally assessed that these buyout clauses are most commonly employed in the United States, functioning within the legal framework of "Work Made for Hire". This doctrine establishes a legal presumption that the employer or producer is deemed the author of the work and is automatically entitled with all copyright on the creation. Under the "Work Made for Hire" paradigm, the employer or producer compensates the creator with a single, one-time payment referred to as the "buyout fee." That single fee covers the services rendered by the creator and encompasses all potential uses and exploitations of the work, as broadly outlined in the contractual agreement.

It is worth noting that while the "Work Made for Hire" doctrine originates from US copyright law, it is increasingly finding applications in contracts within the global audio-visual production industry. This trend persists irrespective of whether the involved parties or transactions have any direct connection to the United States.

3.1.3. Techniques used to impose a buyout agreement

Buyout agreement, also known as a buy-sell agreement, leads to a similar result that is unfavourable to authors and performers, and to circumvent European rules, favourable to the author.

The techniques used to lead to a buyout agreement may vary, depending on the context.

A technique to circumvent the application of protective European copyright law may simply consist of choosing, in the contract, the applicable law, namely, US law and, to be sure that mandatory European rules would not be applied, for the contract to include a clause conferring jurisdiction on the US courts. As this could be discussed from an international private law perspective (see below), some operators can also ask their contractor to create an ad hoc subsidiary company in the US.

Of course, specific provisions can impose a lump sum payment in exchange of a general waiving of all rights in any contract (see examples below). In countries where CMOs are sufficiently powerful and entitled of the rights, this may lead to a difficulty that the operator resolves by asking the author to resign from the CMO, or choosing authors that are not already members of any CMO.

²⁰ 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.175.

The authors' associations add that the confidentiality of the clause or, more frequently, of the contract, is stipulated.

3.1.4. The particular case of "hidden" buyout practices

It is also possible to identify "hidden" buyout practices that meet these two criteria, even when a flat fee is not explicitly specified, but the compensation system leads to the same outcome. This is the case in the book industry with advances granted to authors, or in the audio-visual sector with the practice of upfront payments. In both instances, the flat sum is never amortised, and the percentage that may have been stipulated in the contract is never applied. For example, in the book industry, fewer and fewer contracts specify a minimum number of copies for the first print run, as this is the result of the distribution campaign that takes place after the publishing contract is signed. It is decided on the basis of the sales representatives' positioning of the work. In practice, sums paid to the author in anticipation of the royalties that will be generated by the exploitation of the work, commonly referred to as "à-valor" or "advance payment," are more common. These sums are considered as receivables for publishers, allowing proportional exploitation rights to be charged, but they are rarely covered by the fruits of exploitation, which in practice means depriving the author of the effectiveness of proportional remuneration.

It is possible to detect hidden redemption practices that correspond to the above criteria, even in the absence of an expressly stipulated fixed amount. These methods are often masked by proportional remuneration systems stipulated in the contracts, which in reality are not applied and ultimately lead to results identical to the fixed price.

To illustrate these hidden practices, let's take a few examples from the book and audio-visual industries.

Currently, creative work is not directly paid; only the transfer of rights is paid by means of advances on these rights (called "at value"). However, these advances are rarely fully amortised due to limited editions or insufficient exploitation of the work. Consequently, not only do authors often not receive remuneration for the first copy sold, but it very often happens that they will not receive anything in the future, due to lack of sufficient exploitation. When the advance is not repaid, the author contracts a debt to the publisher, although he has largely waived all his rights. This situation essentially constitutes a form of buyout practice, where the only payment received, in the form of an advance, is exchanged for a large assignment, making the author indebted to the publisher.

Similarly with screenwriters who may receive upfront payments for their writing work. These payments are made before the project (such as a film or television series) even begins generating revenue. These payments can be substantial, but in many cases, they are not damped by subsequent project profits. These practices may seem advantageous for creators in the short term, as they guarantee an immediate fixed income. However, in the long term, they can lead to a significant financial imbalance, especially when the projects are not profitable and the writers have had to make several substantial modifications spread over several years.

3.2. Contractual provisions: examples

Practical knowledge of contractual practices is important. Since confidentiality provisions are widespread, it was difficult, during the various interviews performed to have many examples.

3.2.1. Provisions contained in so-called audio-visual production contracts between authors and producer

Contractual provisions that can be found and appear to be frequent in some sectors (see below II, 1.2) can be written as follows:

"XX. Lump Sum Compensation

For the utilisation of the series in territories where the Author has not entrusted the management of his/her remuneration to a collective management society), and on the XXX Services globally that do not involve the payment of an individualised price by the public to access the Series and/or the Work, the Author acknowledges and agrees that the basis for calculating proportional compensation cannot be determined. This is because such utilisation does not result in an individualised payment by the public, and compensation cannot be ascertained based on operational revenue. In any event, the basis for calculating proportional participation cannot be practically determined.

Consequently, as full and final compensation for these territories and utilisation, the Author shall receive the amount specified as the Lump Sum Compensation in Article XX of the Contract. The Author will not receive any additional compensation of any kind. The Author will receive royalties from collective management societies for territories where these societies ensure collection and have established an agreement. "

Another frequently used example:

"XX. Fixed Compensation:

(a) Initial Compensation: An initial payment amounting to XXX € (XXX Euros) (the "Initial Compensation"), which is allocated as follows:

- (i) 50% (fifty percent) as full and final compensation for the exploitation of the Episodes on XXX Services, worldwide and for the duration (as referred to in Article YY of this Agreement);*
- (ii) 20% (twenty percent) as a guaranteed minimum to be credited against any sums due under Proportional Compensation; and*
- (iii) the balance of 30% (thirty percent) as a "premiere bonus" (i.e., a lump sum paid for the use of an original unpublished work, which will not be deductible from the Proportional Compensation)."*

In 2016, the main union representing audio-visual producers in France (Union Syndicale de la Production Audiovisuelle, USPA), was distributing to its members a contract template, containing those provisions:

"Article 1.1 The Producer commissions the Author to create the Contribution, and the Author assigns to the Producer his rights thereto, under the terms set forth in this contract.

ARTICLE 5 – REMUNERATION In compensation for the creation of his Contribution, and the assignment of his copyright rights thereto, the Author will receive a lump-sum payment of gross euros, before AGESEA deductions, payable as follows:

- € excluding tax (amount in words) upon signing this agreement;
- € excluding tax (amount in words) upon the Producer's acceptance of the works. This lump sum compensates for the delivery of the commissioned works and the rights assignment provided in article 3 of this contract, in accordance with article L. 131-4, 4° of

the Intellectual Property Code, the Author's contribution not constituting one of the essential elements of the intellectual creation of the Work, which the latter expressly acknowledges. Therefore, in accordance with this article, the Author cannot claim proportional compensation, neither directly from the Producer nor indirectly through author's societies.

ARTICLE 6 - CREDITS *The name of the Author of the Contribution will appear in the credits of the Work. The Producer commits to communicating this obligation to any broadcaster or publisher of the Work, but its liability cannot be pursued for breaches of this obligation committed by them. In the event that the Work is broadcast as part of a show composed of studio segments, the Author authorises the shifting of the Work's credits to the end credits of said show."*

3.2.2. Example between the executive producer, making a program on behalf of a platform in the audio-visual sector

(a) Provision between an executive producer and a platform

In the relationship between the executive producer, making a program on behalf of a platform, here is the type of clause encountered:

"All rights in the Program, including all materials commissioned (including the results and proceeds of the services rendered hereunder) or previously created by or on behalf of Producer for the Program (the "Materials") shall be owned by Company exclusively, throughout the universe, in perpetuity (or for the maximum legal term of protection, if shorter). The Materials constitute "works made for hire" / commissioned works for and by Company and, therefore, all rights therein will vest in Company, immediately upon creation."

(b) Creator exclusion clause

A frequent provision proposed by an important platform, states as follows:

"Licensor warrants and represents that none of the [works or any other element] are (i) composed by authors whose primary membership and/or affiliation is with any of the following performing rights societies: GMR, SODRAC (Canada), SGAE (Spain), SIAE (Italy), SACEM (France), GEMA (Germany), STIM (Sweden), SABAM (Belgium), BUMA/STEMRA (Netherlands), ZaiKS (Poland) (collectively the "Specified Societies") or (ii) registered in the first instance with and are available from any of the Specified Societies;"

3.2.3. Example of contractual provision between a Producer and a Screenwriter

Provision found in the context of French applicable law:

"In the event that the PRODUCER does not use the writing work done by the AUTHOR or if the AUTHOR's contribution to the WORK, through the adaptation of the WORK subject to this contract, does not constitute, in the sense of article L. 131-4 of the Intellectual Property Code, one of the essential elements of the intellectual creation of the WORK, the following has been agreed upon, which the AUTHOR acknowledges in advance:

- *The amounts paid to the AUTHOR under this contract will constitute a lump sum and final remuneration under article L.131-4 2nd paragraph 4° of the Intellectual Property Code, and will not entitle the AUTHOR to royalty collections from authors' societies;*
- *The AUTHOR will not be entitled to any remuneration proportional to the revenues generated by the exploitation of the WORK, and the provisions below of article 3.2. would not apply.*

- *The AUTHOR's name will not be mentioned in the credits of the WORK under this contract or will be mentioned under terms at the discretion of the production."*

3.2.4. Examples of contractual provisions used in the United States (work for hire contracts)

A simple example of a provision choosing US law as applicable law :

"Governing Law

This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York, United States of America, without regard to its conflict of laws principles."

Choice of court provisions are often complementary to circumvent mandatory regulations that prohibit or limit buyout contracts in copyright should be deemed unenforceable.

(a) Producer Agreement:

"All results and proceeds of the services of Producer and/or any third party furnished or engaged by Producer (hereinafter individually and collectively referred to as "Producer Personnel"), including the Master(s) (but excluding the Composition(s) to the extent of Producer's interest therein and thereto) shall be deemed "works-for-hire" for Artist within the meaning of the Copyright Act of 1976 (Title 17, U.S.C.), as amended, shall be subject to the provisions of this Agreement, and Producer shall cause any such Producer Personnel to be bound in writing by the terms hereof. If it is determined that the Master(s) do not so qualify, then the Master(s), together with all rights therein (other than the Composition(s)), shall be automatically assigned to Artist's Designees by this Agreement. Upon signature of this Agreement, Producer shall immediately transfer to Artist all rights (including but not limited to copyright) in and to the Master(s) (excluding the Composition(s)). Producer further grants to Artist's Designees the right, throughout the universe and in perpetuity, to use Producer's professional name, and Producer's likeness and biographical material solely in the packaging and metadata of Records embodying the Master(s) and in all promotion and advertising therefor. We shall provide you for your approval any likeness, portrait or pictures of Producer or biographical material about Producer which we propose to use in connection therewith. We will not use any such material which you disapprove in writing within five (5) business days following the date on which such materials are provided to you. No inadvertent, non-repetitive failure to comply with this paragraph will constitute a breach of this Agreement, and you will not be entitled to injunctive relief to restrain the continuing use of any material used in contravention of this paragraph. You shall have the right to submit photographs and likenesses of, and biographical material concerning, Producer and your submission of the same shall constitute your approval thereof. Artist and Distributor shall have the exclusive right to exploit the Master(s) in all methods, manner and media, now known or hereafter developed, throughout the universe and in perpetuity, or to refrain therefrom. Producer waives any claims based on infringement of Producer's "moral rights" in and to the Master(s), and understands that the Master(s) may be changed, altered, remixed, or coupled with any other recording(s) or other material in Artist's and Distributor's sole discretion, subject to the terms and conditions of the Recording Agreement. Producer shall have the right to request that Producer's credit be removed from the Master(s) if the Master(s) are materially altered in any way (other than for timing or formatting purposes) by giving Artist written notice thereof. For avoidance of doubt, Producer is not an original author of the copyright underlying the Master(s) and shall not in any event claim any reversionary right under the United States Copyright Act Section 203, or otherwise. "

(b) Side/Featured Artist Agreements

“All results and proceeds of the services of Side Artist and/or Side Artist, and/or any third party furnished or engaged by Side Artist (hereinafter individually and collectively referred to as “Side Artist Personnel”), including the Recording (but excluding the Composition(s) to the extent of Side Artist’s interest therein and thereto) shall be deemed “works-for-hire” for Artist within the meaning of the Copyright Act of 1976 (Title 17, U.S.C.), as amended, shall be subject to the provisions of this Agreement, and Side Artist shall cause any such Side Artist Personnel to be bound in writing by the terms hereof. If it is determined that the Recording does not so qualify, then the Recording, together with all rights therein (other than the Composition(s)), shall be automatically assigned to Artist and Artist’s Designees by this Agreement. Upon signature of this Agreement, Side Artist shall, or shall cause Side Artist to, immediately transfer to Artist all rights (including but not limited to copyright) in and to the Recording (excluding the Composition(s)). Side Artist further grant to Artist and Artist’s Designees the non-exclusive right, throughout the universe and in perpetuity, to use Side Artist’s professional name and Side Artist’s pre-approved (in writing) likeness and biographical material solely in the packaging and metadata of Records embodying the Recording and, in all promotion, and advertising therefor. We shall provide you for your approval any likeness, portrait or pictures of Side Artist or biographical material about Side Artist which we propose to use in connection therewith. You shall have the right (not to be unreasonably withheld or delayed) to approve all artwork prepared and/or controlled by Artist in connection with the release of the Recording that embodies Side Artist’s name and/or likeness. We will not use any such material which you disapprove in writing within seven (7) business days following the date on which such materials are provided to you.”

(c) Recording Agreement

“(a) All Recordings embodying the performances of Artist recorded during the Recording Term or submitted hereunder from the inception of the recording thereof, and all reproductions derived therefrom, together with the performances embodied thereon (but excluding the underlying composition), are and will be the property of Company throughout the Territory and in perpetuity, free from any claims whatsoever by Artist or any other Person. Company has and will have the exclusive right throughout the Territory to copyright those Recordings in Company’s name as the author and owner of them and to secure all renewals and extensions of copyright. Each of those Recordings shall be considered a “work made for hire” for Company in that (i) it is prepared within the scope of Company’s engagement of Artist’s exclusive personal services as a recording artist; or (ii) as one selection contained in a Record embodying multiple Recordings, Record Artwork and/or other material, it constitutes a work specifically ordered or commissioned by Company for use as a contribution to a collective work. If for any reason any of those Recordings is determined not to be a “work made for hire,” then you hereby irrevocably grant, transfer, convey and assign to Company the entirety of the rights, titles and interests throughout the Territory in and to each of those Recordings, including the copyright, all renewals and extensions of copyright, and the right to secure copyright registrations therefor. You and Artist hereby irrevocably and unconditionally waive in perpetuity and to the fullest extent permitted by law, in favor of Company and Company’s licensees, all so-called “moral rights” in respect of Recordings hereunder and in the performances embodied thereon, whether such rights exist now or arise in the future and any other similar right arising anywhere in the Territory, so as to enable Company and Company’s licensees to make the fullest possible use throughout the Territory and in perpetuity of such Recordings and performances (but excluding the underlying composition). Where it is not possible to waive such moral or similar rights, you and Artist agree not to assert such moral or similar rights. Without limiting the foregoing,

Company and all Persons authorized by Company shall have the exclusive and unlimited rights throughout the Territory to own, control and use Artist's services as a recording artist during the Recording Term and to all the results and proceeds of such services.

(b) You agree to execute and deliver to Company, and to cause each Person rendering services in connection with such Recordings to execute and deliver to Company, all documents and instruments that Company deems necessary or desirable to apply for, obtain, register, effectuate and/or record ownership of rights hereunder, including written assignments to Company (in a form satisfactory to Company) of all sound recording copyright rights (including renewal and extension rights) that you or any such Person may have. Artist hereby irrevocably grants to Company a power of attorney, as your agent and limited attorney-in-fact, solely to execute such documents and instruments in your name, and the name of Artist and/or all other Persons rendering services in connection with such Recordings and to dispose of such documents and instruments, which limited power of attorney may only be exercised if you or Artist fail to execute and deliver to Company any document which Company may reasonably submit to you or Artist for execution within seven (7) Business Days after such document is submitted to you or Artist. You hereby acknowledge that Company's agency and power are coupled with an interest. Company shall undertake to provide you with copies of any such documents Company signs in your name, provided that Company's non-repetitive inadvertent failure to do so will not constitute a breach of this agreement or impair the effectiveness of the document concerned. As between Company and you and Artist, Company is and will be the owner in perpetuity for the Territory of all Record Artwork, with the right to sell and otherwise use such Record Artwork in accordance with the terms of this agreement.

(c) Company and each Person authorized by Company has and will have the perpetual right, throughout the Territory, without cost or any other liability to you or any other Person, to use and to authorize other Persons to use the Identification Materials relating to Artist, each producer, and each other Person rendering services in connection with Recordings hereunder, in and in connection with the packaging and metadata of Records, and for purposes of advertising, promotion and trade and in connection with the marketing and use of such Recordings and Records and general goodwill advertising, without additional payment to you, Artist or any other Person. Notwithstanding the immediately preceding sentence, Company's rights with respect to use of the names and likenesses of Persons rendering services in connection with Recordings hereunder other than you or Artist (each, an "Other Person") shall be limited to those granted in any pre-existing written agreement between you and the Other Person concerned regarding the Recordings concerned; provided that: (i) you have used all commercial efforts to obtain all rights granted in the preceding sentence from the Other Person concerned; (ii) you have notified Company of any such limitations prior to or simultaneously with Company's initial receipt of the Recording concerned; and (iii) in all events Company shall have the right to use such Other Person's name in a customary credit in the liner notes and other credits of Records embodying the Recordings concerned.

(d) You hereby irrevocably sell, transfer and assign to Company all right, title and interest in and to each of the Purchased Materials (including all copyrights and extensions and renewals of copyright therein but excluding the underlying composition), and the Purchased Materials shall be the property of Company throughout the Territory free from any claims whatsoever by you, Artist or any other Person. The Purchased Recordings shall be deemed: (i) to be Recordings made hereunder for the purposes of the representations, warranties and other provisions of this agreement; (ii) to have been recorded in the Initial Period; and (iii) to, together with the Purchased Artwork, be Materials hereunder. Company shall have all rights in the Purchased Recordings that Company has in Recordings hereunder, and Company shall have all rights in the Purchased Artwork that Company

has in Record Artwork hereunder. You shall Deliver the Purchased Materials prior to or simultaneously with your execution of this agreement. Some or all of the Purchased Recordings may be included on a Committed Record hereunder, and, if so included, will constitute a portion of the Recording Commitment for the Contract Record concerned. All Purchased Recordings not embodied on a Committed Record shall not be applied in reduction of the Recording Commitment. You shall execute and deliver to Company such instruments of transfer (including any documents reasonably necessary to effectuate the transfer of copyrights specified herein) and other documents regarding the rights of Company in and to the Purchased Materials as Company may reasonably request to carry out the purposes of this agreement. You and Artist hereby irrevocably grant to Company a power of attorney equivalent to the power of attorney described above, solely if you fail to execute and deliver to Company any document which Company may reasonably submit to you for execution within seven (7) Business Days after such document is submitted to you. ”

4. EU MEASURES IN FAVOUR OF FAIR REMUNERATION OF CREATORS

KEY FINDINGS

The report addresses the EU's efforts to ensure fair remuneration for creators. Central to these efforts is the concept of appropriate and proportionate remuneration, as outlined in Article 18. Article 19 introduces a transparency obligation, ensuring that creators are adequately informed about the exploitation of their works, while Article 20 discusses a remuneration adjustment mechanism. The EU also encourages the use of alternative dispute resolution procedures to address complaints. Another decisive measure is the right of revocation, allowing creators to reclaim their rights under certain conditions. The study underscores the vital importance and strength of these obligations in promoting fairness.

With the DSM Directive, the European Union legislator initiates a preliminary harmonisation of contractual law pertaining to copyright. The primary objective is to enhance the protection of creators by addressing the unbalances that exist to their detriment in their contractual relationships with operators, as referenced in Recital 72.

The examination of these articles reinforces the notion that the Union legislator's aim is to establish a contractual right of literary and artistic property that safeguards the interests of authors and artists while respecting the diverse interests and traditions at play.

4.1. Appropriate (and proportionate) remuneration (Art. 18)

4.1.1. Background

Initially, in the Commission's Directive DSM Proposal, no specific provision that envisioned a principle of fair and proportionate compensation for authors and performers when they assign or licence their exclusive rights to their works and performances. Article 15 of the Proposal only introduced a contract adjustment mechanism, which could be activated if the originally agreed-upon remuneration for authors and performers who entered into contracts for the exploitation of their rights was deemed unreasonably low in comparison to the subsequent revenues and benefits generated by the use of the work or performance. It was during subsequent deliberations that the principle, now encapsulated in Article 18, was deliberated upon and ultimately incorporated into the Directive.

The parliamentary proposal initially suggested two key elements. Firstly, the inclusion of a recital (Recital 39d in the parliamentary text) emphasising that, as a fundamental principle, authors and performers should invariably receive 'fair and appropriate remuneration.' Secondly, the parliament recommended the incorporation of a provision, placed at the outset of Chapter 3 within Title IV (Article 14), explicitly articulating the principle of equitable and proportionate compensation for authors and performers regarding the utilisation of their works, including in online contexts.

This principle was considered to be realised across various sectors through a combination of agreements, including collective bargaining agreements, and statutory remuneration mechanisms. Additionally, the parliamentary version of the Proposal excluded the application of this principle when an author or performer granted a non-exclusive usage right to all users free of charge. It stipulated that Member States should consider the unique characteristics of each sector when promoting proportionate remuneration for rights granted by authors and performers, and contracts were

mandated to specify the remuneration applicable to each mode of exploitation. During the triologue negotiations, the principle of appropriate remuneration was accepted for inclusion in the final text of the Directive (the Parliament's version referred to a "fair and appropriate" remuneration), particularly in relation to 'exploitation contracts of authors and performers' as indicated by the chapter title. This principle was complemented by a requirement that the remuneration also be "proportionate."

4.1.2. Content of the obligation

Within Chapter 3 of the DSM Directive, concerning "Fair remuneration in exploitation contracts of authors and performers," the front provision (art. 18) provides: "Member States shall ensure that where authors and performers licence or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive **appropriate and proportionate remuneration.**"

Being placed as the first obligation in the list, it can be inferred from this position that the obligation provided for by Art. 18, which is considered by EU Legislator of most importance. However, this reading should perhaps be relativised, which would be regrettable, due to the absence of citation of Article 18 in Art. 23 which provides for the mandatory nature of the other obligations of Chapter 3.

As highlighted in Recital 73, the stipulation for remuneration to be both appropriate and proportionate involves an evaluation of the actual or potential economic value of the licensed or transferred rights.

In pursuit of this assessment, various elements come into play, including the author's or performer's contribution to the overall work or subject matter, alongside other pertinent circumstances, like market practices, especially within the specific sector that may have its unique characteristics, or the practical utilisation of the work.

Recital 73 further elucidates that a lump sum payment can also be qualified as proportionate remuneration, but it should not be the prevailing norm. As this does not imply that lump sum payments should only be chosen in rare instances, they should not be the default or standard choice to guarantee that the remuneration is, at the very least, proportionate.

One may add that the principle of a "proportionate remuneration" implies that the remuneration aligns with the genuine or potential economic value of the licensed or transferred rights, thereby rendering it synonymous with the concept of 'fair' compensation. In other words, there's like an application of the principle of proportionality, a proportionality requirement. This interpretation remains consistent with the historical context and underlying purpose of the provision, as well as with the implied understanding of proportionality within the contract adjustment mechanism outlined in Article 20. Moreover, the proportionate character stands as a fundamental principle within EU law, with its safeguarding enshrined on the basis of fundamental rights according to Article 52 of the EU Charter of Fundamental Rights. Additionally, references to proportionality can also be found in relevant EU directives related to copyright, such as Articles 3 and 14 of the Enforcement Directive 2004/48 and Article 6 and Recital 48 of the InfoSoc Directive 2001/29²¹.

4.2. Transparency obligation (Art. 19)

Article 19, titled the "transparency obligation," tackles a contentious issue within the cultural industry, addressing the pressing need to provide creators with increased transparency that is needed to ensure

²¹ Eleonora Rosati, « Article 18—Principle of Appropriate and Proportionate Remuneration », in Eleonora Rosati (dir.), *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790*, Oxford University Press, 26 August 2021, p. 364.

their effective and fair remuneration. Creators require this transparency to effectively manage their finances and make informed financial decisions.

In order to be able to assess the fairness, proportionality and appropriateness of their remuneration, they must be able to identify precisely the use made of their works and all revenues generated.

It is crucial for them to be sure that the royalties they receive as part of their agreements or the payments related to their statutory remuneration rights correspond to the revenue generated from the use/the exploitation of their works or at least to what have been negotiated. However, in practice, monitoring the deals, often publishers, record labels, producers, etc., and the associated financial details prove challenging.

These intermediaries are incentivised to operate in a secretive manner, as the more they conceal from the creators, the more they can retain for themselves. Hence, the necessity for Article 19.

Article 19(1) requires that creators receive, at least once a year, current, pertinent, and comprehensive information concerning the modes of exploitation of their work of mind (and their interpretation for performers), as well as all generated revenues and owed remuneration. This is a positive and very important step. It is regrettable that subsequent paragraphs of Art. 19 and Recitals 74-77 dilute the potential effectiveness of the first paragraph.

It is important that authors and performers are duly provided with exploitation-related information. Therefore, Article 19(2), explained by Recital 76, further addresses situations where subsequently the rights have been sub-licensed to others who exploit the rights. In such cases, authors and performers will receive information from their first contractual counterpart and the Directive entitles them, when the information received is not sufficient to assess the economic value of their rights, to request additional relevant information on the exploitation.

However, creators have to request this information from the sub-licensee. The first licensee shall therefore provide information on the identity of those sub-licensees. Recital 76 appears to entitle Member States whether creators can request the relevant information from the sub-licensee directly or must go through the licensee²². This may allow the licensee to withhold time-sensitive information by creating separate entities.

One limitation of this important obligation of transparency is provided for in Article 19(3). There, the obligation in paragraph 1 is removed when the cost of sharing the information is deemed "disproportionate" to the revenue generated. This condition is questionable in relation to the digital copyright market, where data management costs have fallen considerably, while revenues have increased, especially in relation to the large online platforms. In that perspective, the derogation could put creators at a disadvantage. In this respect, Art. 19 may contain a loophole in which platforms and other actors in the cultural sector could use or abuse. Indeed, in the interviews performed, it has been said that the reporting requirements under Art. 19(1) is an operational burden.

Article 19(4) introduces the "significance of contribution" clause, also found in Article 18. This means that the importance of the contribution of the author or performer has to be taken into account. Relating to the obligation of transparency, if the contribution is not significant, Member States may then decide that the transparency obligation does not apply, unless creators demonstrate that the information requested is needed for the exercise of their right to claim additional, appropriate and fair

²² Rec. 76, *in fine*: "Member States should have the option, in compliance with Union law, to provide for further measures to ensure transparency for authors and performers."

remuneration under Art. 20(1). However, assessing the “weight” of a contribution is challenging, often left to the contractor, thus disadvantaging creators with limited bargaining power.

On a more positive note, Article 19(5) allows Member States to provide that for agreements subject to or based on collective agreements, the rules on transparency may be negotiated “collectively”, which strengthens the negotiating power of musicians in particular, according to their representatives, as confirmed by the interviews conducted.

Article 19(6) provides that, where Art. 18 of Directive 2014/26/EU (CRM Directive)²³ is applicable, the obligation of transparency under Directive DSM shall not apply

Indeed, CMOs are already subject to transparency provisions under the CRM Directive.

The obligation of transparency should apply equally to proportional and flat-rate remuneration. Article 19 does not distinguish between these methods of payment. Consequently, even if an author or a performer has been remunerated with a lump-sum payment, they are still entitled to receive the relevant information under Art. 19(1). This stance clearly opposes the buyout practices. Authors and performers should have the means (in other words, access to relevant exploitation-related information) to assess the scale of it and, above all, to assess whether the remuneration perceived corresponds to a fair remuneration; in other words, an appropriate remuneration, proportionate to the value of their rights. This access to relevant exploitation-related information is also important because that is the sole means they have to exercise, if necessary, their right to adjust the remuneration provided for in the contract under Art 20. Indeed, they can claim for an additional remuneration where the remuneration initially agreed proves to be unreasonably low in relation to the total income subsequently derived from the exploitation of the works or performances.

Before going on with this remuneration adjustment mechanism, it is also worth to note that according to Recital 77, when implementing the transparency obligation, Member States should take into account the specificities of different content sectors. In particular, the question arises as to what practices will be developed in the context of buy-out practices. But the very principle of the information obligation should not be called into question. Moreover, all relevant stakeholders should be involved when deciding on such sector-specific obligations.

4.3. Remuneration Adjustment Mechanism (Art. 20)

Article 20(1) introduces a contractual adjustment mechanism for authors and performers (hereinafter referred to as creators) 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”. To be more precise, Member States shall ensure the creators are entitled to such a contractual adjustment mechanism, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in Art. 20. Member States may choose the specific mechanism applicable in their national laws, but Art. 20 is clear: to assess whether the remuneration originally agreed turns out to be disproportionately low, it should be compared to “all the subsequent relevant revenues derived from the exploitation of the works or performances”. Recital 78 reaffirms that all revenues should be taken into account, including, where applicable, merchandising revenues.

²³ 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, OJ L 84, 20.3.2014, p. 72–98.

In order for such a mechanism to be effective, it is crucial that creators have access to the relevant information on the exploitation of their work or other protected objects. Therefore, the reporting requirement under Art. 19 is of utmost important.

This article has been likened to “best-seller clauses” found in some Member States, notably Germany and the Netherlands, where such clauses have had a significant impact. Similar mechanisms, albeit in a more limited form, also exist in Denmark, France, and Poland, as outlined in an analytical overview available below.

The harmonisation of the best-seller provision at the European level is a positive step that recognises the principle that success should trigger improved financial terms for all participants in the creative value chain, rather than just those with high bargaining power. However, it’s important to note that this mechanism serves as a corrective measure that is usually activated upon achieving success, limiting its impact on the broader creative ecosystem. The phrasing of the provision has been criticised for introducing a degree of uncertainty, especially when combined with the conditions listed in Recital 78. These conditions encompass factors such as the significance of the creator’s contribution, which, while justifiable in some cases, can involve subjective judgments. Additionally, the specificities and remuneration practices within different content sectors, as well as whether the contract is based on a collective bargaining agreement, are factors to consider.

Furthermore, when limiting the application of that contractual adjustment mechanism “In the event that the economic value of the rights turns out to be significantly higher than initially estimated,” the Directive distinguishes Article 20 from similar clauses in Germany and the Netherlands. In these countries, the existence of a claim does not require that the market success of the work was unforeseen, whereas Article 20 seems to address contracts that were unfair from the outset, stemming from the inherent power imbalance between individual creators and their often-dominant contractual counterparts.

Recital 78 also confines the rights, for which the remuneration of creators can be renegotiated, to those “harmonised at the Union level.” For some rights as adaptation rights, for example, there could be discussion then. On a positive note, Recital 78 in a way acknowledges the potential harm to a creator’s reputation resulting from a claim for contractual adjustment. It suggests that representative organisations should not only offer assistance but also safeguard a creator’s identity.

4.4. Alternative dispute resolution procedure

As mentioned above, creators are sometimes not willing or not in a position that allows them to bring their difficulties as to the application of the transparency obligation to light on one hand, or of the contractual adjustment mechanism before the courts on the other hand. However, Art. 21 requests from Member States that disputes regarding 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 also ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.

It is important for authors and performers that are often reluctant to enforce their rights against their contractual partners before a court or tribunal, to be able to bring their claims in such a procedure and, moreover, that their representatives may do so on their behalf.

As explained by Recital 79, Member States may establish a new body or mechanism or rely on existing one and they have flexibility in deciding how the costs of the dispute resolution procedure are to be allocated.

Regarding the buy-out practices and the importance of its secrecy aspects, such alternative resolution disputes could be better accepted by online platforms and other actors using buyout agreements. But it is very clear in Recital 79: such alternative dispute resolution procedure shall not be imposed on creators.

One point to watch out for regarding the different transpositions and the application of Art. 20: the frequent confidentiality clause, that platforms, producers or distributors will often (or rather, inevitably) associate with information relevant to the exploitation of the work, should not be able to be invoked against either the competent body or the courts.

4.5. Right of revocation

The right of revocation enshrined in Art. 22, corresponds to a kind of exploitation obligation. Indeed Art. 22(1) provides that Member States have to ensure that, where creators have licensed or transferred their rights on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights in case of a lack of exploitation of the works or of other protected subject matter by the contractual counterpart. But, logically, as stated in Art. 22(4), the paragraph 1 shall not apply if the lack of exploitation is mainly the responsibility of the creators, in other words, if the failure to exploit is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy. Besides, one can easily understand that this right might not be exercised after a “reasonable time” following the conclusion of the licence or the transfer of the author’s or performer’s rights, as provided by Art. 22(3). This paragraph also states that the author or performer concerned shall notify their contractual counterparts and set up an “appropriate deadline.”

Even if the business model of the platforms that use buyout agreements suggests that they will exploit the works produced, it is important to consider the possibility of a lack of exploitation. Moreover, a problem may arise, even for these platforms, if there is more than one author or performer, if they decide not to exploit some contributions...

More precisely, the right of revocation may be considered as limited. Indeed, Member States are allowed a certain flexibility that may limit the scope of this right. They may take into account the specificities of the different sectors and the different types of works and performances or the fact that, within a work or other subject matter that contains the contribution of more than one author or performer, some individual contributions may be of relative importance, and the legitimate interests of all authors and performers may be affected by the application of the revocation mechanism by an individual author or performer. In such cases, Member States may exclude works or other subject matter from the application of the revocation mechanism if such works or other subject matter usually contain contributions of a plurality of authors or performers. This is an important limitation on the free choice of Member States. Moreover, where a restriction of time to exercise the right of revocation is duly justified by the specificities of the sector or of the type of work or other subject matter concerned, Member States may provide that the revocation mechanism can only apply within a specific time frame. Finally, Member States may provide for creators choosing to terminate the exclusivity of the contract instead of revoking the licence or transfer of the rights.

Finally, Member States have the option to enforce any contractual provision that deviates from the revocation mechanism mentioned in paragraph 1, but only if it is grounded in a collective bargaining agreement.

4.6. Strength of these (essential) obligations

We often heard in the interviews that Chapter 3 of the DSM Directive is mandatory, even though, after a certain time, producers seem to be well aware of the limited scope of Art. 23. Indeed, Art. 23(1), which is entitled “Common provision,” provides that “Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.” The mandatory nature of these legal provisions is clearly stated. As Recital 81 explains, the mandatory nature of three provisions within Chapter 3 means that contractual “parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements”.

Recital 81 clarifies the “consequences” of the mandatory nature of Art. 19, 20 and 21. Referring to Art. 3 of Rome I Regulation²⁴, it specifies that Art. 3(4) should apply. When “all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States, the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum”. The imperative nature of Art. 19, 20 and 21 is clearly stated regarding EU contracts.

Art. 23 makes no reference to Article 18, which enshrines the principle of appropriate and proportionate remuneration for creators and performers, nor to Art. 22 under which it is provided for a right of revocation²⁵. At least, as it is asserted by some of the members of the legal literature and by some of the creators' representatives that have been interviewed, Art. 23(1), explained by Recital 81 does not explicitly incorporate Article 18 and Article 22.

However, the choice made by the European Legislator looks clear. Professor E. Treppoz suggest that this choice may be justified by the fact that Member States benefit considerable freedom in implementing the principle of appropriate and proportionate remuneration²⁶. It could also be founded either by a lack of daring or by taking into account interests other than those of the creators. Or perhaps because, in any case, the imperative of the contractual adaptation mechanism ultimately ensures that authors and performers are fairly remunerated over time...

To enrich and inform the discussion it is worth emphasising that in order to qualify Art. 19 as mandatory, when this provision is linked notably to Art. 18 and 22²⁷, without qualifying these last provisions as mandatory, can be considered as lacking coherence. Or that consistency could be found in the will to take more account of the interests of contractual counterparts than of creators' interests. What is the sense of qualifying the contractual adjustment mechanism under Art 20 of the DSM Directive but not Art. 18 and 22? Is that expressing the will that the remuneration originally agreed can be unfair, but no contracts' clause may exclude the right for the authors, performers to claim additional, appropriate and fair 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. So, the remuneration originally agreed can be

²⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

²⁵ E. Rosati, *ibid.*; S. Dusollier, ‘The 2019 Directive on copyright in the Digital Single market: Some progress, a few bad choices, and an overall failed ambition’ (2020) 57 CML Rev 979, p. 1023.

²⁶ E. Treppoz, « L'impérativité européenne en droit d'auteur », in *Mélanges Michel Vivant*, LexisNexis / Dalloz, 2020, p. 653.

²⁷ Recital 74 clearly stated this interconnection between Art. 18 and 19 in the following passage : “Authors and performers need information to assess the economic value of rights of theirs that are harmonised under Union law.”

disproportionately compared to the economic value of the rights licensed or transferred, but that remuneration cannot be disproportionately low compared to all the subsequent relevant revenues from their exploitation? It sounds strange and this seems to contradict the very title of the chapter which is "Fair remuneration in exploitation contracts of authors and performers." Besides, regarding Art. 22, the discrimination made considering its imperative nature is also a real issue. Indeed, being able to know that there is no exploitation of their work or performance, the creators and performers will not be able to receive any remuneration if a proportional remuneration has been initially agreed upon. The right of revocation, in that case, indirectly the very effectiveness of the remuneration.

5. NATIONAL MEASURES IMPLEMENTING THE EU DIRECTIVE

KEY FINDINGS

The study analyses how various EU nations have implemented the EU directive. In Belgium, there's a specific focus on Chapter 3 of the directive, with the notable establishment of a non-revocable right to compensation, as well as in Lithuania and Slovenia. France, besides executing the EU Directive, introduced a 2021 regulation on audiovisual communication. Germany had pre-existing laws but also implemented the EU Directive. Finland, Italy, Ireland, Netherlands, Spain, and Sweden implementations are also analysed, showing that the general option to implement in domestic laws appears to make all the protective provisions are mandatory in a contractual relationship.

5.1. Belgium

5.1.1. Implementation of chapter 3 of the directive

On June 19, 2022, the directive was transposed in the Belgian law, modifying Book XI "Intellectual Property and trade secrets" of the Code of Economic Law, introducing article 167/1 that disposes "when an author has assigned or licensed his exclusive rights for the exploitation of his works within the framework of an exploitation agreement, he retains the right to receive appropriate and proportional remuneration"²⁸.

Article 19 of the directive was transposed in the Belgian law, modifying Book XI "Intellectual Property and trade secrets" of the Code of Economic Law, introducing article 167/2 that disposes "When an author assigns or licenses his exclusive rights for the exploitation of his works within the framework of an exploitation agreement, the person to whom the rights have been assigned or the licensee provides the author, within a reasonable time after the exploitation concerned has taken place, regularly, and at least once a year, taking into account the specificities of each sector, updated, relevant and complete information on the exploitation of its works, particularly with regard to the operating methods, all revenues generated and the remuneration due.

In duly justified cases in which the administrative burden resulting from the transparency obligation of the person to whom the rights have been transferred or of the licensee, as referred to in paragraph 1, proves to be disproportionate to the revenue generated by the exploitation of the work, the obligation of transparency referred to in paragraph 1 may be limited to the types and level of information that can reasonably be expected in the sector concerned." This provision is mandatory (art. XI.167/6).

Concerning the contractual adjustment mechanism, Article XI.167/3 of Code of Economic Law, provides that "in the absence of an applicable collective agreement, as defined, providing for a mechanism, the author or his representative may claim from the person to whom the rights have been transferred or to the licensee, within the framework of an exploitation agreement, an appropriate and fair additional remuneration, when the remuneration initially agreed turns out to be excessively low in relation to all the revenue subsequently derived from the exploitation of the work." This provision is mandatory (art. XI.167/6).

²⁸ Loi transposant la directive (UE) 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE(1), 19 JUIN 2022, Numac : 2022015053; Moniteur Belge - Belgisch Staatsblad (fgov.be).

The alternative dispute resolution procedure is also implemented, within Article XI.167/3 of Code of Economic Law, which provides that “Collective agreements may in particular determine alternative methods of dispute resolution. Collective agreements always seek to find a fair balance between the rights and interests of each party (art. XI.167/5)”.

5.1.2. Creation of an un-waivable right to compensation

Additionally, Belgian law took an innovative approach in implementing the directive. A new article XI.228/4 in Belgian legislation on copyright and related rights is worded as follows:

“§ 1. When an author or a performing artist has transferred their right to authorise or prohibit the communication to the public by an online content sharing service provider, as referred to in Article XI.228/3, § 1, they retain the right to receive compensation for the communication to the public by an online content sharing service providers.

§ 2. The right to compensation referred to in paragraph 1 is non-transferable and cannot be waived by the authors or performing artists.

§ 3. The management of the right to compensation for authors referred to in paragraph 1 can only be exercised by management companies and/or collective management organisations representing the authors. The management of the right to compensation for performing artists referred to in paragraph 1 can only be exercised by management companies and/or collective management organisations representing the performing artists.

§ 4. The provisions of paragraphs 1 to 3 are mandatory.”

Articles XI.228/10 and XI.228/11 have expanded such a mechanism to establish a comprehensive regulation of direct compensation, encompassing both platforms operating through streaming and those offering content sharing services.

A constitutional objection has been raised by Meta, Google and Sony, against this law, and there’s a possibility that preliminary questions could be sent to the Court of Justice of the European Union.

5.2. Finland

Amendments to the Finnish Copyright Act (404/1961) became effective in April 2023, transposing article 18 of the DSM Directive. Finnish Copyright Act, in article 28 A. provides that the creators who assigns an exclusive right or grants an exclusive licence to exploit a work, is entitled to appropriate and proportionate remuneration for this exploitation. That right cannot be derogated by contracts (article 27). Moreover, article 45 of Finnish Copyright Act provides that performing artists have the right to an appropriate and proportionate remuneration by the exploitation of their work.

In addition, Section 29 of Finnish Copyright Act, mentions that if a term of an agreement made by the original author of a work on the assignment of copyright is contrary to good contractual practice in the field or otherwise unfair, or its application would lead to unfairness, the term may be adjusted or disregarded²⁹.

When assessing unfairness, account must be taken of the entire content of the contract, the position of the parties, the manner and amount of use of the work, the commercial value of the work and the manner in which remuneration is determined, as well as the author’s creative contribution to the work

²⁹ <https://www.finlex.fi/fi/laki/ajantasa/1961/19610404#a22.5.2015-607>

as a whole, as well as factors as the circumstances prevailing when and after the conclusion of the contract.”³⁰

5.3. France

5.3.1. Implementation of the EU Directive

The French transposition of the DSM Directive has been made by several Ordinances. Ordinance No. 2021-580, issued on May 12, 2021, served to transpose the provisions outlined in Articles 18 to 23 of the Directive on the Fair Remuneration of Authors and Performers into French law. This transposition aimed to retain and reinforce specific solutions already present in French legislation. Article 18 of the directive imposes a mandate on Member States to establish a right for authors and performers to remuneration “appropriate and proportionate,” terms that have been in the French version of the directive translated by the expression “appropriée et proportionnelle”. However, it’s worth noting that the term “proportionnelle” in this context might not be the most accurate translation³¹. The directive doesn’t necessarily require remuneration to be directly proportional (in the French version)/ proportionate (in the English one) to the revenue generated by exploitation. Instead, it allows for a flat fee: “A lump sum payment can also constitute proportionate remuneration, but it should not be the rule.”

Therefore, using the term “proportionnelle” alone may not fully capture the directive’s intention, and “appropriate remuneration” might be more precise. In a significant development, the Conseil d’État, in its decision of November 15, 2022 (No. 454477), determined that the Directive on Copyright in the Digital Single Market obliges Member States to ensure that authors and performers, when licensing or transferring their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive ‘appropriate and proportionate’ remuneration. Therefore, any national transposition order must not omit either of these two criteria when determining remuneration. The French Conseil d’Etat states, in favour of authors and performers, that if French law has created a contract adjustment mechanism in accordance with Article 20 of the DSM Directive, the French transposition must be censured in that “it did not provide, contrary to what the Directive requires, that the remuneration be ‘appropriate’ from the outset.”³² Therefore the Conseil d’Etat issued a partial annulment decision “insofar as it does not provide that authors assigning their exclusive rights for the exploitation of their works have the right to receive appropriate remuneration³³.”

French law has already established the principle of proportional remuneration in Article L. 131-4 of the Intellectual Property Code (CPI), and it also regulates the use of flat-rate remuneration. Consequently, the decision was made not to explicitly transpose the provisions of the directive because the proportional remuneration mandated by law inherently satisfies the directive’s requirement of being both appropriate and “proportionate.”

Article 18 of the directive provides Member States with flexibility in choosing mechanisms to establish appropriate and proportionate remuneration. This may include collective bargaining while still considering the principle of contractual freedom and a fair balance of rights and interests. The French government, in this regard, has expanded the scope of collective bargaining within the audio-visual

³⁰ Copyright Act 404/1961 - Up-to-date legislation - FINLEX.

³¹ French Conseil d’Etat, 15 Nov. 2022, n°454477, ECLI:FR:CECHR:2022:454477.20221115: « Annulment of National Transposition Order on Appropriate Remuneration for Authors », GRUR International, June 2023, vol. 72, n° 7, pp. 706-709; « France: obligatory “appropriate” remuneration for authors », IIC 2023, 54(4), 587-590.

³² Ibid. Pt 14.

³³ Ibid. Pt 15.

sector. A newly introduced Article L. 132-25, 2 CPI now mandates the formulation of terms and payment methods for proportional remuneration, either through collective agreements or by decree. This article stipulates: "One or more agreements on author remuneration concluded between professional author organisations, collective management organisations mentioned in Title II of Book III of this part, professional organisations representing producers, and, if applicable, representative organisations of other sectors of activity, shall establish the terms for determining and paying proportional remuneration by mode of exploitation, as well as the conditions under which authors may receive additional remuneration after the work's cost has been amortised, as well as the methods for calculating this amortisation and the definition of the net revenues contributing to it" (L. 132-25-2, I). These agreements hold broad applicability. However, it's noteworthy that the phrase "establishment of the terms for determining proportional remuneration" may not encompass the setting of remuneration rates (as distinct from the basis, which is explicitly addressed here). These agreements have a duration ranging from 1 to 5 years and can be extended to all interested parties through an order issued by the Minister responsible for culture.

Additionally, the order includes a crucial provision concerning the transfer of rights to a musical work to an audio-visual producer. This introduces a new rule of international public order. Article 7 inserts two paragraphs into Article L. 132-24 (CPI, art. L. 132-24, para. 2 and 3). The first paragraph stipulates that contracts in which the author of the musical composition, with or without lyrics, of an audio-visual work transfers all or part of their exploitation rights to the producer of the latter shall not deprive the author of the protective provisions outlined in Articles L. 131-4, L. 131-5, and L. 132-28 of the code, even if the parties have chosen a different governing law. The second paragraph specifies that the author can bring any disputes related to the application of this rule before French courts, regardless of where they or their assignee are established, and regardless of any contrary jurisdiction clause.

The obligation of transparency provided in article 19 of the Directive is implemented in France in the article L131-5-1 of the Intellectual Property Code. Therefore, when the author has transferred all of the operating documents, the transfer must be made available through an electronic communications process, at least for a year, with explicit and transparent information for all the ingredients generated by the operation of the work, distinguish between the different modes of exploitation and the remuneration payable by each mode of exploitation.

I.- The contract adjustment mechanism provided in article 20 of the Directive is implemented in article L 131-5 that provides that: "In the event of the transfer of the exploitation right, when the author has suffered damage of more than seven twelfths due to injury or insufficient forecasting of the products of the work, he may cause the price conditions of the contract to be revised.

This request can only be made if the work has been transferred for a fixed fee. The injury is assessed in consideration of the entire exploitation by the assignee of the works of the author who claims to be injured.

II.-The author is entitled to additional remuneration when the proportional remuneration initially provided for in the exploitation contract turns out to be excessively low in relation to all the income subsequently derived from the exploitation by the assignee. In order to assess the author's situation, his contribution may be taken into account.

III.- I and II are applicable in the absence of a specific provision providing for a comparable mechanism in the operating contract or in a professional agreement applicable in the sector of activity. The request for revision is made by the author or any person specially mandated by him for this purpose.

IV.-The provisions of this article are not applicable to software authors."

5.3.2. Regulation concerning audio-visual communication (2021)

In relation to the expansion of the 'buy out' stipulations within French authors' and performers' contracts, it is pivotal to note that the primary constriction is not rooted in Copyright Law regulations. Instead, the pertinent limitation emerges from the recent regulatory framework addressing audio-visual communication.

To elucidate, Decree No. 2021-793 dated June 22, 2021, which pertains to on-demand audio-visual media services, enumerates in Article 22 a comprehensive array of provisions. These directives curtail the temporal span of rights transfers, constrict the platform's prerogative to function as a principal producer, assure the culmination of commitments, and specify the terms of producer equity and commercial mandates. Such stipulations are operative when the on-demand audio-visual media service designates an associated production as an independent venture.

It is imperative to underscore that such on-demand services, designated as SMAD, are mandated to apportion a minimum of two thirds (subject to specified modifications) of their fiscal expenditures to the proliferation of autonomous productions.

In summation, this intricate regulatory apparatus, through its inherent design, invariably influences the contracts related to audio-visual production that are concluded by producers.

5.4. Germany

5.4.1. Pre-existing statute

In contrast to France, Germany did not have regulations regarding author's remuneration in its copyright law before 2002. Consequently, a new law pertaining to copyright contract law was introduced in 2002, mandating that authors must receive fair and appropriate compensation (previously referred to as the "best-seller clause"). Interestingly, this law excluded the TV and film sector, but this omission did not result in legal disputes, as authors in these domains were accustomed to receiving fair remuneration. The German legislation bears a strong resemblance to the regulations at the European level, as outlined in the 2019 Directive, which meant that Germany did not need to make extensive amendments to its national legislation.

5.4.2. Implementation of the EU Directive

Article 18 of the Directive was introduced into German law by the "Urheberrechtsgesetz Act on Copyright and Related Rights" (URHG)³⁴ in Section 32 (Equitable remuneration). If the agreed remuneration is not equitable, the author has the right to require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration.

The Act to align Copyright Law with the Digital Single Market requirements was officially enacted on June 4, 2021, and it came into effect on June 7, 2021. This legislation primarily focuses on the adaptation of existing copyright contract law, specifically the regulations governing contracts between creators and those who exploit their work (Sections 32 et seq. UrhG). It also bolsters collective legal protection measures (Section 36d UrhG). Notably, the European directives align closely with the pre-existing German copyright contract law.

³⁴ Copyright Act of 9 September 1965 (Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes - UrhBiMaG), available at: https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0170

An additional sentence was introduced at the end of Section 32(2), which emphasises that flat-rate remuneration must ensure the author's fair participation in the anticipated overall proceeds from such utilisation. It must also be justifiable, taking into account sector-specific characteristics.

Section 32a, titled "Author's Further Participation," now includes provisions addressing cases of "the author's disproportionately low remuneration."

Section 32 (Equitable remuneration)

(1) The author is entitled to the contractually agreed remuneration for the granting of rights of use and permission to use the work. If the amount of the remuneration has not been determined, equitable remuneration is deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration.

(2) Remuneration is deemed to be equitable if it is determined in accordance with a joint remuneration agreement (section 36). Any other remuneration is deemed to be equitable if at the time the agreement is concluded it corresponds to what is customary and fair in business relations, given the nature and extent of the possibility of use granted, in particular the duration, frequency, extent and time of use, and considering all circumstances. Flat-rate remuneration must guarantee the author's equitable participation in the expected total proceeds from such use and must be justified in the light of sector-related specificities.

(2a) A joint remuneration agreement may also be used as the basis to determine equitable remuneration in the case of contracts concluded prior to their temporal scope of application.

(3) An agreement which deviates from subsections (1) to (2a) to the detriment of the author may not be invoked by the other party to the agreement. The provisions stipulated in sentence 1 apply even if they are circumvented by other arrangements. The author may, however, grant to all a non-exclusive right of use free of charge.

(4) The author has no right under subsection (1) sentence 3 to the extent that the remuneration for the use of his or her works has been determined in a collective agreement.

URHG provides compulsory application of section 32 "if German law were applicable to the contract of use in the absence of a choice of law or to the extent that the agreement covers significant acts of use within the territory to which this Act applies" (Section 32b).

Consequently, when German law applies to the author's contract, the obligatory adherence to the author's proportional remuneration will encompass all types of contracts, regardless of their origin or nature. This provision may apply to contracts involving both national parties, those with intra-Community origins, or even those with non-Community origins

5.5. Italy

In its endeavour to implement the principle of fair and proportionate remuneration, the Italian legislator has demonstrated a strong commitment to safeguard the interests of the economically weaker contracting party, that is the creator. However, this protective stance comes with the potential risk of creating challenges for cultural enterprises. This principle has been formally enshrined in the Italian Copyright Law through the addition of a second paragraph within former Article 107, which falls under the General Rules governing the 'Transmission of Exploitation Rights' (Chapter II, Section I). It stipulates that authors, performers, screenwriters, dubbing directors, and voice actors, when licensing or transferring their exclusive rights for the exploitation of their work or other protected subject matter, are entitled to receive a remuneration that aligns with the value of the licensed or transferred rights.

This remuneration should also be commensurate with the revenues generated from the exploitation, while considering the specific characteristics of each sector and the existence of collective bargaining agreements, where applicable. This right can be exercised either directly or through a collective management organisation (CMO). The effectiveness of this principle is bolstered by the provision of rendering any contrary contractual terms unenforceable and invalid. Consequently, this principle serves as the foundation for potential contractual claims, enforceable exclusively by authors and performers against their direct contractual counterparts.

The Italian legislator has opted to anchor the concepts of appropriateness and proportionality of remuneration to four key elements: (i) the value of the licensed or transferred rights (ii) the revenues derived from their exploitation, with due consideration to (iii) the unique characteristics of each sector and (iv) the presence of collective bargaining agreements. According to Recital 73, Article 107(2) of the Italian Copyright Law significantly sidelines the practice of lump-sum payments. It explicitly allows for lump-sum payments only when the author's or performer's contribution to the work or performance is deemed ancillary, and the calculation costs are deemed disproportionately high for a detailed assessment: "A flat-rate remuneration shall be allowed for the author or artist where his contribution to the work or performance is purely ancillary and the costs of the calculation are disproportionate to the purpose"³⁵. This formulation is designed to restrict the use of lump-sum payments. As explicitly articulated in the Explanatory Report, the possibility of employing lump-sum payments is confined to very specific cases, expressly outlined where both conditions are concurrently met. Concerning the ancillary nature of the contribution to the work, legitimising a lump-sum payment would only apply in highly specific instances, such as when it involves "ancillary contributions with respect to cultural products that contain a piece of work or performance." Examples include short introductory texts for literary or scientific works, photographs, or illustrations used as book cover decorations, and similar cases.

Italian Copyright Act (L. 22 April 1941, n. 633) provides that entities to which rights have been granted or assigned and their assignees are obliged to provide authors and performers, including through collective management organisations and independent management entities, at least every six months with updated, relevant and complete information on the exploitation of artistic works and performances, and the remuneration due (art. 110-quater. 1). The provision details which information : the identity of all parties involved in the assignments or licences, including secondary users of works and performances who have entered into agreements with direct contractors of authors and performers; the manner in which the artistic works and performances are exploited; the revenues generated from such exploitations, including advertising and merchandising revenues, and the remuneration contractually due, as stipulated in licensing or rights transfer agreements; with specific reference to non-linear audio-visual media service providers, the numbers of purchases, views, subscribers.

According to Article 107 of the Italian Copyright Law, agreements that are contrary to the provisions regarding the adequate and proportionate remuneration of authors and performers will be null and void. This means that the provisions regarding the remuneration of authors and performers will be mandatory, regardless of whether the contracts are concluded between national parties or between parties of foreign origin, either intra-community or extra-community.

Italian Copyright Act (L. 22 April 1941, n. 633) also provides a contractual adjustment mechanism: "without prejudice to the provisions of collective agreements, authors and performers, directly or

³⁵ Decreto Legislativo 8 de noviembre de 2021, n. 177 - Normativa LEGGE 22 aprile 1941, n. 633 - Normativa Art. 107 - Copyright Law: (officeadvice.it).

through collective management entities or independent management entities are entitled to additional, adequate and fair remuneration from the party with whom they have entered into a contract for the exploitation of the rights or from their assigns, if the agreed remuneration turns out to be disproportionately low in relation to the income generated over time from the exploitation of their artistic works or interpretations, taking into account all possible types of income from the exploitation of the artistic work or interpretation, for any reason and in any form, including the making available of phonograms in line” (article art. 110-quinquies).

An alternative dispute resolution procedure is also provided for in the Act (L. 22 April 1941, n. 633, Art. 110-sexies).

5.6. Ireland

Irish Statutory Instrument (S.I) 567/2021 implements the Directive 2019/790 in national law. Article 26.1 establishes that authors and performers shall be entitled to receive “appropriate and proportionate remuneration” when licensing or transferring his or her exclusive rights for the exploitation of his or her works or other subject matter.

“26. (1) Where an author or a performer licences or transfers his or her exclusive rights for the exploitation of his or her works or other subject matter, he or she shall be entitled to receive appropriate and proportionate remuneration.”

Article 19 of Directive 2019/790 referring to the obligation of transparency has been implemented in Ireland through article 27 of the S.I 567/2021. By means of this provision, the party to whom an author or performer has licensed or transferred his or her rights or his successor in title must, at least once a year, provide the author or performer: (a) a description clear and detailed description of how any work or performance subject to that licence or transfer has been exploited throughout the world during the relevant period; b) a detailed list of the value in euros of all copyright income generated worldwide during the relevant period, including, where applicable, commercialization income; and (c) notice of copyright of the author or performer. Furthermore, any agreement between an author or performer and his or her contractual counterparty to keep information shared under this Regulation confidential shall not affect the right of an author or performer to use the information shared to exercise his or her rights under this Regulation.

In addition, Section 28 established a contract adjustment mechanism, for which an author or performer may claim additional, adequate, and fair remuneration from the party with whom he entered into a contract for the exploitation of his rights in a work or performance when the originally agreed remuneration is disproportionately low in comparison with all subsequent relevant income derived from the exploitation of the work or execution. The aforementioned shall not apply to agreements concluded by collective management organisations³⁶.

In that sense, in order to determine the assessment of a claim as to whether the remuneration originally agreed turns out to be disproportionately low shall take account matters as all revenues relevant to the rights at issue, including, where applicable, merchandising revenues; the specific circumstances of each case, including the contribution of the author or performer; the specificities and remuneration practices in the different content sectors; and whether the contract is based on a collective bargaining agreement (section 28.3)

³⁶ S.I. No. 567/2021 - European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 (irishstatutebook.ie).

5.7. Lithuania

Lithuania implemented a dual system, on 30 March 2022³⁷, merging both voluntary and compulsory collective management for activities such as retransmission, direct injection, TV distributor add-on services, and the private copying levy. The newly enacted law emphasised that once an author's rights were vested in a CMO, the entitlement to compensation for those rights' usage was irrevocable and non-transferable, meaning any contract in which the author forfeits the compensation is null and void. Additionally, the law specified that the royalty amount must be fair and commensurate with each utilisation of the audio-visual piece.

This framework, while reflecting the characteristics of mandatory collective management, is notably distinctive. The primary intent of such a system is to ensure a direct relationship between authors and their contractual counterparts, such as producers or publishers. The Lithuanian statute emphasises that when overseen by a collective management organisation (CMO), an author's right to compensation for their work's usage is unyielding and inalienable. Contracts that contradict this are invalidated. The system doesn't enforce collective rights management universally but activates a mandatory mechanism once an author consents to collective rights management through a CMO. Consequently, authors are guaranteed remuneration for their work's use, safeguarding against rights being used without compensation or transferred to third parties. In essence, this new Lithuanian legislative approach resembles a mandatory management of authors' rights³⁸.

5.8. Netherlands

The Dutch Copyright Act in Section 25 c. provides that the author is entitled to contractually stipulated fair compensation for granting a right of exploitation. In that sense, the Minister of Education, Culture and Science may, having consulted an advisory body appointed by order in council and after consulting the Minister of Security and Justice, determine the amount of fair compensation for a specific sector and for a certain period of time. Fair compensation will be determined with due regard to the importance of preserving cultural diversity, the accessibility of culture, a social policy objective, and the interests of the consumer. However, the Minister of Education, Culture and Science will only determine fair compensation, at the joint request of an association of authors existing in the relevant sector and an exploiter or an association of exploiters exploitation, the latter will owe the author additional fair compensation for this.

The Dutch Copyright Act³⁹ provides, concerning the transparency obligation that “any person who intentionally gives false or incomplete information in a written application or submission that is to be used to determine the compensation due for copyright in the business of the person acting as an intermediary in matters relating to music copyright with the Minister of Security and Justice's permission, is punishable with detention (...)” (Section 35b, Section 35c, Section 35d).

The Contractual adjustment mechanism is implemented in Section 25 d., which, provides that “the author may claim additional fair compensation in court from the other party to the contract if, having regard to the performance delivered by both parties, the agreed compensation is seriously disproportionate to the proceeds from the exploitation of the work. If the serious disproportion between the author's compensation and the proceeds from the work's exploitation arises after the other party to the contract with the author assigns the copyright to a third party, the author may issue the claim as referred to in the first subsection against that third party.”

³⁷ Autorių teisių ir gretutinių teisių įstatymo (Law on copyright and related rights) nr. VIII-1185, 2022-03-30 Nr. 2022-06306.

³⁸ Marijus Dingilevskis, “Lithuania transposes the DSM Directive”, The IPKat, April 11, 2022.

³⁹ Dutch Copyright Act, 2015, [wetten.nl - Regulation - Copyright Act - BWBR0001886 \(overheid.nl\)](https://wetten.nl - Regulation - Copyright Act - BWBR0001886 (overheid.nl))

Concerning the alternative dispute resolution procedure, the Copyright Act provides in Section 25g that “the Minister of Security and Justice may appoint a dispute resolution committee for the resolution of disputes between an author and the other party to the contract or a third party. If a court has not been seized of the dispute within three months of a copy of the dispute resolution committee's decision having been sent to the parties, then the parties are deemed to have agreed to the findings set out in this decision once that term has ended.”

5.9. Spain

Royal Decree-Law 24/2021, transposes the DSM Directive. Article 74 sets the principle of adequate and proportionate remuneration when authors and performers grant authorisations or transfer their exclusive rights for the exploitation of their works or other works. It mentions that negotiation of the corresponding authorisations or assignments will be carried out in accordance with the principles of good contractual faith, due diligence, transparency and respect for free competition, which excludes the exercise of domain position⁴⁰.

Article 75.1 organises a transparency obligation with the annual obligation to inform authors or performers and updated information on the exploitation of their works or services, especially with regard to the modes of exploitation, the total income generated and the corresponding remuneration.

The Royal Legislative Decree 1/1996⁴¹ provides the right to review action for inequitable remuneration (art. 47) and that the First Section of the Intellectual Property Commission will carry out mediation or arbitration in conflicts related to the obligation of transparency.

5.10. Slovenia

Slovenia transposed the Directive by amending both its Copyright Act⁴² and Collective Management Act⁴³, securing statutory remuneration rights for audio-visual authors. The updated regulations have led to the establishment of multiple statutory remuneration rights that CMOs must manage. Currently, the Copyright Act grants co-authors of an audio-visual piece an unwaivable right to compensation for actions such as rental, retransmission, public communication via OCSSPs, video-on-demand services, and other related availability. It's imperative to understand that these emergent compensation rights, resulting from the public communication right, are now under the obligatory jurisdiction of CMOs⁴⁴.

5.11. Sweden

The implementation of the DSM Directive in Sweden was carried out by the Copyright Law Amendment Act (Lag om ändring i lagen om upphovsrätt till litterära och konstnärliga verk) which was approved by the Swedish Parliament on March 10, 2021 and came into force on

⁴⁰ Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en las materias de bonos garantizados, distribución transfronteriza de organismos de inversión colectiva, datos abiertos y reutilización de la información del sector público, ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión, exenciones temporales a determinadas importaciones y suministros, de personas consumidoras y para la promoción de vehículos de transporte por carretera limpios y energéticamente eficientes («BOE» núm. 263, de 3 de noviembre de 2021, páginas 133204 a 133364). https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-17910

⁴¹ Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia. (boe.es).

⁴² Zakon o spremembah in dopolnitvah Zakona o avtorski in sorodnih pravicah (ZASP-I) (Act on Amendments and Additions to the Copyright and Related Rights), 11.10.2022, SOP 2022-01-3088.

⁴³ Zakon o spremembah in dopolnitvah Zakona o kolektivnem upravljanju avtorske in sorodnih pravic (ZKUASP-A) Act Amending the Act Regulating Collective Management of Copyright and Related Rights), 11.10.2022, SOP 2022-01-3088.

⁴⁴ SAA, “Better late and effective than early and toothless”, 09.05.2023.

July 1, 2021. Sweden Copyright Act (Upphovsrättslagen 1960:729)⁴⁵ in its article 29, on copyright of literary and artistic works, establishes that the author who, in an agreement, assigns his copyright to someone who intends to use the right in commercial activities, is entitled to “reasonable compensation.” Furthermore, according to its article 27, contractual clauses that restrict the copyright of the author under the aforementioned article are null and void.

According to Article 60 of the Swedish Copyright Act⁴⁶, copyright provisions apply to works created by a Swedish citizen or a person who habitually resides in Sweden, as well as to works that are published for the first time in Sweden or simultaneously in Sweden and abroad. Additionally, cinematographic works whose producer has their registered office or habitual residence in Sweden, as well as works of art that are part of a building located in Sweden or that are permanently fixed to the ground, are also subject to copyright provisions. In this context, if these assumptions are fulfilled, provisions regarding the remuneration of authors and performers will be mandatory, regardless of whether the contracts are concluded between national parties or between parties of foreign origin, either intra-community or extra-community.

⁴⁵ Svensk författningssamling (SFS) ; Number: 2022:1712 ; Publication date: 2022-12-13.

⁴⁶ Act (1960:729) on Copyright in Literary and Artistic Works (as amended up to Act (2020:540) (Unofficial translation) (wipo.int).

6. ASSESSMENT OF THE IMPACTS OF BUYOUT CLAUSES ON THE EU'S CREATIVE SECTOR

KEY FINDINGS

The report evaluates the ramifications of buyout clauses on the EU's creative sector. Generally, these clauses risk infringing moral rights and can restrict market diversity in the cultural sector. The audiovisual sector feels these impacts distinctly. Commonly practised, buyout often results in platforms acquiring full content appropriation. The assessment's perspective varies among stakeholders: Copyright Management Organizations and specialised copyright lawyers may view it differently compared to producers. Furthermore, Creators Unions have their unique stance, emphasising the multifaceted nature of this issue within the EU's creative domain.

6.1. General assessment

6.1.1. A breach of moral rights

When a 'buyout' contract involves a financial agreement between a creator and an interested party for the acquisition of complete rights to a creative work, typically, it stipulates that the transferee can exploit and even modify the work.

Many interested parties, interviewed or having their point of view, raise concerns about an infringement of the author's moral rights, which are an integral part of European Member States legal and cultural tradition. Indeed, that practice tends to undermine the moral sovereignty, the moral rights of the author over their work, and locks them into a financial transaction with a fixed price.

As a matter of fact, in the US system, one could cite provisions (see above) explicitly waiving moral rights.

In a producer agreement, for instance: "Producer waives any claims based on infringement of Producer's "moral rights" in and to the Master(s), and understands that the Master(s) may be changed, altered, remixed, or coupled with any other recording(s) or other material in Artist's and Distributor's sole discretion, subject to the terms and conditions of the Recording Agreement."

In a recording agreement, it is provided for waive of moral rights and, in the case this would not be possible, a waiver of the right to sue on this basis: "You and Artist hereby irrevocably and unconditionally waive in perpetuity and to the fullest extent permitted by law, in favour of Company and Company's licensees, all so-called moral rights in respect of Recordings hereunder and in the performances embodied thereon (...). Where it is not possible to waive such moral or similar rights, you and Artist agree not to assert such moral or similar rights (...)."

However, in some countries (as Finland and Netherlands) the author can waive his moral rights. On one side, the Finnish Copyright and Related Rights Act (Tekijänoikeuslaki) provides that the author's moral rights may be legally waived only in the case of a use of the work that is limited in quality and scope (section 3). On the other side, in Netherlands, the Dutch copyright Act (Auteurswet) provides that the creator of a work can waive to the right to oppose disclosure of the work without mentioning his name or other designation as creator (unless the opposition would be contrary to reasonableness) and can waive to the right to oppose the disclosure of the work under another name other than his,

and against any change in the name of the work or in the designation of the creator (in so far as they appear on or in the work, or have been made public in connection therewith); and can waive to the right to oppose against any change in the name of the work (unless such change is of such a nature that the resistance would be contrary to reason), in so far as they involve changes to the work or to the name thereof (article 25, section 3).

6.1.2. A narrowed market in the cultural sector

The practice of buyout, by eliminating appropriate proportional/fair and proportionate remuneration, can lead to “narrowing” the market due to the users influence. The economic market for creativity becomes increasingly standardised, despite its enormous economic value in Europe (see above, part 1.2).

In particular, collective management societies, which observe the pervasive buyout practices, especially in the music and photography sectors, fear that authors will be given a choice between individual contracts with producers and membership in the collective management society. This would mean that a relatively limited number of authors might choose not to join or leave CMOs under pressure from the producer. Ultimately, the number of creators in the digital single market would be restricted, leading to a limitation of cultural diversity and market segmentation.

Buyout contracts exert a significant influence on the cultural and creative sectors, keeping authors in precarious economic situations that can compromise the quality of their work. By requiring authors to relinquish all rights for a lump-sum payment, these contracts eliminate the possibility of earning royalties from the work's exploitation across various media platforms throughout its economic lifespan. Consequently, authors are deprived of potential income from previous works, hindering their ability to pursue personal projects. To offset this financial instability, authors often juggle multiple projects simultaneously, leading to a fragmented focus and potentially compromising the quality of their creations.

According to the FERA/FSE 2019 survey on audio-visual authors' remuneration⁴⁷, nearly half of audio-visual authors rely on additional income sources to sustain themselves. A significant portion, 53% of directors and 48% of screenwriters, turn to teaching or workshops for supplementary income, while 34% of directors and 42% of screenwriters engage in non-audio-visual sector jobs. These diversions force authors to deviate from their creative practices, impeding their career progression and development.

The issue of content « overproduction » is generally what pushes prices down, exerting pressure on the entire production chain, especially on creators at the end of the chain. The mentioned "production pressure" is driven by the decrease in production and content development costs due to the technical possibilities highlighted by all the individuals interviewed (who also emphasise the potential consequences of using generative artificial intelligence for content).

In the book industry, we also observe a decrease in printing costs, allowing for smaller initial print runs. Not paying authors except through low and delayed advances is also considered in the book industry as a factor in facilitating the quantitative development of low-risk new productions.

This can then result in the conjunction, within all sectors of the cultural industry, of several phenomena which will reinforce each other. First of all, the deadlines given to new productions to reach the public and achieve success or not are becoming shorter and shorter. Then, the ratio between success and failure tends to deteriorate. And at the same time, the growing weight of best-sellers, blockbusters and

⁴⁷ FERA (the Federation of European Film Directors) and FSE (the Federation of Screenwriters in Europe), European study on the remuneration of audio-visual authors, March 2019.

other very successful productions that are both expensive and low-risk leaves less room for the rest of the production. Even if we can hardly speak, as has sometimes been done, of "management through overproduction," the level of new production can take on the appearance of "over-production" when it clearly appears to exceed the overall capacities of the sector to take charge of it in a relevant and effective manner, in terms of promotion and diffusion.

Buyouts should remain an exception and not become a principle: in a free market, the general rule should be negotiation.

6.2. A particular assessment concerning the audio-visual sector

Music creators are well concerned by the buyout practices: Based on a survey conducted by the European Composer and Songwriter Alliance (ECSA) among its members, 53% of respondents have encountered buyout contracts, with an observed increase in such contracts, particularly in the context of Video on Demand (VOD), over the last three years. Additionally, 66% of respondents reported being requested to relinquish partial rights.⁴⁸

Nevertheless, the audio-visual sector is primarily concerned, although this does not exclude the music sector, as regards musical works integrated into audio-visual works.

6.2.1. Frequency of the practice

In the realm of the audio-visual sectors, a study for the European Commission⁴⁹ underscores significant disparities in the ownership and management of intellectual property rights, particularly within the dynamic between European producers and broadcasters/streaming platforms. The research findings illuminate a recurring pattern where producers often embed clauses in their contracts, ultimately resulting in the complete transfer of all intellectual property rights associated with European content, such as films and television series, in exchange for an initial lump-sum payment. These contractual arrangements are commonly recognised as "buyout practices". There is a widespread perception that non-European Union (EU) streaming services and broadcasters exhibit a notably greater inclination to retain intellectual property rights, especially in comparison to their EU counterparts. This trend unfolds against the backdrop of reported increased business interactions between producers and streaming platforms.

In the meantime, it is noted that "the incidence of buyout practices appears to be significant for relatively bigger producers." Furthermore, at this stage, "the survey focused on the relationship between producers and streamers/broadcasters, but concerns have also been raised over the use of such practices on individual creators, such as music composers. This issue will need to be further examined"⁵⁰.

6.2.2. Result of the practice: full appropriation by the platform

The impact of contractual buyout agreements, in the audio-visual sector, whether they occur in the relationship between the executive producer who creates the program and the online platform SVOD or, consequently, in the relationship between the said executive producer and the authors, is significant.

⁴⁸ GESAC et ECSA, « False bargain for european creators! - 5 points on why and how to address buy-out contracts in the vod sector », www.authorsocieties.eu.

⁴⁹ European Commission, The European Media Industry Outlook, May 2023, 17.5.2023 SWD(2023) 150 final, p.5.

⁵⁰ *ibid*, footnotes 10 and 11.

Indeed, firstly, they lead to complete control by these platforms over the content of these programs since, holding all the rights, they naturally have the authority to dictate their wishes. This trend already exists, of course, for any broadcaster or distributor, but this contractual provision only reinforces it.

Secondly, it leads to a real appropriation of the exploitation rights of these programs, as all the rights to programs, even though primarily produced for EU domestic and European audiences, are monopolised by platforms that are, for the most part, American.

6.2.3. No need to totally prohibit buyout practices...

It has been observed through a few interviews performed that certain creators, such as journalists or performers, prefer a one-time payment and have no demand or interest in proportional remuneration. Some authors even underline that, in the context of overproduction, question the appropriateness of proportional remuneration because of under exploitation of works in a strong competitive market (e.g., a book could stay three weeks only on the "shelves" of a bookseller).

Additionally, in some countries where sectors are safeguarded by robust collective management, creators face no challenges. This is the case for French screenwriters, for whom the SACD provides significant protection.

6.3. Diversity of the assessment depending on stakeholders

6.3.1. CMOs and specialised copyright lawyers

CMOs and experienced lawyers and attorneys-at-law in the music and audio-visual sector confirm that these clauses have become more systematic since the emergence of online platforms, such as SVOD, streaming platforms, etc., in the industry. The contracts entered into between the producing creator of the work, executive producer in the French sense of the term, and the platform are indeed more and more subject to American Law and the 'Work made for hire' framework by the use of buyout agreements. In such a scenario, the acquisition of rights from authors occurs through a lump sum purchase of rights, as the author's contractual partner, in fact, holds no rights.

However, several interviewees recall that the practice of 'buy out' did not originate with platforms and has always existed in various forms in the Cinema and Audio-visual sectors. Examples include the exclusion of territories reserved exclusively for co-producers, whether they fall under copyright or not, contracts for consultants inaccurately labelled as audio-visual production contracts to bypass social security legislation, or simply the practice of a guaranteed minimum covering most of the author's compensation. When tied to the low imposed percentages, this leads to a "buy out" in practice, if not legally.

6.3.2. Producers

Producers appear to believe that the DSM directives are ground-breaking and tend toward prohibiting buyout practices. According to them, these practices are not as prevalent as often claimed. A shift can be observed due to competition in the streaming sector. Furthermore, the best-seller clause would render buyouts virtually untenable as it allows for the re-evaluation of remuneration.

The challenge of "buy out" contracts primarily emerges when a platform positions itself as a delegated producer, contracting directly with the national producer who then only assumes the role of an executive producer, essentially serving as a provider to this platform. The Audio-visual Media Services

(AMS) Directive⁵¹ has its deficiencies. On one hand, although it enjoins national investment quotas, it doesn't specify a minimum percentage⁵². The implementation of obligations related to investments varies considerably among EU countries, proving inadequate in many instances. On the other hand, this directive doesn't provide a framework for contracts. Hence, it's essential for the SMA Directive to evolve in line with the 2019 Copyright Directive. The latter acknowledged that beyond the protection of copyright, it's crucial to frame contractual negotiations. Without this framework, the protection of rights loses its significance. Notably, the buyout system isn't explicitly prohibited by the AMS Directive despite its investment obligations. A sensible first step would be to refine the definition provided by the AMS Directive⁵³. The criteria relates to both the author and the producer, and it might be wise to stipulate that the European producer must unequivocally hold intellectual property rights.

6.3.3. Creators Unions

The positions of creators' unions about buyout practices are quite divergent, which may seem surprising.

Some unions tend to marginalise them, or even minimise the risks that arise from them. They were able to explain in the sense that these practices would be marginal, there would possibly be some "rare examples in the sound sector, even more rarely in the audio-visual sector," which would therefore not present, according to them, any imminent danger.

But on the contrary, other organisations (generally, those which represent the most professional creators), highlight these practices, emphasising that they constitute real threats to the professions they defend. They confirm that they have seen these clauses become systematised since the emergence of these platforms. For example, in the audio-visual sector, and in particular as regards screenwriters and directors, the imposition of buy-out contracts by the audio-visual producer has constituted general practice for decades, unless prohibited by law. This practice derives from the presumption of the transfer of rights of the authors to the producer that exists in many countries, and the nature of audio-visual production as a complex, expensive and large-scale project, in which many contributors are involved. The producer has the financial responsibility of the project and tends to acquire the maximum of rights from the authors to secure the future exploitation of the work, even beyond what is necessary. In practice, most contracts are take-it or leave-it for screenwriters and directors who are the first contributors involved in a production process. They transfer their rights to the producer at a time when the value of these rights cannot be estimated as the work does not exist yet. Their remuneration for their role in the production (writing the script, directing the shooting) is then bundled with the transfer of their rights for a lump-sum payment, unless prohibited by law. Organisations strongly condemn bad practices that not only make their profession precarious but lead to the invisibility of the work of their members in the public, media and political spheres.

⁵¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

⁵² AMS Directive, Art. 13 and Recital 69.

⁵³ AMS Dir., art. 1, a) and g).

7. RECOMMENDATIONS OF POLICY MEASURES AT THE EU LEVEL

KEY FINDINGS

The study underscores the need for EU legal reforms. There's a clear justification for revising the current legal framework, emphasising the imminence of such changes. Voluntary agreements and collective bargaining are vital components, but the focus leans towards making national implementation mandatory, especially within intra-EU contracts. A political will towards a better protection of European creators implies to highlight International Private Law issues, with specific mentions of jurisdictional challenges and the French example. Recommendations include adjustments to the DSM Directive and EU Regulations. A pivotal proposal suggests a new mandatory legal status for European creators, ensuring their rights within the EU.

Despite the fact that moral rights are profoundly affected by buyout contracts, they seem useless for the EU legislator, as there is no harmonisation at the EU level. Nevertheless, it seems that the truly cultural dimension of copyright should be taken into account by EU lawmakers, and that the lack of respect for authors' moral rights should prompt them to take action to defend the interests of European creators.

Competition law could also be a possible solution. However, it is not certain that the abuse of a dominant position could be characterised as such⁵⁴, and this would require a specific study, particularly for the analysis of relevant markets.

7.1. Necessity to change positive law

7.1.1. Justification for the need to revise the legal framework

The majority of creators and some other stakeholders, including producers, firmly contend that there is an imperative need to revise the prevailing legal framework. This encompasses not only the stipulations of Copyright Law—ensuring the realisation of the aspirational objectives delineated within Article 18 of Directive (EU) 2019/790 of the European Parliament and of the Council dated 17 April 2019 on copyright and related rights in the Digital Single Market (DSA Directive), which entitles authors to an “appropriate and proportionate remuneration”—but also those pertinent to audio-visual communication. The latter is underscored by Directive (EU) 2018/1808 of the European Parliament and of the Council dated 14 November 2018, which amends Directive 2010/13/EU. This directive pertains to the coordination of specific legislative, regulatory, and administrative provisions of Member States regarding the delivery of audio-visual media services, commonly referred to as the “Audio-visual Media Services Directive.”

It is essential to stress that buyout practices unequivocally hamper the obligations to produce European content. In accordance with Article 167 of the TFEU, the Union's stated aim in the audio-visual

⁵⁴ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02), §13-14: “Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market. (...) The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market.”

field is to cultivate a unified market for audio-visual services throughout the Union, duly integrating cultural considerations into all the strategies it develops.

The justification for amending positive law is the will to protect authors and performers, to recognise and allow them a right to fair remuneration that fully associates them with the exploitation of their works, and above all a possible means of subsistence. Then their creative freedom would be preserved as well as a cultural diversity.

7.1.2. Urgency of such revision

The interviews performed for this Study shows that the majority of creators and their representatives believe that legislative action is both imperative and urgent. There is a pronounced risk of the establishment of practices that, given their prolonged duration, will become increasingly challenging to contest.

Obviously, producers and broadcasters do not have the same approach. They believe, as the interviews performed show it, that no amendments are required. They often emphasise the very recent nature of the new rules resulting from the DSM Directive; even though the Directive is not so new in 2023... They often point out that the process of complying with the transparency obligation is still under way. They also highlight the operational burden represented by the "reporting requirements" set out in Art. 19 of the Directive.

Most importantly, it is asserted by several types of stakeholders that the transposition of the Directive is nearing completion, and it would be appropriate to await the impact of the new legislative provisions before evaluating them. In other words, the inquiry raised in this report may be premature, according to them...

7.2. Voluntary agreements

The consensus among stakeholders, European and American, does not favour in general a soft law approach. Given the existing power dynamics and the relative weakness of authors' professional organisations vis-à-vis their counterparts, no consensus, voluntary agreement, or 'soft law' capable of addressing the imperatives of the aforementioned provisions will be achievable.

CMOs consider such an approach impossible to reach some kind of result.

The agreements executed in France are illustrative in this regard. Two agreements concerning standard clauses conditional upon the allocation of assistance from the National Center of Cinematography (CNC) were signed on 17 September 2021, pertaining to audio-visual (as previously mentioned), and in October 2021, relating to cinema. These agreements were ostensibly designed to indirectly safeguard authors from the contractual practices of platforms by tying CNC aid to adherence to provisions concerning copyright law. However, upon thorough analysis, it is evident that these agreements merely echo pre-existing and mandatory legal provisions, or even distort the regulations to the detriment of the authors. Consequently, instead of seizing the opportunity to enhance the protection of authors, particularly against 'buy out' clauses, these agreements appear conspicuously redundant.

Nevertheless, two difficulties, according to some interviewees, could be raised within the framework of discussion that could lead to voluntary agreements.

Firstly, it would be interesting that discussions between authors' unions and/or CMOs, on the one hand, and main platforms, on the other, could lead to a commitment not to discriminate against authors who are members of a CMO (see above, 2.2.2).

Secondly, in the audio-visual sector, the extending of interprofessional agreements is commonplace, and legal experts are often in favour of such agreements. For example, France has adopted a co-regulatory approach, similar to that used in the United States. This co-regulatory mechanism has proved its effectiveness in the audio-visual field. While directives or laws lay down fundamental principles, interprofessional agreements put them into practice, with varying degrees of constraints. Intervention can take place both downstream, by imposing certain agreements, and upstream, by helping to mediate when no agreement can be reached between the parties.

7.3. Importance of collective bargaining

The problem raised by buyout contracts originates from the fact that there is a huge disproportion in the respective weight of the parties, making negotiation impossible. Thus, one solution to this issue would be to encourage and create a favourable environment for true collective bargaining. Two ways appear to be able to lead to this situation.

The first one would be a collective negotiation within the framework of “classical” contract law. The primary objective in this context is to scrutinise and ascertain whether the remuneration that has been negotiated and agreed upon is both fair and aligned with the value of the rights that are transferred. This ensures that both parties, especially the weaker one, receive compensation that accurately reflects their contribution, expertise, and the current market conditions. Furthermore, in situations where direct negotiations may not yield an equitable outcome due to power imbalances or other factors, collective bargaining plays a crucial role. By allowing labour unions and employers' associations to engage in dialogue, it ensures that a broader perspective, representing the interests of a larger group, is taken into account. This collective approach often leads to the establishment of a minimum remuneration level, safeguarding the rights of workers and ensuring they receive a wage that is not just the bare minimum, but also competitive and fair in the marketplace. In essence, the process prioritises a balanced and equitable approach to remuneration, recognising the importance of both individual negotiations and collective bargaining in achieving fair compensation outcomes.

The creative industry is undergoing rapid transformations, with a large number of authors and artists opting for freelance positions rather than traditional employment paths. While freelancing can offer greater independence and adaptability, it doesn't come with the protections typically provided by labour law-backed collective agreements, which safeguard remuneration and work rights. This paradigm shift necessitates innovative adaptations in the way we approach collective agreements. There's an imperative to devise new frameworks that cater specifically to the needs of these independent creatives, ensuring that their rights and compensations are not undermined.

Yet, current attempts to strengthen support for these authors haven't yielded the anticipated benefits. Publishers and producers often show a marked resistance to negotiating standard practices, either due to profitability concerns or a dislike to deviating from established practices. Exacerbating the situation is the noticeable lack of strong representative bodies for authors and performers in many creative domains. Such associations could potentially advocate their cause, ensuring fair treatment and compensation. Those that do exist struggle with their own challenges, including limited resources or narrowed operational scopes. Given the multifaceted character of the creative field, a one-size-fits-all strategy is impractical. It underscores the necessity for an approach that's both custom to individual sectors and inclusive of their unique challenges and needs.

The second way to go towards a fair remuneration is to involve collective management organisations. On the one hand, their involvement goes towards balancing the weight of negotiations. On the other, CMOs have the means to ensure that the remuneration is effective. A collective management organisation can undertake tasks that are unfeasible or hardly for an individual:

- Procuring detailed accounts is highly challenging.
- Being certain that the accounts are comprehensive.
- Recalculations based on data from producers are needed, and it appears that agents, who are notably active in the audio-visual sector, do not undertake this responsibility.
- It is crucial to tally exploitations, including those overseas.
- Broadening the territories that practise collective management would streamline processes.
- In other words, harmonisation in Europe seems imperative: authors are far better protected in countries where collective management is robust.

A way to involve CMOs is to create an unwaivable remuneration right, as some countries decided so, while implementing the DSM Directive, like Belgium, Lithuania or Slovenia. The mechanism is known in many European countries, since 2006 and Art.5 RLD 92/100/EEC (current Directive 2006/115/EC⁵⁵). The Committees on Culture and Education (CULT) and the Committee on Industry, Research and Energy (ITRE) proposed both the introduction of an “Unwaivable right to fair remuneration for authors and performers” for the making available online of their works and performances derived from the exploitation of their work⁵⁶.

If national law introduces remuneration rights for audio-visual works under mandatory collective management, authors can continuously earn from the exploitation of their works across all media platforms without revisiting their initial agreements with producers. This is because the rights are settled by the end-users without additional conditions. With strict copyright laws in place, VOD platforms and other end users would be legally bound to conform. Thus, regardless of the terms initially agreed upon regarding the transfer of exclusive rights, audio-visual creators would gain supplementary income from the online use of their creations. Such a legal provision would be unaffected to any attempts at circumvention, regardless of the contract's content. This effective role of CMOs was demonstrated by the European Commission’s Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market⁵⁷.

7.4. Mandatory application of national implementations

The main EU law provisions that are involved by the buyout agreements, are those in Chapter 3 of the DSM Directive analysed above. It has been highlighted that Art. 23 of the Directive provided for a mandatory nature of certain provisions, which means that the rules enacted in Chapter 3 are not only binding for Member States, who are required to set their national law in accordance with Art. 18 to 23, but also that, in private law contracts, no contrary clauses may be drawn up to circumvent Art. 19, 20 and 21.

⁵⁵ 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.

⁵⁶ Opinion of the Committee on Industry, Research and Energy (ITRE), 01.08.2017, (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), Amendment 56 ; Opinion of the Committee on Culture and Education (CULT), 04.09.2017 (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), Amendment 92.

⁵⁷ Commission Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, 19.11.2021, SWD(2021) 338 final.

The objective of EU Legislators in doing so was to mainly guarantee a better sharing of the value generated by online content distribution. Since most authors and performers, if not all, are the weaker parties to publishing, production, or distribution contracts, the resulting deal may favour the interests of the intermediary to the detriment of the author's interests. Because of the weakened position of authors and performers in exploitation contracts, the DSM Directive, with Chapter 3, introduces strong protection for authors and performers in an ambitious and innovative way. One of the objectives was to impose an imperative contractual framework to protect the interests of creators, who find themselves in a "less favourable contractual position" as stated notably in Recital 72 and 75.

7.4.1. *De lege lata: arguments in favour of mandatory character of Chapter 3*

The first question is also whether the intention of the EU legislator is to provide the "best possible" protection for creators, who are clearly weaker parties to the contracts that bind them to producers, distributors and the various online platforms. The very protection of creators' legitimate interests require obviously that they are guaranteed of receiving a fair, appropriate remuneration, proportionate to the value of the work or protected object, in other words proportionate to the economic value of their rights. However, Article 23 (1) does not expressly safeguard article 18 against contractual override. This reality is often seen by creators and their representatives, as the interviews made shows, as a weakness of the directive. A simple change of article 23(1), in order to make expressly Article 18 a mandatory requirement may be seen as a guarantee of legal certainty.

But everybody seems to agree that, despite the text itself, article 18 is mandatory and cannot be overridden. Producers and platforms representatives consider forgetting article 18 in article 23(1) is a mistake but does not change anything to the spirit of Chapter 3.

Several authors share this opinion, with various considerations. Article 18 looks like conferring an unwaivable right to equitable remuneration likewise in Article 5(1) of the Rental and Lending Rights Directive 2006/115⁵⁸.

Art. 18 "would have a direct effect and might be "directly invoked" before any national courts"⁵⁹. In certain instances, in particular if the implementation is not clear enough, the rule encapsulated in Art.18 DSM, which is "unconditional and sufficiently clear and precise," could possess a direct effect and might be "directly invoked" in national judiciaries. For a long time now, CJUE consider that a Directive can exhibit a direct effect when its clauses are unconditional, lucid, and exact, and when the EU member state hasn't implemented the directive by the stipulated deadline⁶⁰. More broadly, and Art. 18 shall be mandatory mainly because of the rationale of the directive⁶¹.

However, not all authors of the legal literature share the same analysis⁶², and the desire for legal certainty is both understandable and significant from a harmonisation perspective.

⁵⁸ T Riis, 'Remuneration rights in EU copyright law' (2020) 51(4) IIC 446, p. 448.

⁵⁹ R. Xalabarder, « The Principle of Appropriate and Proportionate Remuneration of ART.18 Digital Single Market Directive: Some Thoughts for Its National Implementation », InDret, 2020, vol. 4, pp. 1-51, p.22.

⁶⁰ "a precise obligation which does not require the adoption of any further measure on the part either of the community institutions or of the member states and which leaves them, in relation to its implementation, no discretionary power" (ECJ 4 December 1974, Yvonne van Duyn v Home Office, Case 41-74, pt.6)

⁶¹ E. Rosati, « Article 18—Principle of Appropriate and Proportionate Remuneration », in Eleonora Rosati (dir.), Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790, Oxford University Press, 26 august 2021, n°4.3.

⁶² T. Shapiro, « Remuneration provisions in the DSM Copyright Directive and the audio-visual industry in the EU: the elusive quest for fairness », 2020, p. 785.

7.4.2. A situation limited to intra-EU contracts

The mandatory nature of these Art. 19 to 21 of the DSM Directive is clearly stated but it is a 'European' imperative. That means that only intra-Community contracts (and domestic contracts in the application of national transpositions) are concerned. However, a very large number of contracts that produce their effects on EU territory and involve EU creators are international. And this is the case for most buyout contracts in the cultural sector. The rapidly evolving cultural content online market is dominated by non-EU online services and broadcasters. These operators subject participation of EU creators in their programmes (e.g., films, series, etc.) to the conclusion of a buyout contract (so-called total buyout contract or “work made for hire” contract).

As stated in Recital 3 of the DSM Directive, “rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future-proof”. In that perspective, it has to be underlined that tomorrow in order to “build” worlds, use copyrighted work or protected objects under neighbouring rights in Metaverses⁶³, the platforms, which might be, as it is already the case, mostly US ones, will also impose buyout agreements.

Both EU law and national laws of many Member States discourage, sometimes prohibit such buyout practices. Yet, these online services circumvent those rules by choosing US law as the applicable law for their contract and above all, jurisdiction clause, clause conferring jurisdictional competence to US jurisdictions.

Moreover, this question of private international law has been partly addressed by the Directive which, in recital 81, points out that these mandatory provisions of European origin take precedence over the choice of law of a third country for intra-EU contracts, pursuant to article 3(4) of the Rome I Regulation.

The main question here is whether the will is that the rules of EU law, based on the values EU Legislator want to prevail, should apply to international contracts, or not. And if the very rationale is to balance the weakened position of creators and ensuring that they receive an appropriate and proportionate remuneration, EU rules should apply to international contracts. It is worth noting that the EU legislator took care in the DSA Regulation to provide for its application to platforms operating on EU territory, whether established in the EU or not⁶⁴

7.5. Protecting European creators: International Private Law issues

CMOs and practitioners interviewed for the purpose of this study find such types of solutions interesting. The issue of private international law is particularly significant in this field.

7.5.1. General issues: conflict of law and jurisdiction

In international private law, the issue of applicable law pertains to determining which jurisdiction's legal rules should be used to interpret and govern a specific contractual relationship. The Rome I Regulation, officially known as the Regulation (EC) No 593/2008 on the law applicable to contractual obligations⁶⁵, provides a framework for such determinations within the European Union. According to Rome I, parties to a contract have the freedom to choose the law that will govern their contractual

⁶³ European Parliament, Directorate-General for Internal Policies of the Union, Maciejewski, M., *Metaverse*, European Parliament, 2023, <https://data.europa.eu/doi/10.2861/624181>, pp. 118 and sq.

⁶⁴ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

⁶⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

obligations (the principle of party autonomy). In the absence of such a choice or when the choice is not explicit, the regulation sets out specific rules to designate the applicable law based on the nature and characteristics of the contract. This ensures that cross-border contractual disputes within the EU have a consistent basis for determining the relevant governing law.

Choice of court provisions are frequently found in international contracts. They're typically paired with choice of law clauses referencing the same jurisdiction to enhance the likelihood of the selected court applying the designated law. Although not always motivated by the wish to bypass an imperative legal rule, choosing a foreign court often leads to the same outcome since it's uncommon for a judge to consider mandatory laws outside their jurisdiction. The Brussels I bis Regulation⁶⁶ includes specific rules that grant jurisdiction to the court where the more vulnerable party resides or routinely works, and it places restrictions on the unrestricted choice of forum.

7.5.2. The French example

One could envision, as a general principle, that the relationship between the producer of a program and the platform be mandated to form under the law of the country of the program's initial exploitation. This would prohibit it from being governed by non-EU law when the initial exploitation occurs within the EU. Within this framework, the notion of an independent producer as per Directive 2010/13/EU should also be fortified to prevent reliance on 'buy out' contracts that reference the 'work made for hire' scheme.

The French example of article L.132-24 IPC seems to be seen with great appreciation by interested parties.

But for many, it remains unclear if the solution is in line with The Rome I Regulation for the enforcement of the law chosen by the parties and the Brussels I Bis Regulation for jurisdictional conflict aspects. Both German law and Dutch law implement a similar logic of displacing the chosen law, and the solution appears to be legal, as it can be considered as an overriding mandatory provision in the sense of article 9 of Rome 1 Regulation.

Many stakeholders and academics consider that such a provision may come from the European legislative, in order to protect EU creators: "Recognizing the vulnerable position of authors and rectifying it with a mandatory protective framework, European law should have extended this imperativeness into private international law by establishing a protective jurisdiction in favour of the author, akin to the protection accorded to workers and consumers in private international law."⁶⁷

7.5.3. Possible EU measures *de lege ferenda*

As the mandatory application of the principle of fair remuneration appears to be, *de lege lata*, a question of domestic law, some provisions could be, *de lege ferenda*, put under consideration, keeping in mind the rationale of the provision of the EU DSM Directive.

(a) Modifications of the DSM Directive

Article 23 of the DSM directive could be modified in a way that would prohibit any circumvention of the principle of fair remuneration of chapter 3, under the condition the contract is sufficiently linked to an EU Member state territory.

⁶⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

⁶⁷ E. Treppoz, « Le droit contractuel des auteurs – Aspects de droit international privé », *Propriétés intellectuelles*, 2021, p. 60.

This could simply be performed by adding Art. 18 and Art. 22 to Art. 23.1:

*“Member States shall ensure that any contractual provision that prevents compliance **with Articles 18 to 22 of this Directive** shall be unenforceable in relation to authors and performers.”*

This would not imply a very substantive modification of positive law, as the rationale of Chapter 3 goes along these lines as well as the Member states implementations.

Given that the aim of the Directive is to protect the weaker party, it might be advisable to go further than the reference to art. 3(4) of Rome I Regulation in Recital 81. Inserting a reference to Article 9 this Regulation, for example in Recital 72 or 81, which expressly emphasises the weak position of creators in their contractual negotiations. One shall recall that ECJ has already affirmed such mandatory rule before Rome I regulation in order to protect the weaker contracting party, for instance about Commercial agency⁶⁸ or consumers⁶⁹ emphasising a “public interest” of the Directive at stake.

Moreover, this would be consistent with the DSA Regulation, as its “shall apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment.”⁷⁰

A stronger affirmation of the rule could be provided in the form of a new Article 23.1, which would take as a model other directive which concern another person who tends to be in the weaker contractual position, the consumer. They often contain a conflict-of-laws provision, such as the 1993 Directive on Unfair Terms in Consumer Contracts⁷¹, the 2002 Directive concerning the distance marketing of consumer financial services⁷², the 2008 Directive on credit agreements for consumers⁷³.

Following this last example, the new provision could be worded as follows :

“Member States shall take the necessary measures to ensure that Authors and Performers do not lose the protection granted by the Chapter 3 of this Directive on fair remuneration in exploitation contracts by virtue of the choice of the law of a third country as the law applicable contract, if the contract has a close link with the territory of one or more Member States.”

But the special conflict rules contained in the protective directives are notoriously difficult to coordinate with the Rome I Regulation, since the latter did not decide to revoke all the conflict rules contained in the specific directives.

Therefore, the regulations themselves should be considered for amendment.

⁶⁸ ECJ, 9 November 2000, Ingmar GB Ltd and Eaton Leonard Technologies Inc., C-381/98, pt 24 : “Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained.”

⁶⁹ ECJ, 26 October 2006, Elisa María Mostaza Claro v Centro Móvil Milenium SL, C-168/05, pt 24.

⁷⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), Article 2.1.

⁷¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Article 6.2.

⁷² Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, Official Journal L 271 , 09/10/2002, pp. 16-24, Article 12 : “Imperative nature of this Directive's provisions

1. Consumers may not waive the rights conferred on them by this Directive.
2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States.

⁷³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66–92, Article 22.4.

(b) Modification of EU Regulations

An even more important enshrinement could be the amendment of the Rome I Regulation itself, including copyright contracts, respecting classical conditions of “habitual residence at the time of conclusion of the contract” and “close connection” to an EU Member State.

A possible strategy demonstrating deep political commitment to better protect European creators would involve adopting regulations similar to European provisions for consumers, employees, and insured individuals, who enjoy specific safeguards that restrict unilateral decision-making. In the context of buyout contracts, the primary intention often arises from entities, notably American platforms, that produce and exploit works and other safeguarded materials. One approach could be to prioritise the legal system of the creator's usual residence, potentially introducing an article in the Rome I Regulation named “Authors and Performers’ contracts”. This method has enabled the EU to enforce European consumer law on major online entities, predominantly from the US. Such a provision would guarantee a European jurisdiction for authors and performers. Furthermore, this enhanced European ruling in private international law would expand beyond merely the intra-EU contractual scope, raising considerations in both conflicts of law and jurisdictional disputes.

To prohibit such circumventions in international contracts, especially prevalent in buyout agreements, a modification to the Brussels I bis Regulation could be proposed. Drawing inspiration from its articles 19 and 23, this revision would counteract the harmful effects of a jurisdiction clause specifying a third-country court.

7.6. Implementation of a New Mandatory Legal Status for European Creators within the European Union

Many authors, performers and CMOs find this idea interesting, consisting in creating a public order legal status for creators, which could be established within the European Union, notably recognising their freedom to organise in the form of professional organisations, without any limitations, especially concerning competition law. This status would detail the respective competencies of these professional organisations and collective management entities.

The European Parliament⁷⁴ underscores the crucial need to acknowledge the intrinsic value of culture, advocating for consistent financial and infrastructural backing for the cultural domain. It also brings to the forefront the imperative of ensuring continuous cross-border movement for artists and cultural experts, encompassing administrative necessities across all Member States: visas, taxation, social benefits, and the validation of artistic educational certificates. The European Parliament's endorsement of this resolution is balanced to strengthen and revitalise the cultural and creative sector, a cornerstone of Europe's cultural character.

In addition, the resolution advocates for concrete tangible actions to guarantee equitable revenue allocation among authors and performers. In pursuit of this, the resolution suggests the inauguration of a European Artist Status⁷⁵, considering envisioning a unified framework that stipulates work conditions and baseline standards throughout the EU. Conclusively, the resolution appeals to Member

⁷⁴ European Parliament resolution of 20 October 2021 on Europe's Media in the Digital Decade: an Action Plan to Support Recovery and Transformation (2021/2017(INI)): https://www.europarl.europa.eu/doceo/document/TA-9-2021-0430_EN.pdf

⁷⁵ Press Releases: Status of the artist: improve working conditions of artists and cultural workers, 24 October 2023: <https://www.europarl.europa.eu/news/fr/press-room/20231023IPR08139/ameliorer-les-conditions-de-travail-des-artistes-et-professionnels-de-la-culture>

States to champion artistic liberty and prompts the Commission to impose sanctions on those Member States neglecting their duties in this domain.

MEPs adopted a proposal for an EU framework to improve the living and working conditions for cultural and creative workers. In a draft legislative initiative, adopted by 43 votes to five and three abstentions, MEPs highlight the precarious working conditions and uncertain legal status for artists and other professionals in the cultural and creative sectors (CCS) in several European countries, and request legislative tools to address the issue. This framework would include:

- a directive on decent working conditions for CCS professionals and the correct determination of their employment status;
- a European platform to improve the exchange of best practice and mutual understanding among member states to improve working and social security conditions with the involvement of social partners;
- adapting EU programmes that fund artists, such as Creative Europe, to include social conditionality to contribute to the compliance with EU, national or collective labour and social obligations.

The Parliament will vote on this legislative initiative in November 2023 plenary session in Strasbourg. The Commission will then have three months to reply by either informing the EP on steps it plans to take or giving reasons for any refusal to propose a legislative initiative along the lines of EP's request.

The lack of social protection, limited opportunities for collective bargaining, and the absence of decent working conditions are intricately linked to the atypical work patterns and irregular incomes prevalent in the cultural and creative sector. This situation results in a high level of vulnerability among industry professionals to exploitative subcontracting, pseudo-self-employment, underpayment, or even non-remunerative work, along with coercive buyout contracts. Additionally, the advent of new digital technologies, such as artificial intelligence, further exacerbates the challenges faced by professionals in this sector.

The current legal framework, characterised by varying statuses for creators from one Member State to another, especially concerning their social status, makes it challenging to envisage a uniform approach. Discrepancies between national laws regarding the status of artists and their recognition across borders hinder collaboration and mobility.

The establishment of a European Artist status involves the revision of administrative requirements linked to visas, taxation, social security and the recognition of diplomas in artistic education. Concerning copyright income and streaming platforms, it would be a question of guaranteeing artists and authors access to collective negotiations. The imperative lies in ensuring artists and authors the access to collective negotiations and, prior to any engagement, establishing an inherent right to be represented and social bargaining, in order to ensure the integrity of social dialogue.

As the European directive often refers questions to collective negotiation, it would be necessary to think more concretely about the way in which Member States must ensure this social dialogue:

- Is it under the aegis of the Ministries in charge of Culture issues, in charge of Labor issues?
- Is it under the aegis of independent and experienced mediators?
- On the contrary, is it without State interference?

Moreover, in the interviews performed for the purpose of this study, two questions seem to diverge among the authors and artists themselves.

The first concerns the establishment of professional criteria which would allow creators considered "professional" to access the social and fiscal rights usually linked to professionals. Some creators consider that the measures for professionals could generate regrettable differences in treatment with

regard to amateurs. And on the other hand, professionals are rather worried to see that positive law does not sufficiently respond to the problems that they specifically encounter when they are professionals (parental leave, retirement, professional training, etc.).

The second concerns the difference between employed creators and independent creators, who are not strictly identified. Many employed authors are very autonomous, while some independent authors are sometimes very dependent on their publishers/producers/distributors, to the point that one wonders about the existence of a relationship of subordination. As a result, authors' organisations are campaigning for a regime of intermittent performance, others for the massive qualification of creators as employees, and still others for remaining independent, invoking the freedom of creation which would be threatened by employment.

Throughout history and in all sectors of professional activity, social dialogue and collective rights are there to restore imbalances, because when creators unite around a collective identity, they are stronger than when isolated. However, we note that the route to collective negotiation is often dead end, because creators do not really have collective bargaining rights. We recommend setting up a study on the recognition of a professional body and the organisation of real negotiations under the aegis of independent and neutral mediators.

7.7. Further studies

Article 30.1 of the 2019 DSM Directive provides: "No sooner than 7 June 2026, the Commission shall carry out a review of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee." The Audiovisual Media Services Directive (Art. 33) is subject to regular reports, and the next one shall also be delivered in 2026.

It is anticipated that buyout practices will not only increase in intensity over time but also gain complexity, particularly in light of emerging platforms such as "digital worlds". Consequently, it is of paramount importance that these practices are expedited to contribute effectively to the evaluations that the Commission will need to undertake for the year 2026.

As a consequence, the European Parliament should consider commissioning comprehensive, forward-looking studies to delve deeper into the issues highlighted in this report. In our view, there are two subjects that need to be explored in further detail.

First, the issue with buyout contracts stems from a significant imbalance in the negotiating power of the involved parties, rendering effective negotiation unfeasible. Therefore, a viable solution to address this problem would involve fostering and establishing a conducive atmosphere for genuine collective bargaining (see 7.3). A study exploring ways of strengthening authors' bargaining power would be specially useful, in particular comparing the European situation with practices in the United States. It will be conducted to compare the collective bargaining frameworks in the European Union and the United States. This analysis may illuminate the regulatory and negotiation structures governing the relationship between creators, industries, and emerging technologies. Understanding the similarities and differences between these frameworks is crucial for crafting informed policies that address the specific needs and concerns of creators on both sides of the Atlantic.

Secondly, we recommend a study that will delve into the profound impacts of artificial intelligence (AI) on creative professions, with the goal of unraveling the intricate dynamics and challenges arising from the integration of AI technologies in these fields. This examination is essential for comprehending the implications for job security, creative autonomy, and the overall landscape of artistic expression.

By conducting these two comprehensive studies, we aim to equip ourselves with a nuanced understanding of the challenges posed by AI and the variations in negotiating structures. This knowledge will be invaluable in formulating effective strategies, policies, and collective bargaining agreements that uphold the rights, livelihoods, and creative integrity of individuals in the face of evolving technological landscapes.

8. CONCLUSION

There can be few doubts that the question of buyout contracts needs to be carefully followed up in its application. The DSM Directive is an outstanding contribution to the protection of European creators, but its effective application needs to be monitored.

Moreover, solutions to improve the effectiveness of the protective rules in Chapter 3 of the Directive must be considered, in the interests of the cultural sector as a whole, which represents considerable economic potential, but also in the interests of creators and the protection of European culture.

The possibility of voluntary agreements should not be ignored, but appears to be a limited scope option. Collective bargaining must be encouraged, since the root of the issue lies in an asymmetry in the respective weights of negotiation and, ultimately, contractual agreements imposed by platforms. The role of collecting societies is fundamental, but varies from one European country to another.

Legal solutions must therefore be considered to improve the effectiveness of the protective principles of the DSM Directive. On the one hand, it must be ensured that all the coherent rules contained in the Chapter III of Title IV of the DSM Directive, entitled "Fair remuneration in exploitation contracts of authors and performers", are effectively implemented, i.e. that the contract cannot override these rules. This is not always the case when it comes to the appropriate and proportionate remuneration of creators.

On the other hand, the question must be raised of the applicability of rules protecting creators to international contracts, particularly when they involve a non-European party. This would require a more ambitious approach, considering that the weak position in which European creators currently sit makes it necessary to impose that the applicable law be European, following the example of existing consumer protection rules. This might concern the DSM Directive itself, by creating one "loi de police" in the Rome I Regulation, which would apply to exploitation contracts concluded by an author or performer. More ambitiously, but also in line with a policy protecting artists and authors that goes beyond copyright, a European Artist status could be conceived more extensively.

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Belgium

[Economic Law Code](#)

France

[Code of Intellectual Property](#)

Finland

[Copyright Act 404/1961](#)

Germany

[German Copyright and Related Rights Act](#)

Ireland

[Copyright and Related Rights Act, 2000](#)

[S.I. No. 567/2021 - European Union \(Copyright and Related Rights in the Digital Single Market\)](#)

Italy

[Italian Copyright Act \(law 22 april 1941, no. 633\) Protection of copyright and other rights related to its exercise](#)

[Legislative Decree 177. Implementation of Directive \(EU\) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and rights in the Digital Single Market and amending the 96/9/EC and 2001/29/EC. \(21G00192\)](#)

Lithuania

[Law on copyright and related rights no. VIII-1185](#)

Netherlands

[Dutch Copyright Act](#)

Slovenia

[Act Amending the Act Regulating Collective Management of Copyright and Related Rights](#)

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ANNEX 1 - INTERVIEW QUESTIONNAIRE

Interview Questionnaire



General presentation

Objective

The research team aims to conduct interviews with several important stakeholders in the objective to clearly **define** the nature and implications of the use of contractual buyout clauses, attempt to **measure and assess** the real impacts of such clauses on the EU's creative sector, and **recommend** several available policy measures for remedying such a situation at the EU and international level.

Methodology

The interviews will be conducted in a "semi-structured" manner, where the interviewer(s) will utilise the questions below as a starting point for further discussion. Interviews will take place virtually, and will be recorded solely for the purposes of transcription. Transcriptions and notes will be made available to stakeholders after interviews in order to re-verify and add relevant information. Prior to publication, stakeholders will be notified of the use of their responses in the final report, retain the right to anonymisation. Stakeholders are further encouraged to submit any additional relevant information (including references to existing studies, reports, data points, etc.) to the interviewers where it may be relevant.

0.- General questions

1. Background of position; role; development of the department between the last 5-10 years?
2. Which departments do you closely collaborate with?
3. What is your area of expertise in the area of copyright contracts?
4. How would you define "buy-out" practices?

1.- State of the art

- 1.1- In which sector(s) do you operate ?

- 1.2.- How frequent is, in your opinion, the “buyout” practices ?
- 1.3.- How is this practice formalised? Do you have example(s) of contractual clause(s)?
- 1.3.- Is the “appropriate and proportionate remuneration” effectively applied, in your practice?
- 1.3.- How do contractual buyout agreements impact the cultural sector ?

2.- Need to change positive law?

- 2.1.- According to the answers above, do you think there is a need to change the legal framework?
- 2.2.- If the answer is positive:
 - a.- how would you qualify the level of importance of this legislative evolution?
 - b.- how would you qualify the level of urgency of this legislative evolution?

3.- Policy options

If the answer to 2.1. is positive, what would be the best policy in your opinion ? What would be the limitation implementing such option ?

- 3.1.- International or industry-wide consensus, voluntary agreements or “soft law” (e.g., Memorandum of Understanding, Code of Conduct)
- 3.2.- Mandatory application of European laws and jurisdiction in European contracts
- 3.3.- Application of a new legal and mandatory status for European creators within the European Union
- 3.4.- Application of a new legal and mandatory status for European creators within and outside the European Union (extraterritorial legislation)
- 3.5 - Assuming that questions 3.3 or 3.4 are answered in the affirmative (recognition of a status for European creators), what would be the basic rights associated with this status?

ANNEX 2 - INTERVIEWEES

Organisation	Person(s)	Position(s)
Stakeholders		
Amazon Prime	Julien Taieb	Legal department
CISAC	Constance Herreman Leonardo de Terlizzi	Head of Legal Department Senior Legal and Policy Advisor
Charte des auteurs illustreurs	Sophie Dieuaide	Member
European Writers Council	Nina George	President
European Audiovisual Observatory / Council of Europe	Sophie Valais	Legal department
GEMA	Kai Welp	Head of the Legal Department
GESAC	Burak Özgen	General Counsel at GESAC
Guilde des scénaristes France	Anna Fregonese	Director
IDFRights (Institute for Digital Fundamental Rights)	Jean-Marie Cavada	Director, former MEP
IDFRights (Institute for Digital Fundamental Rights)	Colette Bouckaert	Secrétaire générale, Responsable des Affaires européennes et juridiques
Ligue des auteurs professionnels	Frédéric Maupomé / Benoit Peeters	Presidents
MEFU Italie	Francesco Archidianoco	President
SAA	Cecile Despingre	Secrétaire générale de la SAA
SACD France	Hubert THILLET	directeur juridique
SACEM	David El Sayeg	Direction juridique
SCAM.SACD Belgique	Frédéric Young	Délégation générale
SCAM France	Hervé Rony	herve.rony@scam.fr
Scénaristes de cinéma associés	Sabine Le Stum	Director
Studio Canal	Véronique Mousnier	Legal department
Syndicats des scénaristes France	Marc Herpoux	Président
USPA (Union Syndicale de la Production Audiovisuelle)	Jérôme Deschênes	Legal department
Warner Bros	Trevor Albery	WW Content Protection & Analytics
Professionals / Attorneys		
Bestelmeyer Rechtsanwälte	Dr. Nikolaus Reber	Attorney-at-law, Munich
Cabinet Christophe Pascal	Christophe Pascal	Attorney-at-law, Paris Bar
Cabinet Denis Goulette	Denis Goulette	Attorney-at-law, Nantes Bar

Cabinet Vercken & Gaullier	Gilles Vercken	Attorney-at-law, Paris bar, Media Lawyer and IP Expert
Montels Avocats	Benjamin Montels	Attorney-at-law, Paris Bar
Swanson, Martin & Bell LLP (US Firm)	Amanda Alasauskas	Associate Attorney, Chicago
Academics and experts		
University Louvain, Bruxelles	Alain Strowel	Professor, copyright expert
Université de Nantes	André Lucas	Professor, copyright expert
Université de Nantes	Agnès Lucas-Schloetter	Professor, copyright expert
University of Stockholm	Eleonora Rosati	Professor, copyright expert
University of Strasbourg	Nicolas Nord	Professor, Private International Law Expert
University of Strasbourg	Nicolas Ereseo	Professor, Competition Law Expert

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, aims to provide an analysis of buyout contracts imposed by platforms in the cultural and creative sector in EU law. The study provides a detailed analysis of buyout practices and assess their economic and cultural impact on the creative sector. Policy recommendations are formulated in relation to EU creators' protection, in light of EU and member states' implementations.

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