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**CONTRACT ADJUSTMENT MECHANISM: ENSURING FAIR
REMUNERATION IN CONTRACTS OF AUTHORS AND
PERFORMERS IN THE DIGITAL SINGLE MARKET**

Undergraduate Thesis

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Abbreviations

DSM Digital Single Market

UCTD Unfair Contract Terms Directive

Introduction

Lack of transparency in contractual obligations is a present legal problem in the copyright regime of the European Union. Consequently, ensuring a fair level of remuneration in contracts of authors and performers will face obstacles: this is why the Commission's 2016 Proposal for a Directive aims at achieving a functioning marketplace for copyright in the Digital Single Market. By introducing a contract adjustment mechanism in Article 15, it assesses the issue of weak bargaining power of creators. The mechanism strives for ensuring fair remuneration in contracts of authors and performers, affecting creators and their contractual counterparties in publishing, audiovisual and music sectors. It will change the way creators are remunerated and copyright contracts negotiated: it is an essential part of modernizing EU copyright law and creating a Digital Single Market. Researching the mechanism is therefore necessary, notably in the context of prospective issues of implementation. Article 15 will set a common approach to all EU Member States, implementing a contract adjustment mechanism to EU copyright law for the first time. The impact of the mechanism has not been adequately analyzed, nor have the terms and obligations included in it been defined. Since contract adjustment mechanism is a prerequisite for ensuring fair remuneration, analyzing and defining the notion of fair remuneration is necessary. Thus, in order to investigate the mechanism and clarify its functions, the scope of the topic of the Thesis focuses on the concept of fair remuneration as well as the mechanism itself.

The goal of the Thesis is to point out legal issues inherent in the current EU copyright regime and the Single Market in the context of the Directive 2001/29/EC and fair remuneration, and to analyze whether the 2016 Proposal is able to resolve those issues, namely the lack of transparency in creators' contracts. It remains unclear whether contract adjustment mechanism will truly succeed in ensuring fair remuneration in the Digital Single Market: it is probable that the enforcement of Article 15 could be compromised. The hypothesis presumes that **due to unclear aspects of implementation, contract adjustment mechanism will have difficulties in ensuring fair remuneration in the Digital Single Market.** The Thesis aspires to bring forward unclear aspects of implementation that are caused by the ambiguous nature of the contract adjustment mechanism and with this evidence, the Thesis is to conclude an answer to the research question of **whether the contract adjustment mechanism ensures fair remuneration in contracts of authors and performers in the Digital Single Market.** In addition, four sub-questions aid the research in order to prove the hypothesis correct, divided on the basis of four main chapters. Firstly, what does the concept of "fair compensation" entail in the Single Market?

Why is it necessary to propose a new copyright Directive in the Digital Single Market? What is the purpose of the contract adjustment mechanism and how does it function? And lastly: how will the copyright Directive and contract adjustment mechanism be implemented?

The Thesis is divided into four main chapters, of which the first focuses on fair compensation in the Single Market in the context of the Directive 2001/29/EC. It brings forward the economic rights of creators and the concept of “fair compensation”, and presents the contractual approaches that are applicable to creators. It states the present legal problem – lack of transparency in creators’ contracts – by emphasizing the three contributive factors affecting the issue. Second chapter focuses on fair remuneration in the Digital Single Market and introduces the 2016 Proposal for a Directive on copyright, stating the objectives of the Proposal. It also points out how the modernized copyright system aims at resolving the issues of the old one by laying down policy options that address the issue of lack of transparency. Third chapter introduces the chosen policy option, the contract adjustment mechanism itself. It presents the purpose of the mechanism, i.e. the objectives of the mechanism and what it strives for. In addition, the chapter focuses on how the mechanism functions, stating the right of the creator to request renegotiation and to receive adequate remuneration. The fourth and last chapter concerns the mechanism in practice rather than in theory, and focuses on legal implementation by presenting the options of the EU Member States for regulation. In addition, the chapter takes Finland as an example of how the mechanism will be transposed into national law. Lastly, it will point out aspects of implementation that remain unclear.

By seeking to find answers to the research question and sub-questions, collecting evidence and consequently producing findings that were not determined in advance, qualitative methods are used in writing the Thesis. This qualitative research is conducted via researching the concepts of fair remuneration and copyright contracts in the Single Market as well as in the Digital Single Market and by analyzing the purpose and objective of a contract adjustment mechanism. In order to produce findings on hypothesis, the implementation of the ambiguous mechanism and its consecutive issues are investigated. To be more specific, textual analysis method, teleological interpretation method and historical interpretation of legal texts are used in writing the Thesis. Regarding the textual method, the structure and functioning of the text in various EU documents are studied. In order to interpret this data, the content and meaning of Impact Assessments, Communications, statements, briefings and notes are analyzed. As regards to teleological interpretation method, EU and national legislative acts and provisions are interpreted in the

context of their intent, values and legal and economic objectives. In addition, EU directives and proposals are studied in order to comprehend the whole EU legal order. Furthermore, as regards to the method of historical interpretation of legal texts, proposals and directives are analyzed in the light of the circumstances preceding the legislation and by taking account of the legislator's intention (concentrating on recitals, for example). The CJEU case law is interpreted by a way of focusing on the historical background and purpose.

Books used for the purposes of writing the Thesis provide for a legal basis as regards to the concepts of copyright, compensation and contract law. Furthermore, a variety of books concern copyright lawmaking and copyright contracts from the EU perspective. Peer reviewed articles, on the other hand, focus on understanding the modernization of EU copyright rules and contain analyses of the new copyright legislation. In general, these articles provide for information on contract design and economics of copyright contracts, notably in the sphere of the new digital environment and online infringements. EU legal acts bring forth a bundle of copyright directives, and national legal acts of the states consist of national copyright legislations in a variety of EU Member States. Case law concerns landmark cases, focusing on the concept of fair remuneration and the use of bestseller or revision clauses. Other sources are especially important, as they contain declarations, Commission Staff Working Documents, Communications from the Commission, reports, statements, reviews, opinions, notes and proposals concerning the EU Digital Single Market and the 2016 legislative Proposal for a copyright Directive.

1. Ensuring fair compensation in the Single Market

Synonymous with Internal Market¹, the Single Market is legally based on Articles 4(1)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union (TFEU)² and makes imperative that there are no internal frontiers or regulatory hindrance to the free movement of goods, persons, services and capital.³ In order to operate the Single Market and to decrease differences in the given protection, directives concerning intellectual property rights, in particular copyrights, aim for approximating Member State law.⁴ Albeit Article 118 of the TFEU established European intellectual property rights for the purpose of providing uniform protection throughout the Union, the fact that separate protection regimes coexist conflicts with the goal of creating a Single Market⁵: since from the *Deutsche Grammophon*⁶, the CJEU has underlined the necessity for European copyright regulation in the context of copyright and the free movement of goods.⁷ The principal EU directives for remuneration of authors and performers concern the Information Society Directive 2001/29/EC (Article 5), Rental and Lending Rights Directive 2006/115/EC (Articles 3, 5, 6 and 8) and the Term of Protection Directive 2011/77/EU (Article 3.2), of which the Directive 2001/29/EC concentrates solely on copyrights.⁸ The moral validity is contributed to the legal protection of copyright by affixing cultural value to authorship: this is conducted by maintaining a triangle of linkages – namely creators, entrepreneurs and users.⁹ From a contractual perspective, authors and performers' right to acquire monetary remuneration is not harmonized, even if such right is largely dependent on the agreed contract with publisher,

¹ Mortelmans, K. The Common Market, the Internal Market and the Single Market, What's in a Market? Common Market Law Review 1998, 35 (1), pp 101-136, p 107.

² The internal market: general principles.

http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.1.html (10.2.2017).

³ The European Single Market. https://ec.europa.eu/growth/single-market_en (10.2.2017).

⁴ Ginsburg, J. C., Treppoz, E. International Copyright Law: U.S. and E.U. Perspectives, Text and Cases. Northampton, Edward Elgar 2015, p 79.

⁵ Dashwood, A. *et al.* European Union law, 6th Edition. USA, Hart Publishing 2011, p 449.

⁶ A manufacturer of sound recordings exercising the exclusive right to distribute the protected articles and thus prohibiting the sale in another Member State conflicts with the provisions concerning free movement of products. CJEU 8.6.1971, Case 78-70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, p 502.

⁷ Synodinou, T. Codification of European Copyright Law: Challenges and Perspectives. The Netherlands, Kluwer Law International 2012, p 34.

⁸ Reynolds, S. European Parliamentary Research Service (ERPS) Study – Review of the EU copyright framework: The implementation, application and effects of the "InfoSoc" Directive (2001/29/EC) and of its related instruments, Brussels, October 2015, p 331.

⁹ Cornish, W. *et al.* Intellectual Property: Patents, Copyright, Trade marks and Allied Rights, 7th Edition. London, Sweet & Maxwell Limited 2010, p 426.

producer or other entities.¹⁰ The Commission merely establishes – through a “market-knows-best” approach – that creators presuppose a fair compensation for the exploitation of their work, without presenting any legal means to achieve this objective.¹¹ Copyright contract law is thus a field where future EU legislation is necessary: further harmonization of national laws could improve the situation of creators.¹²

1.1 The 2001 Information Society Directive

1.1.1 Economic rights of creators

Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (the “InfoSoc Directive”), adopted on 22 June 2001 with the intent to “foster the development of the information society in Europe”, acknowledged the necessity of improving an effective operation of the Internal Market for new copyrighted products and services.¹³ Regardless of the fact that copyright is territorial (national law provides for the rights granted under it) and subsequently no integral rights exist at EU level¹⁴, the Directive aimed at ascertaining an appropriate level of compensation for authors and performers¹⁵ and in general, the recitals bring forth a comprehensive basis of European copyright law.¹⁶ By harmonizing a variety of exclusive rights necessary to the online distribution of works (in particular the right of reproduction and the right of making available)¹⁷ and re-evaluating those in view of the new digital environment¹⁸, the Directive was to create a particularly uniform Internal Market¹⁹ with a

¹⁰ Reynolds, S. European Parliamentary Research Service (ERPS) Study – Review of the EU copyright framework: The implementation, application and effects of the “InfoSoc” Directive (2001/29/EC) and of its related instruments, Brussels, October 2015, p 330.

¹¹ Renda, A. *et al.* Centre for European Policy Studies (CEPS) Special Report No. 120 / November 2015 – The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, Brussels, November 2015, p 108.

¹² Leistner, M. Copyright Law in the EC: Status Quo, Recent Case Law and Policy Perspectives. *Common Market Law Review* 2009, 46 (847), pp 847-884, p 883.

¹³ OJ L 167/10, 22.6.2001, recital 2, p 10.

¹⁴ Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules, Accompanying the document “Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market” and “Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes”, PART 1/3. SWD(2016) 301 final, Brussels, 14.9.2016, p 7.

¹⁵ Stamatoudi, I.A. (ed.) *New Developments in EU and International Copyright Law*. The Netherlands, Kluwer Law International B. V. 2016, p 313.

¹⁶ Leistner (2009), *supra* nota 12, p 882.

¹⁷ SWD(2016) 301final, PART 1/3, Brussels, 14.9.2016, p 6.

¹⁸ OJ L 167/10, 22.6.2001, recital 31, p 12.

¹⁹ Renda, A. *et al.* Centre for European Policy Studies (CEPS) Special Report No. 120 / November 2015 – The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, Brussels, November 2015, p 12.

particular emphasis on information society²⁰, i.e. the “global networks and structures of communication created by new technologies”.²¹

Irrespective of the fact that the InfoSoc Directive is not the sole directive in the EU copyright framework that concentrates on the remuneration of creators²², it particularly harmonizes the economic rights of authors and performers.²³ In the context of acquiring fair compensation, “economic rights” are rights that entitle rightholders to license the use of their works, and allow them to receive monetary compensation for this use.²⁴ As opposed to this and as required by the Berne Convention²⁵, “moral rights” are not assignable but allow authors to control how others present their work.²⁶ It is notable that the InfoSoc Directive emphasizes “European cultural creativity”²⁷, subsequently indicating that copyright ought to encourage cultural creativeness by a way of remunerating artists.²⁸ The Directive recognizes the significance of roles of authors and performers in innovation by stating that copyright is “crucial to intellectual creation”^{29, 30}. It is therefore justified that the author of the work possesses particular rights, which he solely is able to deploy³¹, notably acquiring an adequate level of compensation³².

²⁰ OJ L 167/10, 22.6.2001, art 1(1), p 15.

²¹ Von Lewinski, S., Walter, M. M. (ed.) *European Copyright Law: A Commentary*. New York, Oxford University Press 2010, p 937.

²² [...Under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers...] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. OJ L 265/1, 11.10.2011, recital 14, p 2.

²³ Ginsburg (2015) *supra* nota 4, p 80.

²⁴ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 6.

²⁵ Berne Convention for the Protection of Literary and Artistic Works, Switzerland, 9.9.1886, art 6bis.

²⁶ Adeney, E. *The moral rights of authors and performers: an international and comparative analysis*, 6th Edition. New York, Oxford University Press 2006, p 1.

²⁷ OJ L 167/10, 22.6.2001, recital 11, p 11.

²⁸ Synodinou (2012), *supra* nota 7, p 231.

²⁹ OJ L 167/10, 22.6.2001, recital 9, p 11.

³⁰ Synodinou (2012), *supra* nota 7, p 226.

³¹ World Intellectual Property Organization (WIPO) Publication No. 909(E) – *Understanding Copyright and Related Rights*, Switzerland, 2016, p 4.

³² [...If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work...]. OJ L 167/10, 22.6.2001, recital 10, p 11.

1.1.2 A concept of “fair compensation”

Fair compensation stems from the concept of equitable remuneration and is based on a fundamental principle of justice: rightholders ought to be entitled to acquire financial reward from the use of their work.³³ It [...] must be regarded as an autonomous concept of European Union law to be interpreted uniformly throughout the EU...]³⁴ and should be calculated on the basis of “the possible harm to the rightholders”³⁵. Rights are licensed or transferred in consideration of disbursement of adequate remuneration.³⁶ Putting forth a compromise between the schemes of copyright and *droit d’auteur*, the conception was new to the European copyright *acquis* and obliged countries without precedent remuneration frameworks to ratify other forms of compensation.³⁷ The notion was comprehended in the context of considering the all-encompassing objective of the Directive, i.e. to provide an equitable level of reward for rightholders.³⁸ In the discourse of permitted exceptions and limitations for private copying, it was decided to introduce a provision that would strike a balance and ensure the rightholders’ revenue: the expression “*equo compenso*” was adopted and not “*compenzazione*”, which would have indicated a compensation of damage. In English, this translated into “fair compensation”.³⁹

However, for the question of whether the condition of fair compensation included in Article 5(2)(b) applies favorably towards the private copy levy schemes, the Directive does not provide answers.⁴⁰ Although recital 35 states the general principle that specific circumstances of each case should be considered (generally referring to the self-evident flexibility that the Member States possess)⁴¹, Article 5(5) could supersede recital 35.⁴² In this sense, Article 5 regulates the

³³ Stamatoudi (2016), *supra* nota 15, p 315.

³⁴ CJEU 21.10.2010, Case C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, p 22, para 33.

³⁵ OJ L 167/10, 22.6.2001, recital 35, p 13.

³⁶ CJEU 4.10.2011, Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcom Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08) and Karen Murphy*, para 107 and 108, p 58. CJEU 27.2.2014, Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, para 23, p 5. CJEU 20.10.1993, Joined cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricial Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH*, para 21, p 9. CJEU 18.3.1980, Case 62/79, *Coditel v Ciné Vog Films*, para 14, p 22.

³⁷ Ramalho, A. *The Competence of the European Union in Copyright Lawmaking: a Normative Perspective of EU Powers for Copyright Harmonization*. Cham, Springer International Publishing 2016, p 177.

³⁸ Stamatoudi (2016), *supra* nota 15, p 315.

³⁹ *Ibid*, p 315.

⁴⁰ *Ibid*, p 319.

⁴¹ Recital 35 merely notes that there are “situations where no separate payment is due or where no obligation for payment would arise”. *Ibid*, p 317.

⁴² *Ibid*, p 318.

rightholders' compensation.⁴³ However, compensation merely involves unauthorized but legitimate use of the creators' work without indicating whether the compensation itself is fair: consequently, the InfoSoc Directive is indifferent as regards to how appropriate the level of compensation is.⁴⁴ Regarding equitable remuneration, the German Copyright Act for example mentions that compensation must be congruent with what is "customary and fair in business" as regards to the length and timing of the permitted uses.⁴⁵ A two-step test is used: firstly, the remuneration in question ought to be "customary in the particular branch" and secondly, it must be "fair or honest".⁴⁶

It is notable, that by determining the criteria which to use when assessing particular circumstances of each case, phrase 3 of recital 35 does bring forth guidance concerning the matter: [...a valuable criterion would be the possible harm to the rightholders resulting from the act in question...].⁴⁷ ⁴⁸ The CJEU has interpreted this as meaning that fair compensation must be calculated on the basis of the detriment caused to creators, implying that the level of fair compensation correlates with the harm.⁴⁹ However, applying such harm-related rule on fair compensation is problematic in the sense that it conflicts with the notion itself: fair compensation was originally designed as a lenient minimum obligation, not a maximum – consequently, EU MS are not precluded from providing a higher level of compensation than what is "fair".⁵⁰ It is probable that a major part of authors and performers will be under-remunerated due to the fact that for the definition of fair compensation, the equilibrium of power between authors, performers and distributors is dependent on market forces. It is largely acknowledged that the InfoSoc Directive did not succeed in safeguarding that the level of compensation is appropriate.⁵¹

⁴³ Fair compensation is mandatory for some exceptions. OJ L 167/10, 22.6.2001, art 5(2), p 16.

⁴⁴ Renda, A. *et al.* Centre for European Policy Studies (CEPS) Special Report No. 120 / November 2015 – The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, Brussels, November 2015, p 110.

⁴⁵ Hilty, R. M., Peukert, A. "Equitable Remuneration" in *Copyright Law: the Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.?* Cardozo Arts & Entertainment, 2004, 22 (401), pp 401-450, p 417.

⁴⁶ *Ibid*, p 430.

⁴⁷ OJ L 167/10, 22.6.2001, recital 35, phrase 3, p 13.

⁴⁸ Stamatoudi (2016), *supra* nota 15, p 317.

⁴⁹ CJEU 21.10.2010, Case C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, p 25, para 42.

⁵⁰ Stamatoudi (2016), *supra* nota 15, p 319.

⁵¹ Renda, A. *et al.* Centre for European Policy Studies (CEPS) Special Report No. 120 / November 2015 – The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, Brussels, November 2015, p 126.

1.2 Contractual approaches applicable to creators

1.2.1 Contract law and copyright

Contractual arrangements generate rights against the parties of the contract, i.e. rights *in personam*, while copyright establishes rights against everyone else, i.e. rights *in rem*.⁵² The coexistence of copyright law and contract law is premised on the fact that contracts are particularly essential in order to truly implement copyright: copyright cannot endorse information products without being severely dependent on contracts.⁵³ By creating reciprocal rights and obligations, copyright contracts are contracts *per se*⁵⁴: authors' exploitation contracts are concluded between authors and publishers or alternatively, authors and producers – exploitation rights are transferred by an assignment, licensing or the waiving of rights⁵⁵, and strive for monetary reward for the creator.⁵⁶ Performance contracts, on the other hand, transfer the communication to the public right for live performances.⁵⁷ The three customary ways to provide monetary compensation include proportional remuneration, equitable remuneration and a lump sum.⁵⁸ Rules of remunerating creators rely on national laws, and either generate an obligation to determine the amount of compensation or stipulate that the author participates proportionally in the profits. Such rules also presume that the agreed revenue is revised in case of an imbalanced disadvantage for the transferee and that monitoring and reporting obligations observe the rewards received from the use of the work.⁵⁹

By restricting the relationship between authors and producers or publishers, negotiation of the contract determines the scope, conditions and methods of transferring of rights.⁶⁰ A classical contract model presumes that negotiated bilateral agreements are voluntary and conducted in

⁵² Elkin-Koren, N. Copyright Policy and the Limits of Freedom of Contract. Berkeley Technology Law Journal 1997, 12 (93), pp 93-113, p 97.

⁵³ De Werra, J. Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-line Information Licensing Transactions. Columbia Journal of Law & the Arts 2003, 25 (239), pp 243-374, p 247.

⁵⁴ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 22.

⁵⁵ By assigning the rights, the ownership of economic rights is transferred. By licensing the rights, the permission to exercise the right is given to a transferee. By waiving of rights, rights benefitting the transferee are renounced. *Ibid*, p 29.

⁵⁶ *Ibid*, p 6.

⁵⁷ *Ibid*, p 116.

⁵⁸ In case of proportional remuneration, the author proportionally participates in the profits. In case of equitable remuneration, the right to acquire a fair level of compensation is perceived as unwaivable rights. In case of a lump sum, the rights are transferred for an originally agreed sum without considering the post-contract use of the work. *Ibid*, p 37, p 84, p 104.

⁵⁹ *Ibid*, p 8.

⁶⁰ *Ibid*, p 23.

good faith between informed and balanced contractual parties⁶¹. The Principles of European Contract Law (PECL) acknowledge a variety of doctrines of good faith in Member States, which impose obligations and decrease unfair contractual clauses.⁶² The notion of freedom of contract refers to the freedom that parties exercise in being entitled to conclude any agreement regarding the use of the creative content⁶³: from a utilitarian viewpoint, the parties' welfare is maximized, subsequently benefitting the society. From a naturalist perspective, such liberty emphasizes the right of individuals to monitor their own activities.⁶⁴ Since contractual arrangements extend copyrights, it is legitimate to limit the principle of freedom of contract⁶⁵: these limitations are legislative resolutions aimed at correcting imbalanced bargaining powers between the contracting parties – it is generally acknowledged that authors are the weaker party to the contract.⁶⁶ While the general law of contracts is applicable to copyright contracts, those legal rules are not formed with the intention of protecting authors: their implementation may even lead to a situation where the exploiter is protected.⁶⁷ In consequence of [...inexperience, lack of information or desire to be published or produced at any cost...]⁶⁸, the first contract in particular puts creators in a weaker bargaining position.⁶⁹

1.2.2 Economics and copyright

In economic analysis terms, introducing fair compensation mechanisms is justified by the necessity to evade transaction payments rather than the need to ensure an adequate level of remuneration.⁷⁰ The economic reality of copyright presupposes that publishers, producers and other economic entities exploit authors' rights⁷¹, since creators almost never maintain monetary

⁶¹ Guibault, L. M. C. R. *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*. London, Kluwer Law International 2002, p 200.

⁶² Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 9.

⁶³ "Everyone is free to bind themselves to legal obligations." Guibault (2002), *supra* nota 61, p 113.

⁶⁴ *Ibid*, p 115.

⁶⁵ *Ibid*, p 197.

⁶⁶ Hugenholtz, B. P. (ed.) *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management*. The Hague, Kluwer Law International 2000, p 151 cited in De Werra (De Werra (2003), *supra* nota 53, p 248).

⁶⁷ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 50.

⁶⁸ *Ibid*, p 16.

⁶⁹ The first contract refers to "a fundamental act for the work, as it enables it to become an economic asset and to yield some revenue." *Ibid*, p 22.

⁷⁰ Towse, R. *et al.* *The Economics of Copyright Law: A Stocktake of the Literature*. Review of Economic Research on Copyright Issues 2008, 5 (1), pp 1-22, p 15.

⁷¹ [...It should be recognized that publishers play a significant role in transforming the creation into an economic asset...]. Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs –

resources needed to produce, distribute and communicate their works to the public.⁷² In consequence of this relationship, copyright typically regulates the conditions related to transactions or the form of exclusive licenses: in general, authors license or transfer the rights of their works to entities, which consequently distribute those works to the public⁷³, in consideration of acquiring financial rewards as well as recognition.⁷⁴ In the context of recitals of the InfoSoc Directive and the *Luksan* decision⁷⁵, the position of the author is established on economic considerations of advancing innovation in the EU copyright regime.⁷⁶ Based on a traditional approach of a naturalistic perspective of copyright law (the fact that the author is naturally entitled to monitor the financial and aesthetic aspects of his creation legitimizes copyright monopoly⁷⁷), this author-protective *droit d'auteur* system presumes that authors receive the right to gain monetary rewards for the act of creation as well as for contributing the society.⁷⁸

In Germany, a general principle of “just remuneration” is consolidated with a theory of monism⁷⁹, which presumes that economic and moral rights of copyright are interacting and coexist in the sense that they cannot be separated from each other⁸⁰: copyright is seen as encompassing “a right of exploitation (remuneration)” and “rights of personality (moral rights)”.⁸¹ The economic theory of copyright perceives the matter by means of an incentive argument, establishing that authors are entitled to copyright for the reason that they are able to receive an appropriate level of remuneration for their work.⁸² Standard economic theory presupposes that by associating the outcomes with financial rewards, the contractual party is thereby given a proper incentive to do what the contractor demands – this task will produce profits, and a contract operates as a mechanism determining how the monetary gain is divided

Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 16.

⁷² Guibault (2002), *supra* nota 61, p 198.

⁷³ De Werra (2003), *supra* nota 53, p 247.

⁷⁴ Dusollier, S. *et al.* Study requested by the European Parliament’s Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 22.

⁷⁵ CJEU 9.2.2012, Case C-277/10, *Martin Luksan v Petrus van der Let*, p 4.

⁷⁶ Synodinou (2012), *supra* nota 7, p 231.

⁷⁷ De Werra (2003), *supra* nota 53, p 321.

⁷⁸ Hilty, Peukert (2004), *supra* nota 45, p 405.

⁷⁹ Gaita, K., Christie, A. F. Principle or compromise? Understanding the original thinking behind statutory licence and levy schemes for private copying. *Intellectual Property Quarterly* 2004, 4 (4), pp 422-447, p 428.

⁸⁰ Hilty, Peukert (2004), *supra* nota 45, p 407.

⁸¹ Gaita, Christie (2004), *supra* nota 79, p 428.

⁸² Watt, R. Copyright and Contract Law: Economic Theory of Copyright Contracts. *Intellectual Property Law* 2010, 18 (173), pp 173-206, p 175.

between contractual counterparties.⁸³ The standard theory of contracts becomes particularly complex in situations where the information received is not in symmetry between the parties⁸⁴: the Principal-Agent model presumes that in consequence of such asymmetric information, a situation of uneven equilibrium occurs where the principal, after witnessing the agent's first period performance, revises his incentive strategy.⁸⁵ This premise between creators and their contractual counterparties is in the core of lack of transparency in copyright contracts.

1.3 Lack of transparency in creators' contracts

A principle of transparency encompasses a prerequisite for the conclusion of a contract: the non-drafting counterparty of the provider must be entitled to become aware of and comprehend the terms of the contract. The protection of interests is not ensured by the mere possibility to read the terms: for the CJEU, transparency implicates more than accessibility of information.⁸⁶ In the case *Invitel*, the Court interpreted recital 20 and Article 5 of the Unfair Contract Terms Directive (UCTD) in the context of the ability of consumer to foresee amendments of fees linked to the service, claiming this to be of fundamental importance.⁸⁷ In *RWE*, the same justification was applied.⁸⁸ A breach of transparency can be described as a formal element that must be assessed regarding the unfairness of standard terms⁸⁹ – in the EU consumer law, the UCTD states that the trader has the obligation to provide the standard terms to the consumer⁹⁰. Other EU law instruments regulate this obligation as well, without limiting it to consumer transactions: the Commercial Agency Directive⁹¹, the Distance Marketing of Financial Services Directive⁹², the Services Directive⁹³ and the E-commerce Directive⁹⁴.⁹⁵ Drivers for the issue of lack of

⁸³ Kretschmer, M. *et al.* Research commissioned by the Strategic Advisory Board for Intellectual Property Policy (SABIP) – The Relationship Between Copyright and Contract Law. London, April 2010, p 19.

⁸⁴ Information is asymmetrical in a situation where “the contractor cannot fully observe all that he or she would like to regarding the behavior or identity of the contracted party”. *Ibid*, p 19.

⁸⁵ Laffont, J. J., Tirole, J. The Dynamics of incentive contracts. *Econometrica* 1988, 56 (5), pp 1153-1175, p 1153.

⁸⁶ De Franceschi, A. (ed). *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*. Cambridge, Intersentia 2016, p 198.

⁸⁷ CJEU 26.4.2012, Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, p 10.

⁸⁸ [...The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges...]. CJEU 21.3.2013, Case C-92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, p 12.

⁸⁹ Loos, M. B. M. Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law. *European Review of Private Law* 2015, 23 (2), pp 179-194, p 189.

⁹⁰ OJ L 95/29, 21.4.1993, art 3, p 31.

⁹¹ OJ L 382/17, 31.12.1986, art 4, p 18.

⁹² OJ L 271/16, 9.10.2002, art 5, p 20.

⁹³ OJ L 376/36, 27.12.2006, art 5, p 52.

⁹⁴ OJ L 178/1, 17.7.2000, art 10, p 12.

transparency in creators' contracts include insufficient legislative solutions, imbalance in bargaining power between creators and their contractual counterparties, as well as new and unknown modes of exploitation.

1.3.1 Insufficient legislative solutions

Due to fragmented transparency obligations in different MS⁹⁶, lack of transparency creates a barrier to a proper operating of the Single Market for creators.⁹⁷ Already in 2002, the Wittem Project strove for endorsing transparency in the European copyright regime.⁹⁸ Both the AV/M Study⁹⁹ and the Print Study¹⁰⁰ note that lack of transparency in contractual relationships of creators involve both possible (how the work may be used) and actual (how the work is used) exploitation, as well as the remuneration owed for the exploitation. Circumstances such as the nature and scope of exploitation must be established as a prerequisite to defining the appropriate reward of creators, as they are dependent on each other.¹⁰¹ The fact that creators are unable to acquire sufficient information from their contractual counterparties subsequently causes obscurity as regards to the actual exploitation and the owed remuneration. Due to the fact that creators lack the possibility of effectively controlling the use, evaluating the financial success and determining the economic value of their creations, negotiating an adequate level of compensation is infeasible.¹⁰²

In the EU, there are 14 Member States where transparency obligations exist in the book or press sector¹⁰³, 6 in the music sector¹⁰⁴ and 14 in the audiovisual sector¹⁰⁵.¹⁰⁶ In order to guarantee that

⁹⁵ De Franceschi (2016), *supra* nota 86, p 198.

⁹⁶ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 176.

⁹⁷ *Ibid*, p 133.

⁹⁸ Established in 2002 and consisting of a group of European scholars, the group focused on drafting model provisions of a European Copyright Code. Published in 2010, the Code emphasized both the natural rights and utilitarian rationale for copyright. Synodinou (2012), *supra* nota 7, p 340.

⁹⁹ Guibault, L., Salamanca, O., van Gombel, S. Europe Economics, A study prepared for the European Commission – Remuneration of authors and performers for the use of their works and the fixations of their performances, European Union, 2015, p 135.

¹⁰⁰ Guibault, L., Salamanca, O. Europe Economics, A study prepared for the European Commission – Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works, European Union, 2016, p 121.

¹⁰¹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 174.

¹⁰² *Ibid*, p 176.

¹⁰³ Notably Belgium, Croatia, Czech Republic, Denmark, Finland, France, Italy, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden.

¹⁰⁴ Notably Czech Republic, Denmark, France, Germany, Slovakia and Slovenia.

¹⁰⁵ Notably Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Poland, Romania, Slovakia, Slovenia and Spain.

contracts precisely define the scope and terms of the transferred rights and safeguard the position of the creator, a variety of MS have implemented mandatory contractual obligations in their national laws.¹⁰⁷ In case of unknown forms of exploitation, the most recent progress in France and Germany includes provisions that provide protection of authors' interests when transferring rights.¹⁰⁸ However, regulatory resolutions providing transparency are neither adequate nor efficient: a majority of Member States execute transparency obligations that are either overly broad or, alternatively, concern specific sectors solely without encompassing enforcement mechanisms.¹⁰⁹ Albeit there exists EU legal instruments that concern and focus on creators' contractual relationships (namely in the form of the Rental and Lending Right Directive¹¹⁰ and the Term of Protection Directive¹¹¹), an even further EU action is necessary.¹¹²

1.3.2 Imbalance in bargaining power

Naturally, there exists an imbalance in bargaining power – partially derived from the information asymmetry – that consequently leads to the fact that the counterparty of the creator is favored.¹¹³ In accordance to Laffont and Tirole, this lack of balance puts creators in “take it or leave it” situations.¹¹⁴ When transferring creators' rights for a lump sum payment, particularly extensive “buyout” or “all rights included” contracts are used more and more¹¹⁵, despite of the fact that from an economic point of view, such agreements are not the most effective resolutions.¹¹⁶ When transferring a bundle of creators' rights, copyright contracts are generally more excessive than what is required for the planned exploitation.¹¹⁷ Furthermore, the use of standard contract terms

¹⁰⁶ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 204.

¹⁰⁷ There are strict rules in Belgium, France, Poland and Spain and more lenient ones in Germany, Hungary, Sweden and the UK. Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 49.

¹⁰⁸ [...New rules facilitate transfer of rights relating to unknown forms of exploitation while preserving authors' interests...]. Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 49.

¹⁰⁹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 176.

¹¹⁰ “The right to obtain an equitable remuneration for rental cannot be waived by authors or performers”. OJ L 376/28, 27.12.2006, art 5(2), p 30.

¹¹¹ The term of protection of a musical composition with words is extended to apply to “the author of the lyrics and the composer of the musical composition.” OJ L 265/1, 11.10.2011, art 1, p 3.

¹¹² SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 133.

¹¹³ *Ibid*, p 175.

¹¹⁴ Laffont, Tirole (1988) *supra* nota 85, p 1153.

¹¹⁵ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 12.

¹¹⁶ *Ibid*, p 84.

¹¹⁷ *Ibid*, p 12.

contributes to new forms of inequality of bargaining power: a party who is discontent with the terms of the standard form contract faces obstacles when trying to obtain better terms. These issues are particularly common in situations where one party is lacking bargaining power.¹¹⁸ While associations representing the interests of creators have acknowledged that authors ought to be allowed to participate in the financial success of their work¹¹⁹, creators are often so reliant on their contractual counterparties that they are reluctant to demand further information due to a possibility of negative consequences.¹²⁰

Legislative rules on unfair terms recognize the issue of imbalanced bargaining positions and acknowledge that non-negotiated contracts lead to unfair contract terms for the weaker party. The UCTD, however, is not applicable to copyright contracts concluded by authors – this is due to the fact that authors are [...acting as professionals when they contract with exploiters...].¹²¹ It is notable, that a French court has interpreted the unfair terms rules as to encompass a contract where the author was perceived as a consumer by applying the unfair terms logic rather than copyright provisions¹²². Thus, despite of non-applicability of the Directive, other provisions (such as good faith and principles of equity) assess the concept of unfairness.¹²³ While it is true that in some Member States there are provisions that determine the conditions of negotiation in order to stabilize the uneven equilibrium, such obligations do not cover the matter of the naturally weaker author or the fact that there exists no remedial mechanisms which would let creators to amend the contract in case of an economically changed situation.¹²⁴ In the negotiations of copyright contracts, uneven bargaining powers pertain to the level of remuneration: authors are concerned about the nonexistence of renegotiation rules where their financial success exceeds expectations.¹²⁵

¹¹⁸ Von Bar, C. *et al.* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Munich, Sellier European law publishers GmbH 2009, p 67.

¹¹⁹ SAA, FERA, FSE, Joint statement – An end to buyouts in Europe, Brussels, 10.4.2012.

¹²⁰ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 176.

¹²¹ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 56.

¹²² Tribunal de grande instance de Paris 28.10.2008, Case No RG 06/05750, *UFC Que Choisir v Amazon.com, Amazon Services Europe, Amazon.eu*, cited in Dusollier (Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 56).

¹²³ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 56.

¹²⁴ *Ibid*, p 14.

¹²⁵ Authors' Group – Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators, Brussels, 31.5.2016.

1.3.3 New modes of exploitation

Regardless of the fact that copyright has doubtlessly become global in the digital era, the fundamental rights of copyright have remained territorial in nature.¹²⁶ In the context of digital exploitations, problems in securing a fair remuneration contribute to the increasing power of stakeholders and putting authors in unfavorable positions.¹²⁷ While lack of transparency in the remuneration system is not particular to the digital environment, the multiple forms of exploitation emerging online further aggravate such problem.¹²⁸ The accelerating complexity of new modes of online dissemination and the diversity of intermediaries both affect transparency. The fact that digital distribution will probably become the main form of exploitation inevitably leads to a situation where an individual creator faces hindrances in trying to monitor the actual online use of his work. Ensuring transparency in contractual relationships of creators is therefore particularly necessary in the online environment.¹²⁹ To a certain extent, the position of the creator and the depth of the problem vary in different MS: in the case of collective bargaining, however, the situation is seemingly better.¹³⁰ Discrepancies in national legislations generate obstacles for the providers of cross-border services, as they must adapt to a variety of legal obligations concerning online exploitation and remuneration.¹³¹ Rightholders, on the other hand, are concerned about the enforcement of copyright – insufficient standards for enforcement enable illicit use.¹³²

In the interactions between Internet platforms and rightholders, copyrighted works face inequity concerning the digital value transfer and the remuneration of authors: the present legislative system was created at a time when online dissemination of content was restricted by technology.¹³³ Due to the complexity of modes of online dissemination and the fact that post-

¹²⁶ Stamatoudi, I. A. (ed) *Copyright Enforcement and the Internet*. The Netherlands, Kluwer Law International 2010, p 63.

¹²⁷ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 13.

¹²⁸ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 134.

¹²⁹ *Ibid*, p 174.

¹³⁰ *Ibid*, p 175.

¹³¹ Commission Staff Working Document – A Digital Single Market for Europe: Analysis and Evidence, Accompanying the document "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe". SWD(2015)100 final, Brussels, 6.5.2015, p 30.

¹³² Kemp, B. Copyright's Digital Reformulation. *Yale Journal of Law & Technology* 2002, 5 (141), pp 142-153, p 144.

¹³³ SWD(2015)100 final, Brussels, 6.5.2015, p 30.

Internet contracts do not always determine the rights obtained¹³⁴, there exists uncertainty of ownership of digital rights. This affects the remuneration of creators in the context of new modes of exploitation, as authors and performers are unable to acquire financial compensation in a situation where the rights have not been transferred.¹³⁵ When an extensive agreement of economic rights is concluded, transferees might not debate on digital rights but consider all rights acquired, including digital: in the context of online exploitation, the anticipated remuneration is rarely taken into account. In order to manage with the ambiguous future of digital markets and to avert supplemental negotiation costs, the contractual counterparties strive for attaining the rights extensively, while authors don't have any other choice but to accept that multi-territorial compensation systems are applicable to services that have not emerged yet.¹³⁶ Digital markets result in the concluded contract being out of date at any moment, as the online environment increases the divergences in contractual protection of creators.¹³⁷

¹³⁴ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 174.

¹³⁵ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 66.

¹³⁶ *Ibid*, p 67.

¹³⁷ *Ibid* p 13.

2. Ensuring fair remuneration in the Digital Single Market

In the Digital Single Market (DSM), the citizens, individuals and businesses are able to access online activities under the conditions of fair competition.¹³⁸ The European Commission's strategy aimed at modernizing copyright rules¹³⁹, determining the conclusion of DSM as "one of the ten political priorities".¹⁴⁰ A public consultation was conducted in December 2013, revising EU copyright rules with an emphasis on the discrepancies in the copyright market¹⁴¹ and in May 2015, the Digital Single Market strategy was adopted.¹⁴² The DSM is based on three pillars: the availability of digital goods and services, flourishing digital networks and maximized potential growth of the digital economy.¹⁴³ The digital economy¹⁴⁴ is dependent on creative works, encompassing a principle that requires authors to be intertwined with the use of their works and to obtain fair remuneration of such exploitation.¹⁴⁵ The Internet has recently become the principal marketplace for the distribution of copyrighted works¹⁴⁶ and since new uses, actors and business models have emerged, the way in which protected subject matter is created, produced, distributed and exploited has changed¹⁴⁷: consumers anticipate access to copyrighted works everywhere, yet creators demand fair remuneration.¹⁴⁸ Following the adoption of the Communication on a modern and more European copyright framework¹⁴⁹ and the Proposal for a Regulation on Cross-border Portability of Online Content Services¹⁵⁰, the Commission adopted a

¹³⁸ SWD(2015)100 final, Brussels, 6.5.2015, p 3.

¹³⁹ Katsarova, I. European Parliamentary Research Service (ERPS) Briefing – The challenges of copyright in the EU, June 2015, p 9.

¹⁴⁰ SWD(2015)100 final, Brussels, 6.5.2015, p 3.

¹⁴¹ Katsarova, I. European Parliamentary Research Service (ERPS) Briefing – The challenges of copyright in the EU, June 2015, p 9.

¹⁴² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe. COM(2015) 192 final, Brussels, 6.5.2015.

¹⁴³ Digital Single Market. [https://ec.europa.eu/digital-single-market/en/digital-single-market#Articlehttp://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0280\(OLP\)\(8.2.2017\)](https://ec.europa.eu/digital-single-market/en/digital-single-market#Articlehttp://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0280(OLP)(8.2.2017)).

¹⁴⁴ Digital economy can be characterized as "widespread dissemination of information and extensive transformative use of that information." Selvadurai, N. Designing copyright licensing laws to support the converged digital economy. *European Intellectual Property Review* 2015, 37 (5), pp 285-295, p 285.

¹⁴⁵ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 14.

¹⁴⁶ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 132.

¹⁴⁷ *Ibid*, p 7.

¹⁴⁸ SWD(2015)100 final, Brussels, 6.5.2015, p 25.

¹⁴⁹ The Communication "sets out how the Commission intends to achieve the goal of a more modern, more European copyright framework". Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a modern, more European copyright framework. COM(2015) 626 final, Brussels, 9.12.2015, p 2.

¹⁵⁰ The Proposal "aims to remove barriers to cross-border portability so that the needs of users can be met more effectively as well as promoting innovation for the benefit of consumers, service providers and rightholders". COM(2015) 627 final, Brussels, 9.12.2015, p 2.

second Copyright Package on 14 September 2016.¹⁵¹ The reform consists of a proposed Regulation, which fosters the cross-border distribution of television and radio programmes¹⁵², and a proposed Directive on copyright in the Digital Single Market¹⁵³, which *inter alia* aims at achieving a well-functioning marketplace for copyright – notably by imposing new rules to increase transparency in fair remuneration of authors and performers.¹⁵⁴

2.1 The 2016 Proposal for a copyright Directive

2.1.1 A well-functioning copyright marketplace

The Proposal for a Directive on copyright in the Digital Single Market has its legal basis in Article 114 TFEU, which grants power to the EU to adopt measures that have the foundation and operation of the Internal Market as their objectives.¹⁵⁵ It is justifiable that mechanisms established in order to ascertain a well-functioning marketplace in the online environment are decided at EU level, because digital dissemination of copyrighted works is ultimately cross-border¹⁵⁶ and since intervention at MS level would not be sufficiently effective, but further accelerate fragmentation.¹⁵⁷ One of the key policy objectives of the Proposal is to achieve a copyright marketplace¹⁵⁸ and a value chain, one that functions efficiently for all parties while giving incentives to the distribution of creative content.¹⁵⁹ Respecting contractual freedom¹⁶⁰, the initiative responds to the objectives of the Communication of December 2015¹⁶¹ and focuses on the issues faced “upstream” (rightholders licensing works in the digital environment) and those faced “downstream” (authors and performers negotiating fair remuneration of exploitation contracts)¹⁶²

¹⁵¹ Note – Information by the Commission about the second copyright package from the Commission to the Council, Brussels, 15.11.2016.

¹⁵² Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594 final, Brussels, 14.9.2016.

¹⁵³ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, Brussels, 14.9.2016.

¹⁵⁴ Note – Information by the Commission about the second copyright package from the Commission to the Council, Brussels, 15.11.2016.

¹⁵⁵ COM(2016) 593 final, Brussels, 14.9.2016, p 4.

¹⁵⁶ *Ibid*, p 5.

¹⁵⁷ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 133.

¹⁵⁸ *Ibid*, p 9.

¹⁵⁹ *Ibid*, p 134.

¹⁶⁰ COM(2016) 593 final, Brussels, 14.9.2016, p 6.

¹⁶¹ COM(2015) 626 final, Brussels, 9.12.2015.

¹⁶² SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 10.

2.1.2 Legal certainty, transparency and balance

One of the specific objectives of the Proposal is to increment [...legal certainty, transparency and balance in the system that governs the remuneration of creators...]¹⁶³, aimed at guaranteeing a fair sharing of value in the digital environment.¹⁶⁴ The fourth title of the Proposal presents measures to accomplish this goal: Articles 11 and 12 widen the rights of publishers of press publications for the online use of their publications; Article 13 presupposes that information society service providers take adequate measures to safeguard the functioning of contracts concluded with rightholders; Article 14 obliges Member States to impose transparency obligations that benefit creators; Article 15 requires that a contract adjustment mechanism is established, supported by the measure included in Article 14; and Article 16 calls for the establishment of a dispute resolution mechanism for matters arising from Articles 14 and 15.¹⁶⁵ These measures strive for improving transparency of the acquired financial rewards as well as providing balanced contractual relationships between creators and their contractual counterparties, and are expected to positively affect the production of content and accessibility to it by consumers.¹⁶⁶

2.1.3 Enforcement against online infringements

Since users are able to replicate and copy information goods, digital technologies weaken the enforcement mechanisms contained in the pre-Internet era – content owners describe this by using an expression “digital threat”: newly established abilities to privately replicate and disseminate creative content have a negative impact on the market for copyright.¹⁶⁷ A prominent feature in ensuring a functioning marketplace for copyright in the Digital Single Market is the strengthening of enforcement against online infringements while safeguarding fundamental rights of creators.¹⁶⁸ In order to accelerate future production of creative content, it is imperative

¹⁶³ *Ibid*, p 134.

¹⁶⁴ Commission Staff Working Document – Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, Accompanying the document “Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market” and “Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes”. SWD(2016) 302 final, Brussels, 14.9.2016, p 1.

¹⁶⁵ COM(2016) 593 final, Brussels, 14.9.2016, p 10.

¹⁶⁶ *Ibid*, p 3.

¹⁶⁷ Kemp (2002), *supra* nota 132, p 145.

¹⁶⁸ SWD(2015)100 final, Brussels, 6.5.2015, p 30.

that measures to safeguard fair remuneration are provided¹⁶⁹ – unwaivable rights to remuneration should be imposed in particular in the context of exploitations in the online environment.¹⁷⁰ A renegotiation option should be conferred to the author¹⁷¹, as authors and performers ought to have the right to debate how to ensure that the remuneration requested remains sufficient.¹⁷² A revision clause could link the revenue to the digital progress that occurs after the conclusion of the contract and offer a solution to the uncertainty of exploitation in the digital environment.¹⁷³

2.2 Options for addressing lack of transparency

2.2.1 Policy option 1

Under the option 1, the Commission would organize a sector-specific stakeholder dialogue between the representatives of creators and producers, publishers and distributors. By assigning a recommendation to the Member States, the option would require them to adjust national laws to ascertain greater transparency¹⁷⁴ and grant an opportunity for creators to encourage reformations at national level. There would be impacts on compliance costs (which vary in different MS) and on competition (decreasing discrepancies in different national legislations).¹⁷⁵ Most creators are likely to consider this option as inadequate for solving the issue of lack of transparency: the effect on stakeholders would rely solely on the extent of Member State legislation and thus the option wouldn't succeed in producing concrete results.¹⁷⁶ Emphasizing the necessity of intervention at EU level, consumers underline the insufficiency of option 1.¹⁷⁷ There wouldn't occur a direct impact on cultural diversity or fundamental rights and while there might be positive impacts in certain MS¹⁷⁸, this would not be the case throughout the Union.¹⁷⁹ Therefore, option 1 was rejected for lacking effectiveness.¹⁸⁰

¹⁶⁹ COM(2015) 192 final, Brussels, 6.5.2015, p 7.

¹⁷⁰ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 104.

¹⁷¹ *Ibid*, p 15.

¹⁷² *Ibid*, p 76.

¹⁷³ *Ibid*, p 71.

¹⁷⁴ SWD(2016) 301 final, 1/3, Brussels, 14.9.2016, p 178.

¹⁷⁵ *Ibid*, p 182.

¹⁷⁶ *Ibid*, p 190.

¹⁷⁷ *Ibid*, p 178.

¹⁷⁸ *Ibid*, p 190.

¹⁷⁹ *Ibid*, p 182.

¹⁸⁰ *Ibid*, p 190.

2.2.2 Policy option 2

Option 2 imposes transparency obligations on contractual counterparties¹⁸¹: a reporting obligation (advocated for by creators¹⁸²) would require the EU to regulate a minimum content of reporting while different sectors would determine the sector-specific details in order to reflect a number of diverse remuneration agreements.¹⁸³ Reporting obligation would include lump sum remuneration agreements in situations where the contribution of the creator is prominent to the overall work.¹⁸⁴ In case of a royalty-based remuneration, the enforcement of copyright contracts would become more effective, reducing information asymmetry.¹⁸⁵ Option 2 would better enforce creators' rights, thus having a positive impact on copyright as a property right.¹⁸⁶ However, it would limit the freedom to conduct a business without having an impact on formulating the terms of the contract¹⁸⁷ and while it would positively affect the freedom of movement and expression, there would be administrative costs for contractual counterparties.¹⁸⁸ As opposed to contractual counterparties¹⁸⁹, creators strongly favor these transparency obligations – however, an even further interference in unfair contracts would be preferred.¹⁹⁰ Irrespective of the fact that option 2 would decrease discrepancies in the Single Market¹⁹¹, it has been criticized for the lack of bringing forth means of enforcement.¹⁹² Therefore, option 2 is not the preferred option.¹⁹³

¹⁸¹ *Ibid*, p 178.

¹⁸² Authors' Group – Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators, Brussels, 31.5.2016.

¹⁸³ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 178.

¹⁸⁴ *Ibid*, p 179.

¹⁸⁵ *Ibid*, p 183.

¹⁸⁶ *Ibid*, p 186.

¹⁸⁷ *Ibid*, p 187.

¹⁸⁸ *Ibid*, p 190.

¹⁸⁹ Contractual counterparties consider that fair remuneration should be "regulated by the market and the most important issue is ensuring that there is contractual freedom, freedom of negotiation and the right for an author to choose his/her representative". Directorate General Internal Market and Services of the European Commission – Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, p 80.

¹⁹⁰ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 178.

¹⁹¹ *Ibid*, p 186.

¹⁹² *Ibid*, p 190.

¹⁹³ COM(2016) 593 final, Brussels, 14.9.2016, p 8.

2.2.3 Policy option 3

According to the third policy option, MS are obliged to impose a reporting obligation (as presented in the option 2), with an addition of a contract adjustment mechanism¹⁹⁴, which would present legal means for creators to request modification of the remuneration (given that the originally negotiated remuneration is not proportionate to the financial reward acquired from the exploitation¹⁹⁵).¹⁹⁶ A voluntary dispute resolution mechanism¹⁹⁷, on the other hand, would guarantee an effective enforcement of the contract adjustment mechanism.¹⁹⁸ Dispute resolution mechanism aids authors and performers in enforcing their rights without going to court against their contractual counterparties.¹⁹⁹ While contract adjustment mechanism would strengthen creators' bargaining position and remedy unfair agreements, renegotiation costs (the cost of renegotiation and the remuneration owed to the creator) would be imposed on contractual counterparties when revising the contract.²⁰⁰ Due to the fact that estimating such costs is problematic, the Commission has been unable to provide estimation.²⁰¹ Irrespective of the fact that it is debatable whether renegotiation costs could be referred to as supplemental financial effects, creators presume that these costs are justified²⁰²: revenue is not connected to the success of the work in buyout contracts²⁰³ with authors being unable to renegotiate contract terms.²⁰⁴ Emphasizing contractual freedom, contractual counterparties oppose these two mechanisms.²⁰⁵ Option 3 is, however, proportionate to the policy objective and ensures that transparency obligations do not become disproportionately burdensome. Since option 1 is insufficient and option 2 merely brings forth transparency measures without enforcement means, option 3 is the preferred option.²⁰⁶

¹⁹⁴ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 180.

¹⁹⁵ *Ibid*, p 180.

¹⁹⁶ *Ibid*, p 187.

¹⁹⁷ Such mechanism can be found from the Netherlands, for example, in the form of a dispute resolution committee (Copyright Contract Act, 12.2.2015, art 25g).

¹⁹⁸ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 180.

¹⁹⁹ It would not however take away the use of other existing means (a judicial revision of the contract; granting damages to creators; and revising the royalty percentage). *Ibid*, p 180.

²⁰⁰ *Ibid*, p 187.

²⁰¹ "Costs associated to the renegotiation of contracts are very difficult to estimate as they would depend on various factors as the number of relevant works, the scope of the assigned rights, the extent of changes that parties want to introduce and the current practices of remuneration negotiation." *Ibid*, p 187.

²⁰² *Ibid*, p 188.

²⁰³ Directorate General Internal Market and Services of the European Commission – Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, p 79.

²⁰⁴ Authors' Group – Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators, Brussels, 31.5.2016.

²⁰⁵ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 180.

²⁰⁶ *Ibid*, p 190.

3. The chosen policy option: contract adjustment mechanism

The small number of exploitation contracts that are harmonized in the EU are often long-term agreements and offer merely few renegotiation opportunities for authors and performers. Considering national laws applicable to copyright contracts, there ought to be a mechanism that adjusts creators' remuneration in situations where the [...remuneration originally agreed under a license or a transfer of rights is disproportionately low compared to the relevant revenues...].²⁰⁷ Authors and performers endorse this, supporting the so-called "bestseller clause".²⁰⁸ For the author, this provides the possibility of negotiating the remuneration when the digital model of exploitation (the generated value and profit) is assessed.²⁰⁹ Bestseller clauses aim at substituting the agreed lump sum for the authors' proportional remuneration (given that the work succeeds in the market) and call for an adjustment of the remuneration if the changed circumstances are due to digital developments occurring after the contract is concluded. It should be noted, however, that bestseller clauses are unable to solve the common problem of imbalanced bargaining powers.²¹⁰ Regardless of this, Article 15 of the Proposal for a Directive on copyright in the DSM establishes a bestseller clause (i.e. a contract adjustment mechanism), which obliges MS to safeguard authors and performers' remuneration by allowing that remuneration to be renegotiated²¹¹:

"Authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation for the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."²¹²

Nothing indicates whether collective bargaining agreements could be included in applying the clause, and it remains unclear whether the mechanism could be exercised in a case of continuously receiving royalties.²¹³

²⁰⁷ COM(2016) 593 final, Brussels, 14.9.2016, recital 42, p 21.

²⁰⁸ SWD(2016) 301 final, PART 2/3, Brussels, 14.9.2016, p 30.

²⁰⁹ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 72.

²¹⁰ *Ibid*, p 71.

²¹¹ Shapiro, T. EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM). *European Intellectual Property Review* 2016, 38 (12), pp 771-777, p 777.

²¹² COM(2016) 593 final, Brussels, 14.9.2016, art 15, p 30.

²¹³ Shapiro (2016), *supra* nota 212, p 777.

3.1 Purpose of the mechanism

3.1.1 Re-balancing contractual relationships

In accordance to the Public Consultation, authors and performers do not claim that transferring their rights to the transferee wouldn't be necessary, but note that they being in a weaker bargaining position inevitably results in unfair contractual provisions, especially as regards to music and audiovisual sectors.²¹⁴ The significance of strengthening the position of the quintessentially weaker creator in contractual negotiations was first referenced in the Rental and Lending Rights Directive²¹⁵, implying that the exclusive right of rental remains with the author even after the rights have been transferred. Such provision concerning the unwaivable right to equitable remuneration would be the most efficiently implemented by granting a statutory right of remuneration through collecting societies.²¹⁶ This is relevant in the sense that the Proposal is legally based *inter alia* on Rental and Lending Rights Directive and on certain rights related to copyright in the field of intellectual property.²¹⁷ However, despite of the effectiveness of exercising a statutory right through collecting societies, Article 15 makes no reference to it.²¹⁸

Protecting authors and performers in a way of legislative activity should include the conditions of ensuring that authors receive revenue and gain recognition, as well as the conditions of making further creative utilization easier.²¹⁹ Contract adjustment mechanism strongly underlines the rights of authors and performers and in the context of cultural production, it separates the interests of creators from the interests contractual counterparties.²²⁰ Regarding social impacts and fundamental rights, the mechanism would positively affect cultural diversity and the right to property, while freedom of conducting a business would be negatively affected²²¹: this implies a change from the presumption that rightholders and transferees have similar interests, moving towards a copyright regime containing increased transparency.²²² Contract adjustment mechanism grants authors and performers the right to acquire a fair level of remuneration

²¹⁴ Directorate General Internal Market and Services of the European Commission – Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, p 78.

²¹⁵ “It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them”. OJ L 376/28, 27.12.2006, recital 12, p 29.

²¹⁶ Synodinou (2012), *supra* nota 7, p 251.

²¹⁷ COM(2016) 593 final, Brussels, 14.9.2016, p 4.

²¹⁸ *Ibid*, art 15, p 30.

²¹⁹ Ramalho (2016), *supra* nota 37, p 181.

²²⁰ Geiger, C. *et al.* The Resolution of the European Parliament of July 9, 2015: paving the way (finally) for a copyright reform in the European Union? *European Intellectual Property Review* 2015, vol 683, pp 1-31, p 9.

²²¹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 190.

²²² Geiger, C. *et al.* (2015), *supra* nota 220, p 9.

without compromising their contractual relationships²²³ and in accordance with the opinion of the European Economic and Social Committee, succeeds in balancing bargaining powers of artists.²²⁴

3.1.2 Strengthening copyright as a property right

By strengthening the negotiation position of creators and by improving the ability to control the utilization of the work, the 2016 Proposal would positively affect copyright as a property right, as established in Article 17 of the Charter of Fundamental Rights of the European Union (“the Charter”)²²⁵. The significance of this impact relies on the fact that copyright taking a step towards a property right would improve licensing practices and guarantee creators’ income.²²⁶ When it comes to any type of property, the principle is that the owner is entitled to determine how it will be used, without any other person being entitled to legitimately use it without authorization (given that the utilization occurs within lawfully acknowledged rights and interests of the society).²²⁷ Copyright is similar in the sense that the rightholder is entitled to utilize the creation the way he decides and has the possibility of preventing certain acts in respect of the work. National law grants an exclusive right to the owner, which allows the authorization of a third party to exploit the work, given that – similarly to property rights – the interests of others are taken into account.²²⁸ Based on the Lockean theory of intangible nature of a work (each person has “a property in his own person”, including the “labour of his body, and the work of his hands”²²⁹), natural rights theory presupposes that immaterial goods merely refer to immaterial

²²³ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 189.

²²⁴ Opinion of the European Economic and Social Committee – “Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market” and “Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmission of broadcasting organisations and retransmissions of television and radio programmes” and “Proposal for a Directive of the European Parliament and of the Council on certain permitted use of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society”, INT/804 Copyright package, Brussels 25.1.2017, 6.3, p 11.

²²⁵ Charter of Fundamental Rights of the European Union. C 364/1, 18.12.2000, art 17, p 12.

²²⁶ COM(2016) 593 final, Brussels, 14.9.2016, p 9.

²²⁷ World Intellectual Property Organization (WIPO) Publication No. 909(E) – Understanding Copyright and Related Rights, Switzerland, 2016, p 7.

²²⁸ *Ibid*, p 4.

²²⁹ Kramer, M. H. John Locke and the origins of private property: Philosophical explorations of individualism, community, and equality. New York, Cambridge University Press 1997, p 130.

property rights of a *sui generis* nature, rather than imposing ownership rights: corporeal property implies an ownership, incorporeal exploitation.²³⁰

Epstein, however, endorses the resemblance that tangible and intangible properties bear by pointing out that the issues of similarity escalate particularly in the context of digital copyrights.²³¹ The emerging of an online environment and digital dissemination of content results in the divergence between rights *in personam* and rights *in rem* becoming more obscure – this contributes to a system that corresponds to a property regime.²³² Since the doctrines of private and common property have coexisted in the past, a combined resolution ought not to dominate either of the two structures.²³³ Albeit “digital copyright” and “intellectual property” can be viewed as a contradiction in terms²³⁴, it is justifiable that the author is entitled to control the utilization of his property, irrespective of the forum. Determining copyright merely with respect to monopoly privileges focuses on the concept of intellectual property right as a right, rather than perceiving it as a form of property.²³⁵ In the case *Luksan*, the CJEU ruled that in accordance with Article 2(2) of the Rental and Lending Rights Directive²³⁶, the principal director of a cinematographic work is entitled to obtain the status of an “author”.²³⁷ Subsequently, intellectual property was acknowledged as being an “integral part of property”²³⁸. Should the creator be deprived from the legally obtained copyright and be disallowed to utilize his exploitation rights, a breach of Article 17 of the Charter would occur.²³⁹ Thus, as the Impact Assessment evaluated, copyright could be further reinforced as a property right by granting creators the right to claim for supplemental remuneration.²⁴⁰

²³⁰ Gaita, Christie (2004), *supra* nota 79, p 777.

²³¹ Mossof, A. Is Copyright Property? San Diego Law Review 2005, 42 (29), pp 29-44, p 37.

²³² Elkin-Koren (1997), *supra* nota 52, p 98.

²³³ Epstein, R. A. Principles for a Free Society: Reconciling Individual Liberty with the Common Good, 6th Edition. Reading, Mass: Perseus Books 1998, p 254.

²³⁴ Mossof (2005), *supra* nota 231, p 30.

²³⁵ *Ibid*, p 37, 38.

²³⁶ OJ L 376/28, 12.12.2006, art 2(2), p 29.

²³⁷ “With regard to all the exploitation rights at issue, including those governed by Directive 2001/29, the principal director of a cinematographic work is to be considered its author or one of its authors”. CJEU 9.2.2012, Case C-277/10, *Martin Luksan v Petrus van der Let*, para 48, p 12.

²³⁸ *Ibid*, para 66, p 13.

²³⁹ Synodinou (2012), *supra* nota 7, p 221.

²⁴⁰ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 186.

3.2 Functioning of the mechanism

3.2.1 The right to request renegotiation

Contract adjustment mechanism is designed for unforeseen revenues.²⁴¹ German copyright law imposes such clause on copyright contracts in a situation where the remuneration agreed is significantly disproportionate in comparison to the revenue gained from the use of the work.²⁴² The right to request renegotiation is based on that conspicuously disproportionate remuneration, entitling the creator to adjust the agreement²⁴³ and to demand the acquisition of the difference between the revenue determined in the contract and equitable remuneration.²⁴⁴ Such right cannot be waived in advance.²⁴⁵ Solely designed for the contracting partner, the clause safeguards equitable remuneration during the entire term of the contract – in case where the revenue is not appropriate, artists are instantly entitled to sue for payment, meaning that the date on which the contract was concluded is imperative in order to evaluate whether the remuneration in question is conspicuously disproportionate.²⁴⁶ If a contractual provision opposes the possibility of requesting the renegotiation of a contract, it is perceived as lapsed.²⁴⁷ However, whether the German courts are able to assess flat fees in accordance with common rules of control of general terms and conditions (as defined in the German Civil Code), is debatable.²⁴⁸

It should be noted, that the notion of a “bestseller” clause is misleading in the sense that the mechanism applies not only where the work in question is a successful bestseller, but also in a situation where a notable disproportion exists between the contractual remuneration and the factual compensation. Thus, the mechanism applies even in the case of low or medium success, given that the revenue was unforeseen and is disproportionate in comparison to the agreed reward. As the Impact Assessment suggests, a more accurate description of contract adjustment mechanism would therefore be a “betterseller” clause – such term exists, for instance, in the national laws of Denmark and France.²⁴⁹ A direct impact of the mechanism would concern only certain agreements, since in accordance with Article 15, the main condition determining the right

²⁴¹ *Ibid*, p 180.

²⁴² SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 222.

²⁴³ Act on Copyright and Related Rights (Copyright Act) 9.9.1965 (Federal Law Gazette Part I, p. 1273), art 32a(1).

²⁴⁴ Gutsche, K. New copyright contract legislation in Germany: rules on equitable remuneration provide “just rewards” to authors and performers. *European Intellectual Property Review* 2003, 25 (8), pp 366-372, p 368.

²⁴⁵ Act on Copyright and Related Rights (Copyright Act) 9.9.1965 (Federal Law Gazette Part I, p. 1273), art 32a(3).

²⁴⁶ Gutsche (2003), *supra* nota 244, p 368.

²⁴⁷ *Ibid*, p 369.

²⁴⁸ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 222.

²⁴⁹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 179.

to request renegotiation relies solely on whether a significant disproportion occurs.²⁵⁰ The significance in being entitled to request renegotiation relies on the fact that since the copyright grant alone is not able to ensure revenue of any kind, contracts exclusively guarantee remuneration – copyright merely enables the functioning of copyright contracts.²⁵¹

The adaptation of remuneration would be requested on the basis of information contained in the reporting statements and conducted either by a court or other competent authority.²⁵² The particular situation of each case as well as specific circumstances in specific sectors should be taken into consideration when evaluating the mechanism. Should the parties disagree on whether to adapt the terms of the contract, the creator has the right to take legal action.²⁵³ Due to the reluctance of authors and performers to reinforce their rights before a court, an alternative dispute resolution mechanism is established in addition to and in support of the contract adjustment mechanism.²⁵⁴ The right to request renegotiation is significant in the sense that the financial reward that authors and performers acquire for their creation is thoroughly dependent on the end result of the negotiations, rather than the exclusive rights.²⁵⁵ However, in accordance with the standard Principle-Agent model, the impact of granting the right to request renegotiation concerns a problem where the agent foresees the renegotiation and subsequently ensures that the financial outcome is inadequate.²⁵⁶

It is not only authors that have the right to demand an appropriate level of remuneration: contract adjustment mechanism entitles both authors as well as performers.²⁵⁷ In this context, for the EU legislator, authors and performers imply “individuals” in the sense that they are natural persons who create (i.e. copyright granted to authors) and perform (i.e. related or neighboring rights associated with performers, producers and broadcasters) and by doing so, are an original source of cultural activity.²⁵⁸ This conduct is not uncommon: for example, exploitation contracts of both authors as well as performers are acknowledged in the 2002 amendment of the German Act on Copyright and Related Rights.²⁵⁹ Furthermore, the scope of copyright within the Internal Market

²⁵⁰ *Ibid*, p 188.

²⁵¹ Watt (2010), *supra* nota 82, p 175.

²⁵² SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 187.

²⁵³ COM(2016) 593 final, Brussels, 14.9.2016, recital 42, p 21.

²⁵⁴ *Ibid*, recital 43, p 21.

²⁵⁵ Cornish, W. *et al.* (2010), *supra* nota 9, p 433.

²⁵⁶ Bolton, P. Renegotiation and the Dynamics of Contract Design. *European Economic Review* 1990, 34 (2-3), pp 303-310, p 306.

²⁵⁷ COM(2016) 593 final, Brussels, 14.9.2016, art 15, p 30.

²⁵⁸ Ramalho (2016), *supra* nota 37, p 40.

²⁵⁹ Hilty, Peukert (2004), *supra* nota 45, p 416.

has been broadened by the CJEU case law due to a ruling recognizing that the rights to reproduce and to perform are both referred to as exclusive rights requiring protection.²⁶⁰ Performers generally take part in activities that are “more immediately artistic and creative” than the activities of authors who obtain copyrights in sound recordings, films and broadcasts.²⁶¹

3.2.2 The right to receive adequate remuneration

Being entitled to receive remuneration is as significant as the moral rights contained in copyright: the original *GEMA* case acknowledged that the right to be remunerated is “the fundamental principle of copyright”²⁶². Irrespective of disparities between the expressions “compensation” and “remuneration”, several recitals of the InfoSoc Directive imply coexistence between the two notions.²⁶³ Also acknowledged by the European court²⁶⁴, this interpretation indicates that Member States are entitled to choose between a more lenient conception of fair compensation as a permissive standard, or alternatively, copy levy schemes safeguarding equitable remuneration.²⁶⁵ As opposed to the InfoSoc Directive it amends, the Proposal for copyright in the DSM focuses solely on enforcing fair “remuneration” rather than “compensation”²⁶⁶ – this could be interpreted as meaning that since MS no longer have the choice of a lower standard of flexible compensation, the Proposal takes a more restrictive view in increasing transparency in creators’ exploitation contracts.

If the contractual remuneration is not adequate, the author is entitled to require an adjustment of the contract in order to receive equitable remuneration.²⁶⁷ This right is granted in a situation where the [...remuneration originally agreed is disproportionately low compared to the

²⁶⁰ [...The provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority...]. CJEU 18.3.1980, Case 62/79, *Coditel v Ciné Vog Films*, para 18, p 904.

²⁶¹ Cornish, W. *et al.* (2010), *supra* nota 9, p 504.

²⁶² German Federal Supreme Court 18.5.1955, Case 1 ZR 8/54 GRUR 492, *Gema v Grundig*, cited in Gaita, Christie (Gaita, Christie (2004), *supra* nota 80, p 429).

²⁶³ Stamatoudi (2016), *supra* nota 15, p 319.

²⁶⁴ EU Member States are obliged to maintain private copying levy schemes “for the purposes of financing fair compensation”. CJEU 21.10.2010, Case C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, para 46, p 26. CJEU 11.7.2013, Case C-521/11, *Amazon.com International Sales Inc., Amazon EU Sàrl, Amazon.de GmbH, Amazon.com GmbH, Amazon Logistik GmbH v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH*, para 24, 31. CJEU 5.3.2015, Case C-463/12, *Copydan Båndkopi v Nokia Danmark A/S*, para 23, p 8.

²⁶⁵ Stamatoudi (2016), *supra* nota 15, p 320.

²⁶⁶ COM(2016) 593 final, Brussels, 14.9.2016, art 15, p 30.

²⁶⁷ Hilty, Peukert (2004), *supra* nota 45, p 416.

subsequent relevant revenues and benefits derived from exploitation...].²⁶⁸ It remains unclear how the right to request renegotiation of contractual remuneration would truly function, as the mechanism has not yet been discussed on an adequate level – Article 15 does not provide answers for calculating “disproportionality low” remuneration, subsequently generating a question of how extensive the creators’ rights are in challenging the terms that determine their remuneration.²⁶⁹ National copyright legislations could presumably bring forth answers: in Member States where revision clauses already exists, for example in Germany, copyright legislation ensures that the author obtains an equitable proportion of the exploitation of the work, which occurs after the conclusion of the contract (*ex post* view). Subsequently, the creator is entitled to demand an adjustment of the contract, in consequence of the disproportionality of the revenues acquired.²⁷⁰

A disproportionate income refers to a conspicuous disproportion, with considering all advantages for the exploiter.²⁷¹ When determining a “conspicuous” discrepancy, the remuneration is compared with the revenue resulting from the exploitation of the work. It is notable, however, that the returns do not refer to “profits but the gross proceeds” and primarily have an impact on lump sum payments, since the ratio between revenues and proceeds is not affected by royalty rates²⁷² – presumably meaning that a contract adjustment mechanism might function differently in case of royalties and in case of lump sum payments. A difference of 100 percentages between the remuneration and the contractual revenue constitutes a conspicuously disproportionate compensation, however smaller percentages could produce the same conclusion (given that the right to request supplemental remuneration is legitimate).²⁷³ According to French copyright law, the creator is granted a right to claim an adjustment of the remuneration, presupposing that it is a case of flat remuneration and the author’s claim concerns at least 7/12 of the remuneration he ought to have received had it not been disproportional.²⁷⁴ In consequence of a burdensome contract, suffering a detriment that amounts to more than 7/12 is thus determined as being

²⁶⁸ COM(2016) 593 final, Brussels, 14.9.2016, art 15, p 30.

²⁶⁹ Amijee, K. European Commission proposal to modernise copyright. *Entertainment Law Review* 2017, 28 (1), pp 9-12, p 11.

²⁷⁰ Hilty, Peukert (2004), *supra* nota 45, p 416.

²⁷¹ *Ibid*, p 417.

²⁷² It is therefore “advisable to prefer the negotiation of royalty rates instead of lump sums to avoid claims of re-compensation.” Gutsche (2003), *supra* nota 243, p 370.

²⁷³ *Ibid*, p 370.

²⁷⁴ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 221.

“disproportionate”. Similarly to France, in Germany this right to request renegotiation is granted solely in a situation concerning lump sum payments.²⁷⁵

Croatian copyright legislation grants the right to use a revision clause in a case where the revenue obtained is “obviously disproportionate” in comparison to the contractual remuneration, which the author cannot repeal.²⁷⁶ In this case, the author has the right to amend the contract and “fix a more equitable share in the profit”.²⁷⁷ The Copyright Act of Czech Republic determines that creators are entitled to use a betterseller provision where the amount of remuneration is “obviously disproportionate” as well, and adds that the author has the right to obtain an equitable, additional royalty payment.²⁷⁸ A betterseller clause in the Dutch copyright law entitles the author to bring a claim before court and request supplemental fair compensation, given that the contractual remuneration is “seriously disproportionate”²⁷⁹, with the creator being able to use the provision also against a third party.²⁸⁰ Copyright legislation in Portugal specifically mentions the percentage of disproportional remuneration²⁸¹: as a prerequisite, there must be “grave economic injury” suffered due to disparity between the income of the creator and revenues earned by the beneficiary. The author is entitled to request supplemental remuneration only where the [...percentage established is clearly lower than that customarily paid in transactions of the same nature...].²⁸²

²⁷⁵ Intellectual Property Code 3.7.1992, art. L. 131-5.

²⁷⁶ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 220.

²⁷⁷ Copyright and Related Rights Act (O.G. 167/2003), art 54(1).

²⁷⁸ Law No. 121/2000 Coll. Of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act), art 46(6).

²⁷⁹ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 223.

²⁸⁰ Act of March 6, 2003, on the Supervision of Collective Management Organizations for Copyright and Related Rights, art 25d(1).

²⁸¹ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 223.

²⁸² Code of Copyright and Related Rights, 17.9.1985, art 49.

4. Legal implementation of contract adjustment mechanism

By acting independently and without concentrating on any particular national interest, the Council and the European Parliament exercise their legislative powers solely in respect of a text, which has been designed by the Union institution²⁸³ with Article 17(1) of the TEU conferring the duty of effective application, implementation and enforcement of the EU law to the Commission.²⁸⁴ Legislative Proposal for a Directive on copyright will be implemented via ordinary legislative procedure (COD).²⁸⁵ Initially known as co-decision, the procedure is founded on the equality of discussions between the European Parliament (citizens' representation) and the Council (Member States' representation).²⁸⁶ As for the current state of the procedure, the Proposal is awaiting the committee decision.²⁸⁷ In accordance with the Proposal, the Directive will enter into force on the twentieth day following its publication in the *Official Journal of the European Union*²⁸⁸ – the Finnish Parliament has criticized the time of entry into force being exceptionally short, notably in comparison to the extensive scope of the Directive.²⁸⁹ The Commission emphasizes discrepancies in national legislations governing the remuneration of creators (namely in different copyright sectors)²⁹⁰: the Proposal thus presents a uniform approach of transparency requirements throughout the Union, while at the same time it confers power to Member States to govern specificities of each sector. In general, it requires alterations in MS copyright provisions, of which many already impose sector-specific transparency obligations.²⁹¹ Transparency obligations in the Proposal aim at reinforcing the negotiation positions of intellectual creators, and do not have retroactive effects on rights obtained before the transposition date.²⁹² A dispute resolution mechanism supports the contract adjustment mechanism and will affect MS in the sense that they will face implementation costs for establishing the mechanism. Such costs are presumed to remain moderate for MS where

²⁸³ Dashwood, A. *et al.* (2011), *supra* nota 5, p 72.

²⁸⁴ Information from European Union institutions, bodies, offices and agencies. Communication from the Commission – EU Law: Better Results through Better Application (2017/C 18/02), p 1.

²⁸⁵ European Parliament / Legislative Observatory: Copyright in the Digital Single Market. [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0280\(OLP\) \(1.3.2017\).](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0280(OLP) (1.3.2017).)

²⁸⁶ Dashwood, A. *et al.* (2011), *supra* nota 5, p 73.

²⁸⁷ European Parliament / Legislative Observatory: Copyright in the Digital Single Market. [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0280\(OLP\) \(1.3.2017\).](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0280(OLP) (1.3.2017).)

²⁸⁸ COM(2016) 593 final, Brussels, 14.9.2016, art 23, p 32.

²⁸⁹ U communication U 63/2016 vp by the Government concerning Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.

[https://www.eduskunta.fi/FI/vaski/Kirjelma/Sivut/U_63+2016.aspx \(2.2.2017\).](https://www.eduskunta.fi/FI/vaski/Kirjelma/Sivut/U_63+2016.aspx (2.2.2017).)

²⁹⁰ Matulionyte, R. The Upcoming EU Copyright Review: a Central-Eastern European perspective. *International Review of Intellectual Property and Competition Law* 2015, 46 (4), pp 439-468, p 452.

²⁹¹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 191.

²⁹² COM(2016) 593 final, Brussels, 14.9.2016, p 5.

dispute resolution mechanisms are already in place (as they could rely on the existing structures) and in those States where such mechanisms would need to be set up, the costs would still be inexpensive in comparison to the costs of a high number of judicial proceedings.²⁹³

4.1 Options for regulation

4.1.1 Member States with legislative transparency obligations

In the context of EU MS where legislative transparency obligations already exist, Belgium²⁹⁴, Bulgaria²⁹⁵, Croatia²⁹⁶, Czech Republic²⁹⁷, Denmark²⁹⁸, Finland²⁹⁹, France³⁰⁰, Germany³⁰¹, Greece³⁰², Hungary³⁰³, Italy³⁰⁴, Lithuania³⁰⁵, Poland³⁰⁶, Portugal³⁰⁷, Romania³⁰⁸, Slovakia³⁰⁹, Slovenia³¹⁰, Spain³¹¹ and Sweden³¹² all provide copyright legislation imposing transparency obligations. Transparency obligations in force are divided into specific sectors, concerning publishing, audiovisual, music or public performance – or alternatively, imposed on all sectors (namely in Czech Republic, Denmark, Poland, Slovakia and Slovenia).³¹³ In Member States where legislative transparency obligations exist in all three sectors, the transparency measures would only indicate supplemental policy alterations: these MS must revise the transparency obligations required by the contract adjustment mechanism in dialogue with stakeholders, and must guarantee that they comply with the minimum prerequisites.³¹⁴

²⁹³ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 187.

²⁹⁴ Law of April 19, 2014, inserting Book XI 'Intellectual Property' to the Code of Economic Law, art XI.198, XI.206, XI.202.

²⁹⁵ Law of Copyright and Neighboring Rights No 56/1993, art 66.

²⁹⁶ Copyright and Related Rights Act (OG No. 176/2003), art 58(1), 119.

²⁹⁷ Law No. 121/2000 Coll. Of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act), art 49(4).

²⁹⁸ Consolidated Act on Copyright 2014 (Consolidated Act No. 1144 of October 23rd, 2014), art 57.

²⁹⁹ Copyright Act 8.7.1961/404, section 35(2)(2).

³⁰⁰ Intellectual Property Code 3.7.1992, art L. 132-13, L. 132-14, L.132-17-3, L. 132-28, L.132-21.

³⁰¹ Act on Copyright and Related Rights (Copyright Act) 9.9.1965 (Federal Law Gazette Part I, p. 1273), art 79a.

³⁰² Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters, art 34(3).

³⁰³ Act No. LXXVI of 1999 on copyright, art 66(5).

³⁰⁴ Law for the Protection of Copyright and Neighboring Rights (Law No. 633 of April 22, 1941), art 130.

³⁰⁵ Law on Copyright and Related Rights 18.5.1999 No VIII-1185, art 46.

³⁰⁶ Act of 4 February 1994 on Copyright and Related Rights, art 47.

³⁰⁷ Code of Copyright and Related Rights, 17.9.1985, art 96.

³⁰⁸ Law No. 8 of March 14, 1996 on Copyright and Neighboring Rights, art 71(2), 61(1).

³⁰⁹ Act No. 618/2003 Coll. On Copyright and Rights Related to Copyright, art 4(2).

³¹⁰ Copyright and Related Rights Act, 30.3.1995, art 82, 108.

³¹¹ Consolidated Text of the Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996), art 64, 90, 78.

³¹² Act on Copyright in Literary and Artistic Works (1960:729), art 35.

³¹³ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 204 - 209.

³¹⁴ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 191.

It is presumable that in MS where transparency obligations exist in one or more sectors, the States are entitled to autonomously govern whether the provisions will be uniformly applied to extensively cover all sectors.³¹⁵ In the copyright legislations of France and Germany, for instance, there is a long tradition in ensuring fair remuneration³¹⁶. French law imposes a variety of reporting obligations and according to German law, a reporting obligation confers a right to the performer to demand information on rewards acquired by the use of the audio recording from the music producer.³¹⁷ However, the extent of protection regulated by copyright contracts varies even in these MS³¹⁸ and it is recognized that a betterseller clause is not frequently enforced by a way of litigation: judicial proceedings are uncommon within French law³¹⁹, and albeit the *Das Boot* case is the most recognized³²⁰, the respective case law is limited in Germany.³²¹ Furthermore, irrespective of the fact that the Copyright Act in Poland restricts the transfer of rights in the context of future modes of exploitation and implements a bestseller clause, these provisions are infrequently enforced and subsequently, positive guidance on calculating the remuneration does not exist.³²²

4.1.2 Member States without legislative transparency obligations

Member States that do not implement any transparency obligations in any sectors are obliged to establish such provisions.³²³ In Central and Eastern European (CEE) Countries only a few fair remuneration obligations exist, and even those are not often enforced in practice.³²⁴ Under the Copyright Act of Lithuania³²⁵, for example, there are no provisions concerning the adjustment of contract terms: revenue is typically paid for the creator as a lump sum.³²⁶ As regards to

³¹⁵ “Specific elements may nevertheless be left at the discretion of MS, in order to take account of the existing national rules and the specificities of each sector.” *Ibid*, p 133.

³¹⁶ Dusollier, S. *et al.* Study requested by the European Parliament’s Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 19.

³¹⁷ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 201.

³¹⁸ Dusollier, S. *et al.* Study requested by the European Parliament’s Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 19.

³¹⁹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 188.

³²⁰ “The creator first had to raise a claim to obtain information on the exploitation of the work before initiating proceedings on the basis of Article 32a of German copyright law.” German Federal Supreme Court 16.06.2016, Case I ZR 222/14 GRUR 1291, *Das Boot*, cited in Commission Staff Working Document (Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules, PART 1/3, Brussels, 14.9.2016, p 187).

³²¹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 187.

³²² Matulionyte (2015), *supra* nota 290, p 452.

³²³ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 191.

³²⁴ Matulionyte (2015), *supra* nota 290, p 452.

³²⁵ Law on Copyright and Related Rights 18.5.1999 No VIII-1185.

³²⁶ Matulionyte (2015), *supra* nota 290, p 452.

transposing the copyright Directive into national law, these Member States must alter the necessary laws, regulations and administrative provisions in order to adapt to the mechanism in Article 15.³²⁷ In the field of book publishing, for example, transparency measures of the Proposal impose reporting statements, which consists of *inter alia* the amount of copies sold in all formats and in all territories, the number of copies distributed online, prepayment acquired by the creator and the publisher's royalty percentage of each format.³²⁸ In the audiovisual sector, the examples include the amount of copies sold or rented in specific networks and territories, rewards from each territory, the mode of exploitation and the advance obtained by the creator. In the music sector, reporting obligations contain the amount of physical records sold, streamed or downloaded in each territory and the royalty rates and payments.³²⁹

4.2 An example of national legislation: Finland

4.2.1 Finnish Copyright Act

Traditionally, Finnish copyright law has been in conformity with the equivalent laws of the Nordic countries, subsequently bearing resemblance to Danish, Norwegian and Swedish copyright legislation.³³⁰ Irrespective of the fact that contract adjustment mechanisms are generally not acknowledged in copyright provisions of the Nordic countries³³¹, in Finland the necessity to safeguard a fair level of remuneration for authors and performers was first discussed in the period of 2008 - 2009 in the report published by the Ministry of Education. A consensus was not reached³³², and in 2010s the issue came to the fore again due to digitalization and the emerging of digital technology. In 2014, the government drafted a legislative bill for the parliament to pass, concerning *inter alia* the section 29 of the Copyright Act.³³³ Regarding unfair terms in copyright contracts, there was a consensus about the necessity of granting the right to renegotiate such terms. It was deemed necessary to include an adjustment of unreasonable

³²⁷ COM(2016) 593 final, Brussels, 14.9.2016, art 21, p 32.

³²⁸ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 212.

³²⁹ *Ibid*, p 212.

³³⁰ Metaxas-Maranghidis, G. Intellectual Property Laws of Europe. Great Britain, Chancery Law Publishing Ltd 1995, p 126.

³³¹ Government Bill concerning copyright, HE 181/2014. <http://www.finlex.fi/fi/esitykset/he/2014/20140181> (2.2.2017).

³³² Report made by the Copyright Commission concerning the need for amendments to copyright legislation. <http://www.minedu.fi/export/sites/default/OPM/Julkaisut/2010/liitteet/tr9.pdf?lang=fi> (18.02.2017).

³³³ Government Bill concerning copyright, HE 181/2014. <http://www.finlex.fi/fi/esitykset/he/2014/20140181> (2.2.2017).

conditions in consequence of technological development and the subsequent increment of possibilities of exploitation: these could lead to the original contract becoming unreasonable.³³⁴

Thus, section 29 of the Finnish Copyright Act concerning “the adjustment of an unreasonable condition in an agreement on a transfer of copyright” provides *inter alia* that should a contract include a condition that is unreasonable, that condition ought to be altered.³³⁵ The determination of such prerequisite must consider the agreement comprehensively, taking account of the parties’ positions and the conditions applicable before and after the conclusion of the contract.³³⁶ It is expressly mentioned that obtaining revenue in consideration of the exploitation of the work should be understood as a condition in the contract³³⁷ – based on this, authors and performers are entitled to demand an adjustment of their remuneration. In addition, Finnish copyright law imposes reporting obligations solely concerning publishers, given that “a sale or rental has taken place for which the author is entitled to be remunerated”.³³⁸ Section 35(2) of the Copyright Act requires that the publisher must provide a report to the author within nine months from the end of the year, in respect of the “sales or rentals during the year and the number of copies in stock” for which the author is entitled to be compensated. This applies even where the author demands supplemental information about the copies after the ends of the accounting term.³³⁹

4.2.2 Complying with the Proposal

Ministry of Education and Culture has published statements concerning the Proposal for a Directive on copyright and Article 15 from different parties it will have an effect on. For example, IFPI Finland has stated that the contract adjustment mechanism needs to be removed completely due to the fact that the functioning of music industry relies fully on the freedom of contract: it is not justifiable to bring legal uncertainty to the industry.³⁴⁰ The Federation of the

³³⁴ Government Bill concerning copyright, HE 181/2014. <http://www.finlex.fi/fi/esitykset/he/2014/20140181> (2.2.2017).

³³⁵ Copyright Act 8.7.1961/404, section 29(1).

³³⁶ Copyright Act 8.7.1961/404, section 29(2).

³³⁷ Copyright Act 8.7.1961/404, section 29(4).

³³⁸ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 200, 221.

³³⁹ Copyright Act 8.7.1961/404, section 35(2).

³⁴⁰ Musiikintuottajat is a national trade association representing 18 record companies in Finland, including major international record companies such as Sony, Universal and Warner. Musiikintuottajat – IFPI Finland ry, Statement for the Ministry of Education and Culture concerning a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Helsinki, 14.10.2016. http://www.minedu.fi/export/sites/default/OPM/Tekijaenoikeus/eu-yhteistyoe/DMS_direktiivi_lausunnot/Musiikintuottajat_IFPI_Finland_ry.pdf (1.2.2017), p 6.

Finnish Media Industry also notes that the bestseller clause is detrimental as regards to legal certainty of contracts and predictability of businesses.³⁴¹ However, Impact Assessment of the Proposal has evaluated that while contract adjustment mechanism affects negatively on the freedom to conduct a business, a dispute resolution mechanism brings forth a voluntary method of reaching an agreement in the context of the remuneration owed to authors.³⁴² The Society of Finnish Composers, on the other hand, has stated that the mechanism is excellent in the sense that it improves the position of the weaker contractual party³⁴³ and Filmex Ry, a copyright society for actors, alike underlines the absolute necessity of introducing a contract adjustment mechanism.³⁴⁴

As regards to the modernization of copyright in general, Finland's position was formed in connection with the Digital Single Market Strategy for Europe in 2015: in accordance with the Grand Committee, alternative solutions for cross-border licensing should be offered without disrupting the functioning of the Single Market.³⁴⁵ In accordance with the Government statement, the Proposal needs to find a balance between the protection of creators and rightholders, and on the other hand, the fundamental rights and objectives of the society, i.e. the freedom of science and culture. Furthermore, a Parliament report states that it is not probable that the remuneration of authors and performers will face a significant rise after the copyright legislation is modernized: the impact of the Proposal on the benefits of creators has not been sufficiently analyzed.³⁴⁶ When transposed into national law, the copyright Directive will require alterations on the Copyright Act and on the Information Society Code³⁴⁷, which fosters the use of

³⁴¹ Viestinnän Keskusliitto, Statement for the Ministry of Education and Culture concerning a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Helsinki, 15.10.2016. http://www.minedu.fi/export/sites/default/OPM/Tekijaenoikeus/eu-yhteistyoe/DMS_direktiivi_lausunnot/Viestinnxn_Keskusliitto_ry.pdf (3.2.2017).

³⁴² SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 189.

³⁴³ Society of Finnish Composers, Statement for the Ministry of Education and Culture concerning a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Helsinki, 15.10.2016. http://www.minedu.fi/export/sites/default/OPM/Tekijaenoikeus/eu-yhteistyoe/DMS_direktiivi_lausunnot/Suomen_Saveltajat_ry.pdf (2.2.2017).

³⁴⁴ Filmex, Statement for the Ministry of Education and Culture concerning a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Helsinki, 15.10.2016.

http://www.minedu.fi/export/sites/default/OPM/Tekijaenoikeus/eu-yhteistyoe/DMS_direktiivi_lausunnot/Nayttelijoiden_Tekijanoikeusjarjesto_Filmex_ry.pdf (1.2.2017), p 4.

³⁴⁵ The Grand Committee is responsible for the parliamentary scrutiny of the EU legislative proposals in Finland. Opinion of the Grand Committee concerning a Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators.

https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/SiVL_4+2016.pdf (17.2.2017), p 2.

³⁴⁶ U communication U 63/2016 vp by the Government concerning Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.

https://www.eduskunta.fi/FI/vaski/Kirjelma/Sivut/U_63+2016.aspx (2.2.2017).

³⁴⁷ Information Society Code 7.11.2014/917, art 1.

electronic communications services.³⁴⁸ Since the Proposal allows Member States to take the specificities of each sector into consideration, Finland has a certain degree of discretion in deciding whether the remuneration provisions concerning the publishing sector will expand to cover music and audiovisual sectors as well.

4.3 Aspects of unclear implementation

4.3.1 Lack of definitions

In the statement concerning the Proposal for a DSM Directive, the Finnish Musicians' Union has criticized Article 15 for not being tangible enough and lacking definitions, requiring that the Directive imposes clear obligations to MS for executing the mechanism.³⁴⁹ In their opinion on the application of the Principles of Subsidiarity and Proportionality, the Dutch Senate has also pointed out its concerns to the President of the Council of the European Union by emphasizing that it is unclear in the Proposal how and by whom the disproportionality of the remuneration in question will be determined³⁵⁰ and has suggested that a Copyright Contract Law Disputes Committee could presumably be part of this determination³⁵¹. Furthermore, the time of entry into force of the Directive is exceptionally short³⁵² and problematic in the context of Article 15 lacking clear and concrete definitions. For example, the complexity of a bestseller clause in Germany is mostly due to the fact that the amount of appropriate remuneration has not been defined by law and most of the creators and creations are of special character, meaning that the determination of an adequate remuneration must occur on a case-by-case basis (it is uncertain whether the courts are even able to revise and estimate these fees³⁵³).³⁵⁴ The Society of Authors

³⁴⁸ U communication U 63/2016 vp by the Government concerning Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.

https://www.eduskunta.fi/FI/vaski/Kirjelma/Sivut/U_63+2016.aspx (2.2.2017).

³⁴⁹ Suomen Muusikkojen Liitto ry, Statement for the Ministry of Education and Culture concerning a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Helsinki, 14.11.2016. http://www.minedu.fi/export/sites/default/OPM/Tekijaenoikeus/eu-yhteistyoe/DMS_direktiivi_lausunnot/Suomen_Muusikkojen_Liitto_ry.pdf (1.2.2017), p 2.

³⁵⁰ Cover Note – Opinion on the application of the Principles of Subsidiarity and Proportionality on a “Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market” and “Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes” from Dutch Senate to President of the Council of the European Union, Brussels, 17.1.2017.

³⁵¹ Chair of the Standing Committee for Security and Justice, Netherlands – Questions about the package of new EU rules on copyright. Brussels, 20.12.2016, p 2.

³⁵² U communication U 63/2016 vp by the Government concerning Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.

https://www.eduskunta.fi/FI/vaski/Kirjelma/Sivut/U_63+2016.aspx (2.2.2017).

³⁵³ SWD(2016) 301 final, PART 3/3, Brussels, 14.9.2016, p 222.

has also maintained that unclear legal terms in Article 15 might endorse contractual counterparties' opportunities in avoiding the payment of supplemental remuneration to the authors.³⁵⁵ In their draft report, the European Parliament Committee on Legal Affairs has also maintained that the wording of Article 15 should be more precise and suggests amending the text in a way that it would entitle creators to "equitable remuneration" rather than to request "additional, appropriate remuneration".³⁵⁶

4.3.2 Lack of analyses

Regarding the advantage of creators, the impact of the Proposal has not been sufficiently analyzed³⁵⁷: due to the complexity of evaluating the costs of renegotiation for contractual counterparties, the Commission did not generate an evaluation.³⁵⁸ As regards to implementation issues, the fact that there has not yet been an adequate level of discussion about the contract adjustment mechanism subsequently leads to the question of how the right to request renegotiation of contractual terms would be transposed into national law.³⁵⁹ The copyright review process carried out in 2013 - 2016 in respect of the present EU copyright legislation concerned the exceptions on illustration for teaching, research and on specific acts of reproductions³⁶⁰ – the Proposal's Impact Assessment summarized the main relevant results of this process, yet it should be noted that the topic of fair remuneration in contracts of authors and performers was not specifically discussed as no EU copyright rules exist in the area of achieving a well-functioning market place for copyright.³⁶¹ Furthermore, the contracts concluded by performers have been excluded from receiving an appropriate level of discussion. Irrespective of the fact that Article 15 entitles both authors and performers to request equitable remuneration, the study of contractual arrangements applicable to creators (as requested by the European Parliament's Committee on Legal Affairs) was solely focused on authors' exploitation contracts,

³⁵⁴ Government Bill concerning copyright, HE 181/2014. <http://www.finlex.fi/fi/esitykset/he/2014/20140181> (2.2.2017).

³⁵⁵ The Society of Authors (SoA) – Response to the Intellectual Property Office's Calls for Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework, 6.12.2016, p 10.

³⁵⁶ European Parliament Committee on Legal Affairs – Draft Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market. 2016/0280(COD), 10.3.2017, p 43.

³⁵⁷ U communication U 63/2016 vp by the Government concerning Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.

https://www.eduskunta.fi/FI/vaski/Kirjelma/Sivut/U_63+2016.aspx (2.2.2017).

³⁵⁸ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 187.

³⁵⁹ Amijee (2017), *supra* nota 268, p 11.

³⁶⁰ COM(2016) 593 final, Brussels, 14.9.2016, p 6.

³⁶¹ SWD(2016) 301 final, PART 2/3, Brussels, 14.9.2016, p 42.

excluding contracts concluded by performers³⁶², as was the study on the economic mechanisms influencing the flows of income in the present copyright framework in Europe, prepared for the European Commission³⁶³.

4.3.3 Enforcement issues

While it is recognized that bestseller provisions could present an answer to the uncertainty of online modes of exploitation, they are unable to solve the original premise of imbalanced bargaining positions: new negotiations of contractual terms must still take place.³⁶⁴ Furthermore, albeit revision clauses manage to strengthen the power of the author in contractual relationships, there is a lack of imminent effect on the remuneration.³⁶⁵ What makes the enforcement of the Proposal even more complex is that irrespective of the fact that collective bargaining is deemed to be a positive option in ensuring transparency³⁶⁶ and that the Society of Authors has suggested the inclusion of representatives to enable collective representation³⁶⁷, no direct reference to collective bargaining agreements is made in Article 15.³⁶⁸ Enforcement of the mechanism could also be affected by the negative impact of contract adjustment mechanism on the freedom of contract³⁶⁹, which gravely contradicts with the Commission's Entrepreneurship 2020 Action Plan and the prospective competitiveness and entrepreneurship enabled by the digital environment³⁷⁰. European Committee of the Regions has also emphasized that in order to enforce contract adjustment mechanism properly, Article 15 should underline that the mechanism ought not to apply all sectors uniformly: "this mechanism must guarantee fair

³⁶² Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 19.

³⁶³ Guibault, L., Salamanca, O. Europe Economics, A study prepared for the European Commission – Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works, European Union, 2016, p 1.

³⁶⁴ Dusollier, S. *et al.* Study requested by the European Parliament's Committee on Legal Affairs – Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Brussels, January 2014, p 71.

³⁶⁵ Guibault, L., Salamanca, O. Europe Economics, A study prepared for the European Commission – Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works, European Union, 2016, p 122.

³⁶⁶ "Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency." COM(2016) 593 final, Brussels, 14.9.2016, recital 41, p 21.

³⁶⁷ The Society of Authors (SoA) – Reponse to the Intellectual Property Office's Calls for Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework, 6.12.2016, p 10.

³⁶⁸ Shapiro (2016), *supra* nota 211, p 777.

³⁶⁹ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 179.

³⁷⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Entrepreneurship 2020 Action Plan: Reigniting the entrepreneurial spirit in Europe. COM(2012) 796 final, Brussels, 9.1.2013, p 13.

compensation, taking into account the specific features of different sectors”.³⁷¹ In addition, enforcing a bestseller clause is complex where the author receives royalties rather than lump sum payments³⁷² and in general, since revision clauses are rarely endorsed by a way of litigation, they are used as leverage prior to and following the conclusion of the agreement.³⁷³

³⁷¹ European Committee of the Regions – Opinion on Copyright in the Digital Single Market. 121st plenary session – 8-9 February 2017, SEDEC-VI-019, p 8.

³⁷² Shapiro (2016), *supra* nota 211, p 777.

³⁷³ SWD(2016) 301 final, PART 1/3, Brussels, 14.9.2016, p 187.

Conclusion

The coexistence of separate national copyright protection systems contradicts with the objective of creating a Single Market, and the fact that contractual aspects of remuneration are not harmonized further contributes to this fragmentation. The 2001 InfoSoc Directive aimed at ensuring an adequate level of compensation for creators in an information society by introducing the notion of “fair compensation” – in the context of the first research sub-question, fair compensation is a uniform concept in the EU, calculated on the basis of the detriment caused to the creator. The notion aimed at providing a fair level of revenue for rightholders, striking a balance between creators and contractual counterparties. It is recognized that the Directive was not successful in this regard: it did not ensure that the compensation itself was fair, and it was unclear whether fair compensation applied otherwise than regarding private copy schemes. This is problematic in the sense that while contracts are essential in order to implement copyright and secure compensation for creators, lack of transparency results in unfair contract terms. The issue is driven by insufficient legislative solutions, as transparency obligations coexisting in different MS are gravely fragmented. Another factor contributing to the lack of transparency is the imbalance in bargaining power – during the negotiations, authors and performers are in a weaker bargaining position in consequence of the existing information asymmetry. Lastly, new modes and multiple forms of exploitation that have emerged online further aggravate the problem. It is evident that the copyright regime of the Single Market requires further EU action in order to resolve the issue of lack of transparency.

As regards to the second sub-question, it was deemed necessary to propose a new copyright Directive in the DSM, since the Proposal provides a well-functioning marketplace for copyright and guarantees legal certainty, transparency and balance in creators’ contracts. In addition, it aims at improving the enforcement against online infringements in the light of the digital environment. In the context of copyright, three policy options were considered in order to resolve the issues of the Single Market: a stakeholder dialogue guiding MS in ensuring transparency; a minimum reporting obligation decreasing information asymmetry; and a remuneration adjustment mechanism, supported by a dispute resolution mechanism. A stakeholder dialogue and minimum reporting obligations were both rejected, first one due to inefficiency and the latter due to inability of providing enforcement measures. The third policy option, a contract adjustment mechanism, was comprehended in a more positive light, since it would provide legal means for creators to request an adjustment of their remuneration.

Therefore, aiming at resolving the issues of the InfoSoc Directive, the 2016 Proposal for copyright in the Digital Single Market introduced a contract adjustment mechanism in Article 15.

The right to request renegotiation of contract terms under certain circumstances aims at replacing the contractually agreed lump sum by a proportional remuneration of the author. Given that the work is successful on the market (or where a significant disproportion exists between the agreed revenue and the actual revenues), the author is allowed to demand an alteration of the contract terms. To answer the third research sub-question, the purpose of the mechanism is twofold: it strives for rebalancing contractual relationships and strengthens copyright as a property right. Due to the fact that creators' weak bargaining position leads to unfair contractual provisions, the mechanism reinforces their negotiating capacity by granting the right to seek appropriate remuneration without risking professional relationships. In addition, the mechanism will have a positive impact on copyright as a property right since it improves the control of rightholders on the use of their work and provides creators with legal remedies to claim for supplemental remuneration. In practice, contract adjustment mechanism functions by granting creators the right to receive adequate remuneration: legal means to adjust the agreement are provided on the basis of information included in the reporting statements, given that the remuneration in question is disproportionately low.

In the context of the fourth research sub-question, the Directive modernizing EU copyright and introducing a contract adjustment mechanism will be implemented via ordinary legislative procedure, without affecting contracts retroactively. At present, the Proposal awaits the committee decision. Contract adjustment mechanism introduces a common approach of transparency requirements throughout the EU, allowing MS to concentrate on the specificities of each sector. In Member States where transparency obligations already exist, the measures indicate only supplemental policy changes. In MS where there are no legislative transparency obligations, an establishment of the contract adjustment mechanism is required by altering the laws, regulations and administrative provisions that are necessary in order to comply with Article 15. Finnish copyright legislation encompasses transparency obligations in the publishing sector, obliging the publisher to present a report to the author, informing him of the sales for which he is entitled to be remunerated. Irrespective of the fact that Finland has a degree of discretion in governing sector-specific aspects, the Directive requires adaptations on the Copyright Act 404/1961 and the Information Society Code 917/2014. As regards to transposing the 2016

Proposal and the contract adjustment mechanism it introduces into national law, there will be unclear aspects of implementation.

Firstly, Article 15 of the Proposal is criticized for lacking concrete definitions and imposing ambiguous obligations to Member States – it is unclear how and by whom a decision of the disproportionality of remuneration is taken. Even in Germany the level of appropriate remuneration has not been defined by law and consequently, the courts have to re-evaluate flat fees on a case-by-case basis (it is debatable, however, whether this is even achievable). Nothing in Article 15 indicates how “disproportionately low” remuneration should to be calculated, yet MS where contract adjustment mechanisms already exist provide for a variety of answers. Disproportionate income could refer to a conspicuous disproportion (Germany); a prejudice of more than 7/12 of the remuneration (France); an obvious disproportion (Croatia, Czech Republic); a serious disproportion (the Netherlands); or a situation where the percentage established is clearly lower than what is customarily paid (Portugal). The fact that the time of entry into force of the Directive is particularly short further aggravates this problem.

Secondly, the impact of contract adjustment mechanism has not been sufficiently analyzed. Irrespective of the fact that the Impact Assessment on the modernization of EU copyright rules states that there would be a positive impact on creation, cultural diversity, the right to property and the freedom of movement and expression, the mechanism has not yet received an adequate level of discussion: this generates a question of how far creators are able to confront their remuneration terms. Due to a fact that the estimation of renegotiation costs for stakeholders turned out to be problematic, the Commission simply did not provide estimation. Furthermore, the copyright review process carried out in 2013 - 2016 did not cover the topic of fair remuneration, since no EU rules govern the achievement of a well-functioning copyright marketplace. Even though contract adjustment mechanism provides alterations of contract terms for both authors and performers, the study requested by the European Parliament’s Committee on Legal Affairs concerning creators’ contractual arrangements as well as the study on the economic mechanisms affecting the flows of income both focused solely on authors, excluding analyses of contracts concluded by performers.

Lastly, as regards to the enforcement, it is recognized that the mechanism is unable to solve the general issue of imbalanced bargaining powers and merely provides a solution for digital modes of exploitation. While bestseller clauses reinforce the position of the creator, they lack an

imminent impact on remuneration. It is acknowledged that the situation of creators is better where collective bargaining is allowed – however, Article 15 makes no corresponding reference to it. Furthermore, in a situation where creators are receiving royalties on an ongoing basis, upholding a contract adjustment claim is complex (royalty rate does affect the ratio between reward and returns). In addition, enforcement is problematic in the sense that the negative impact of the mechanism on the freedom of contract contradicts with the Commission’s goal of enabling innovation in the Digital Single Market. It is generally not evident that creators’ remuneration would face a significant increment after the implementation of the mechanism: bestseller clauses are rarely enforced in courts even in MS where legislative measures provide for a contract adjustment mechanism. Consequently, the related case law is extremely limited – this contributes to the complexity of evaluating the enforcement of a contract adjustment mechanism.

Therefore, a contract adjustment mechanism introduced by the 2016 Proposal to modernize copyright in the Digital Single Market contains grave issues. The mechanism is not successful in the sense of enforcement and consequently, as stated in the hypothesis, contract adjustment mechanism will have difficulties in ensuring fair remuneration in the Digital Single Market due to unclear aspects of implementation. While the Proposal rightly aims at resolving the issues of the InfoSoc Directive, it fails to rebalance creators’ contractual relationships. The Commission’s aspiration to ensure remuneration of authors and performers via introducing a bestseller clause is well justified, but lack of definitions, analyses and means of proper enforcement inevitably lead to a conclusion that answers to the research question: contract adjustment mechanism does not ensure fair remuneration in contracts of authors and performers in the Digital Single Market. However, creators strongly support the right to request renegotiation of the contract and it is evident that such mechanism is required in the EU copyright regime, notably in the digital environment. It is therefore imperative that lack of transparency in creators’ contracts stipulates a resolution at EU level: author suggests that concrete definitions and tangible answers could be found from national copyright legislations where bestseller clauses are appropriately utilized. All in all, contract adjustment mechanism clearly needs to achieve a more adequate level of discussion before it will be enforced and transposed into national law.

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