Study on contractual practices affecting the transfer of copyright and related rights and the ability of creators and producers to exploit their rights

Final Report

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EXECUTIVE SUMMARY

In order to exercise their rights, authors and performers typically transfer those rights to third parties. The rules and practices governing such transfers vary across Member States (MS) and sectors (i.e. music, audiovisual, visual arts, literary works or videogames). Additionally, it is worth noting that issues related to rights transfers are particularly relevant for producers in the digital environment, especially when collaborating with global streaming platforms, and to a lesser extent with broadcasters, as also highlighted by the European Media Industry Outlook.

The aim of this study, conducted by Verian Group, Milieu Consulting, NTT DATA and VUB, on behalf of the European Commission (DG CNECT), is to gather information and evidence on contractual practices involving transfers of copyright and related rights and to assess the impacts of these practices on authors, performers and audiovisual producers.

The study covers the following stakeholder groups:

- authors and performers from the audiovisual, music, visual arts, literary works and videogames sectors;
- producers in the audiovisual sector.

The study's objectives are to:

- map contractual practices involving rights transfers affecting authors and performers in the creative sectors covered and assess the impacts of such practices on authors and performers (Chapter 3);
- assess the ability of producers to exploit and retain Intellectual Property (IP) rights in their contractual arrangements with broadcasters and/or streamers, building on the results of the European Media Industry Outlook (Chapter 4);
- map and analyse existing rules and legislation at international, EU and Member State levels applicable to contracts for the transfer of copyright and related rights, such as buy-outs (Chapter 5).

Methodology

The study is based on the following sources of information:

- literature review of existing studies on the conditions of authors, performers and producers;
- interviews with individual authors and performers, individual audiovisual producers, broadcasters, streamers and legal experts, umbrella organisations representing authors and performers, umbrella organisations representing audiovisual producers, and broadcasters and streamers;
- survey conducted among authors and performers;
- legal mapping and analysis of international, EU and national rules, policy instruments and legislation in the Member States.

The data collected from these sources was used to analyse the core challenges encountered by authors, performers and producers across the sectors under review.

Concretely, the data collection phase comprised 30 exploratory interviews with experts and EU/pan-EU associations representing authors and performers, 25 in-depth interviews with authors and performers or organisations representing their interests (e.g. collective management organisations (CMOs) and trade unions), four interviews with umbrella organisations representing producers, and 32 in-depth interviews with various stakeholders relevant to audiovisual production (producers, national associations representing producers, legal experts, public and private broadcasters, global streamers, and organisations representing streamers and broadcasters). In addition, the survey disseminated among EU authors and performers generated 747 responses.

The study was conducted in multiple phases. In consultation with DG CNECT, the inception phase of the study was used to fine-tune the methodology. During this phase the team produced the data collection templates (including the interview, survey questionnaire design and templates for national desk research) and concluded an exhaustive mapping of sources to be used throughout the study. The inception phase also included an exhaustive mapping of stakeholders to be consulted during the study.

Following the inception phase and the completion of the exploratory work, the study team carried out an in-depth assessment of contractual practices affecting, on the one hand, authors and performers and, on the other hand, producers in the audiovisual sector. Although conducted simultaneously, the information collection and assessment of practices affecting authors and performers and those affecting producers were assessed separately. At the same time, the study team carried out a legal mapping and analysis of rules and legislation at international, EU and Member State levels, with an in-depth assessment in a selected number of Member States (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Romania and Spain). This legal analysis was used to identify gaps in legislation as well as examples of national solutions from different Member States.

The last phase of the study involved triangulating the evidence gathered from different sources and identifying the main challenges faced by authors, performers and producers.

Despite the large volume of information collected, the implementation of the study encountered some notable limitations. The literature review, in-depth interviews and the survey produced limited evidence concerning the videogames sector. The survey generated only a limited number of responses from this sector. Furthermore, some stakeholders from the sectors within the scope of the study were reluctant to discuss contractual clauses because they had signed non-disclosure agreements. This affected the availability of relevant information to analyse trends in rights transfers.

As a result of the study's reliance on interviews there is limited generalisability and a potential for respondent bias.

Contractual practices involving a transfer of the rights of authors and performers

The analysis of contractual practices involving a transfer of the rights of authors and performers in the creative sectors revealed **varying perceptions of bargaining power across different sectors**. In the audiovisual sector, the weak bargaining power of authors is reflected in the contractual terms, which can involve full buy-out contracts with a single lump-sum payment or royalty payments at rates which are perceived as low. In contrast, performers reported an increase in bargaining power because of the increased use of collective bargaining agreements (CBAs) concluded by trade unions. In the music sector, the survey results reveal that 41% of authors and performers feel that their bargaining power has remained unchanged, while 38% reported that their bargaining power has decreased over the past five years. Contract negotiations with counterparties, mainly record labels and music publishers, are directly handled by authors and performers (83% of the survey

respondents), though 63% of them seek external support from professional organisations, lawyers and CMOs.

Within the visual arts sector, most authors and performers (49%) consider that their **individual bargaining power has not changed**, while 20% reported a decrease. These perceptions may be linked to increased competition, the rise of technology and social media, and the growing use of Artificial Intelligence (AI). In the literary works sector, similar to the other sectors within the scope of this study, bargaining power is influenced by factors such as an author's success, experience and reputation. Where there is a lack of bargaining power, this is often because of limited resources, a lack of support in contract negotiations and the inherent imbalance of power between publishing houses and authors. In the literary works sector, 78% of authors indicated that they do not benefit from CBAs, and many find these agreements ineffective in some Member States. On the other hand, 68% of professional organisations representing literary authors reported that they benefitted from collective agreements. Practices in the videogames sector appear to differ, with negotiations typically taking place at an individual level, where authors with more experience tend to have greater bargaining power.

In the audiovisual sector, **national legislation and specific agreements determine which rights may be transferred and which rights are transferred, leading to varying degrees of rights retention and statutory remuneration across Member States**. Producers generally acquire broad exploitation rights, while authors and performers retain limited exclusive rights and a non-waivable remuneration.

In the music sector, songwriters often transfer their rights to music publishers and performers often transfer their exclusive rights to record labels. Within the sector, session musicians appear to be in a weaker position than featured performers, who typically receive lump-sum payments. Authors and performers in the music sector have generally reported facing 'take it or leave it' situations during negotiations, particularly with Video-On-Demand (VOD) services and record labels.

In the visual arts sector, commissioning contracts are prevalent and may be perceived as problematic, as they involve the transfer of ownership and some exploitation rights in exchange for a lump-sum payment, without any room for further negotiations.

In the videogames sector, authors typically engage in a full transfer of rights in perpetuity under employment or subcontracting contracts. In the literary sector, authors typically sign publishing contracts in the form of licencing agreements with buy-outs being less common.

However, **the presence of commissioners** (e.g. audiovisual producers or record labels) **is not always considered to be problematic,** as they can play a useful role in supporting authors and performers financially, as well as in negotiations with global streamers and broadcasters.

Perceptions of the fairness of remuneration are consistent across the sectors. Most authors and performers interviewed or surveyed believe that the remuneration they receive is not fair. In many cases the reasons given relate to the rules around rights transfers (e.g. transfer against lump-sum payments which do not take into account the potential economic value of the works or performances). In the audiovisual sector, 51% of respondents think that the remuneration is rarely fair, while 33% believe it is never fair, mainly because of the timing of negotiations (pre-production phase), the use of standard industry fees and the lump-sum payment methods. In the music sector, 49% of music authors and performers responding to the survey consider that the remuneration is rarely fair, while 23% believe that it is never fair. Respondents explained that one reason for the unfair remuneration is that contracts are typically negotiated during the initial stages, before the true economic

value of the work can be fully assessed. Additionally, when the remuneration is received in the form of a lump-sum payment, creators may find themselves unable to benefit financially if their work proves to be successful. Similar trends are perceptible in the visual arts sector, where 51% of respondents consider that the remuneration is rarely fair and 26% think that it is never fair, mentioning as reasons an underestimation of the real or potential economic value of their work and the impact on financial sustainability. In the literary works sector, 43% of respondents believe that the remuneration is never fair, primarily because the real or potential economic value of the work is disregarded. No conclusive results are available for the videogames sector.

Contractual practices affecting producers in the audiovisual sector

The study examined the contractual practices affecting producers in the audiovisual sector, primarily through a literature review, an analysis of policy measures and interviews.

According to the study's findings, audiovisual producers face significant difficulties in their negotiations with global streamers and broadcasters, as their bargaining power is often limited. The producers interviewed emphasised significant difficulties in establishing sustainable businesses when they do not own the rights for future exploitation, especially in cases where commissioners retain rights without fully financing productions. The findings based on the interviews with producers show that sometimes producers cannot own and exploit rights even when they are applicants and contribute public funding through mechanisms such as tax incentives or invest in the work's development. This practice is more common under the commissioning model, where public funding contributed by producers is sometimes included in the overall production budget.

The ability of producers to own and exploit rights is often constrained under different financing models. The interviews highlighted different challenges, including contractual issues related to the choice of law and jurisdiction, limited bargaining power to negotiate turnaround clauses, and restricted opportunities for future revenues from derivative and format rights. Long licensing periods were identified as a specific issue under co-production and licensing financing models. Furthermore, producers expressed concerns over the lack of transparency regarding data on the exploitation of audiovisual works by global streamers.

The producers interviewed indicated that **the commissioning model, where the financiers keep all or most of the rights, is widely used by global streamers and private broadcasters in contractual arrangements for TV fiction**. In contrast, the global streamers interviewed noted a shift away from the commissioning model towards models such as licensing and co-productions, with the aim of allowing for a sharing of risks and rights in the uncertain sector landscape, as these approaches require less upfront capital investment for streamers than other cases, such as commissioning works with a full transfer of rights. **Overall, the findings indicate that various financing models coexist, with no conclusive evidence pointing to the predominance of one model.** The interviews with public service broadcasters (PSBs) revealed that they primarily rely on licensing and co-production models, sometimes shaped by regulatory requirements. Private broadcasters reported that they use a variety of financing models, but emphasised that a shrinking market poses significant challenges in securing co-financiers for audiovisual projects.

The interviews highlighted that building a catalogue of rights is important for producers to establish future revenue streams and ensure the long-term sustainability of their businesses. Without rights ownership, audiovisual producers face significant limitations in investing in the creation of new works. Developing assets with long-term value is therefore crucial. However, under the commissioning financing model where producers are unable to retain rights, their ability to grow and sustain their presence in the industry is severely impacted. The interviews with producers corroborated the findings of the European Media

Industry Outlook Report (2023), highlighting a trend of including the transfer of all IP rights in contracts, especially with non-EU streamers. This challenge is particularly prevalent for small, independent producers that are in highly vulnerable positions. The study also highlighted that **the lack of protective mechanisms places producers in a weaker bargaining position**, particularly when negotiating with powerful financiers that can influence contractual terms. It is noteworthy that independent producers retain more rights when there are certain rules at national level in place that guarantee their improved bargaining position when negotiating with global streamers and broadcasters. The results indicate that **audiovisual producers can secure more rights when public financing is involved, guaranteeing them certain rights based on funding criteria**. Additionally, in some EU markets, the opportunities for producers to raise capital are limited, particularly in small markets as they may not be able to get bank loans. This problem can be exacerbated because of the low number of commissioners, particularly in some smaller markets, as it can lead to cashflow challenges for the producers.

Restrictive rights agreements with streamers and broadcasters, which limit the ability of producers to secure remuneration or sustain their companies, threaten the EU's audiovisual industries by potentially reducing independent productions and impacting diversity in content creation. In terms of impact, some interviewed producers and European broadcasters expressed concerns that the adoption of the commissioning model by US-owned global companies has shifted the ownership of the IP of European works away from European entities. According to the insights gleaned from the interviews, the inability of producers to own IP rights also affects the diversity of European audiovisual works, the availability and full exploitation of such works, as well as the diversity of the production companies.

Legal analysis

The study examines the international, EU and national rules governing rights transfer agreements, analysing both the normative mechanisms governing buy-out practices and those governing choice of law and choice of jurisdiction clauses. The study also identifies gaps in existing laws, particularly in balancing contractual freedom with fairness and addressing power imbalances between parties.

International conventions provide general principles and grant authors and performers moral and exploitation rights but rarely address the specifics of rights transfers. While EU law – and in particular the recent Directive on copyright and related rights in the Digital Single Market (DSM Directive) – contains some measures that address the balance of rights between contractual parties, it neither lays down limits on when rights transfer agreements can be used nor prescribes specific terms and conditions for such agreements. In several Member States national laws require rights transfers to be in writing and, as allowed by the Berne Convention, they prohibit the waiver of moral rights when exploitation/economic rights are transferred. Moreover, some national laws prohibit or limit transfers of rights ownership in the case of exploitation rights. Some Member States have put in place mechanisms to improve fairness, such as limiting rights transfers to those necessary for the purpose of the contract or prohibiting transfers of future works or unforeseeable rights.

As concerns remuneration rights, certain rules exist at international level, but there are no prescriptive provisions on lump-sum payments in exchange for a rights transfer. At EU level, the DSM Directive introduces the principle of appropriate and proportionate remuneration for authors and performers in the case of a rights transfer (Article 18). According to the directive, lump-sum payments may also constitute a proportionate remuneration as far as they are not deemed usual practice. Member States can define specific cases for the application of lump-sum payments. At national level, a few Member States define proportionate remuneration in more detail.

At EU level, recent measures in the DSM Directive may benefit authors and performers when transferring their rights through increased transparency on the exploitation of their works (Article 19), as well as through the revocation right in case of a lack of exploitation (Article 22) and contract adjustment mechanism (Article 20) allowing for additional remuneration claims when initial payments prove low. However, the enforcement of such protective measures remains limited owing to the reluctance of authors and performers to engage in litigation in copyright disputes. Voluntary alternative dispute resolution (ADR) procedures for disputes relating to the transparency obligation and the contract adjustment mechanism could prove beneficial in safeguarding their interests (Article 21).

The rights of authors and performers can be managed either individually or collectively. Collective management may be implemented through trade unions and independent associations via collective bargaining or through voluntary or mandatory management by CMOs. However, as authors and performers may assign different rights to various CMOs, this can lead to complex situations at national level. In addition, when exclusive rights are entirely transferred at the outset of a contract – for example, through certain buy-out clauses - this can limit the ability of CMOs to effectively represent authors and performers.

In the case of **audiovisual producers, there are limited applicable international and EU rules governing their contractual relationships with broadcasters and streamers**. This is because producers are generally considered to be in a stronger bargaining position than authors and performers when negotiating with broadcasters and global streaming platforms. In this case, the EU's Audiovisual Media Services Directive (AVMSD) and national rules provide broader mechanisms that can address the imbalance of bargaining power experienced by producers. In addition, general principles of EU contract law and certain non-binding instruments such as model rules can provide protection for weaker parties in contractual relationships. However, such protection remains limited and general in scope, with no specific legal instruments tailored to audiovisual producers. Overall, negotiations are left up to the contracting parties and are influenced by the choice of financing model and the balance of risks in the financial investment. However, this can leave small, independent producers in a particularly vulnerable position.

Regarding the choice of law and choice of jurisdiction, the current framework of EU private international law provides limited mechanisms to address the complexities of copyright transfer agreements in an international context. While the DSM Directive references Article 3(4) of the Rome I Regulation (RIR) in Recital 81, allowing Articles 19, 20 and 21 of the DSM Directive to override contractual agreements under specific conditions, this mechanism applies only when a contract includes a choice of law and is brought before an EU jurisdiction before which the RIR applies. In the absence of a choice of law, the general rules of the RIR apply, and jurisdictional issues default to the Brussels Ia Regulation. However, these frameworks do not provide for tailored provisions for copyright transfer contracts, leaving authors, performers, and producers subject to general contractual rules protecting the principle of contractual freedom rather than correcting potential power imbalances or vulnerabilities in such agreements.

To further enhance the protection of authors/performers and audiovisual producers in cases where the production or exploitation takes place in the EU, two approaches may be envisaged. The first, suggested by the French Presidency report, involves extending the protective regimes for vulnerable parties, such as those provided to consumers or employees, to certain copyright transfer contracts. The second approach focuses on establishing, at EU level, mandatory (substantive law) rules to protect creators within the meaning of Article 9(1) of Rome I Regulation.

KURZFASSUNG

Zur Wahrnehmung ihrer Rechte übertragen Urheber und ausübende Künstler ihre Rechte für gewöhnlich an Dritte. Die Bestimmungen und Praktiken bei der Übertragung von Rechten variieren je nach Mitgliedstaat und Branche (d. h. Musik, audiovisuelle Medien, bildende Kunst, literarische Werke oder Videospiele).Darüber hinaus ist anzumerken, dass Fragen im Zusammenhang mit der Übertragung von Rechten für Produzenten im digitalen Umfeld besonders relevant sind. Dies gilt – wie auch im Media Outlook hervorgehoben – insbesondere für die Zusammenarbeit mit globalen Streaming-Plattformen und in geringerem Maße mit Rundfunkanstalten.

Ziel dieser von der Verian Group, Milieu Consulting, NTT DATA und VUB im Auftrag der Europäischen Kommission (GD CNECT) durchgeführten Studie ist es, Informationen und Erkenntnisse über Vertragspraktiken bei der Übertragung von Urheberrechten und verwandten Schutzrechten zu gewinnen und die Auswirkungen dieser Praktiken auf Urheber, ausübende Künstler sowie Produzenten von audiovisuellen Werken zu beurteilen.

Folgende Stakeholder-Gruppen sind Gegenstand dieser Studie:

- Urheber und ausübende Künstler aus den Bereichen audiovisuelle Werke, Musik, bildende Kunst, literarische Werke und Videospiele;
- Produzenten von audiovisuellen Werken.

Ziele der Studie:

- Erfassung von Vertragspraktiken bei der Übertragung von Rechten mit Auswirkungen auf Urheber und ausübende Künstler in den untersuchten Kreativbranchen sowie eine Beurteilung der Auswirkungen solcher Praktiken auf Urheber und ausübende Künstler (Kapitel 3);
- Beurteilung der Fähigkeiten von Produzenten, Rechte an geistigem Eigentum in ihren vertraglichen Vereinbarungen mit Rundfunkanstalten und/oder Streamingdiensten zu verwerten und zu behalten, und zwar aufbauend auf den Ergebnissen des Media Outlook (Kapitel 4);
- Erfassung und Analyse geltender Bestimmungen und Gesetze auf EU-Ebene und auf Ebene der Mitgliedstaaten für Verträge über die Übertragung von Urheberrechten und verwandten Rechten, wie z. B. Buy-outs (Kapitel 5).

Methodik

Diese Studie basiert auf folgenden Informationsquellen:

- Literaturanalyse vorhandener Studien zu den Bedingungen für Urheber, ausübende Künstler und Produzenten;
- Interviews mit einzelnen Urhebern und ausübenden Künstlern, Produzenten von audiovisuellen Werken, Rundfunkanstalten, Streaminganbietern und Rechtsexperten, Dachverbänden, die Urheber und ausübende Künstler vertreten, sowie mit Dachverbänden, die Produzenten von audiovisuellen Inhalten, Rundfunkanstalten und Streamingdienste vertreten;
- Umfrage unter Urhebern und ausübenden Künstlern;
- Erfassung und Analyse der internationalen, EU- und nationalen Regelungen, der politischen Instrumente und Rechtsvorschriften in den Mitgliedstaaten.

Anhand der aus diesen Quellen gewonnenen Daten wurden die zentralen Herausforderungen analysiert, denen Urheber, ausübende Künstler und Produzenten in den untersuchten Branchen gegenüberstehen.

Die Datenerhebung bestand ganz konkret aus 30 explorativen Interviews mit Fachleuten sowie mit Verbänden in der EU bzw. EU-weiten Verbänden, die Urheber und ausübende Künstler vertreten, aus 25 Tiefeninterviews mit Urhebern und ausübenden Künstlern oder Organisationen, die deren Interessen vertreten (z. B. Verwertungsgesellschaften und Gewerkschaften), aus 4 Interviews mit Dachverbänden, die Produzenten vertreten, sowie aus 32 Tiefeninterviews mit unterschiedlichen Stakeholdern auf dem Gebiet audiovisueller Produktionen (Produzenten, nationale Verbände, die Produzenten vertreten, Rechtsexperten, öffentliche und private Rundfunkanstalten, weltweite Streamingdienste sowie Organisationen, die Rundfunkanstalten und Streamingdienste vertreten). Darüber hinaus nahmen insgesamt 747 Urheber und ausübende Künstler in der EU an der Umfrage teil.

Die Studie wurde in mehreren Phasen durchgeführt. Die Auftaktphase der Studie wurde in Rücksprache mit der GD CNECT für die Feinabstimmung der Methodik genutzt. Während dieser Phase erstellte das Team die Vorlagen für die Datenerhebung (einschließlich des Interviews, des Fragebogendesigns für die Umfrage und der Vorlagen für die nationalen Literaturrecherchen). Abschließend wurde eine umfassende Liste an Quellen zusammengestellt, die in die Studie einbezogen werden sollten. Darüber hinaus umfasste die Auftaktphase auch eine umfassende Auflistung der Stakeholder, die im Rahmen dieser Studie konsultiert werden sollten.

Im Anschluss an die Auftaktphase und den Abschluss der Vorarbeiten nahm das Studienteam eine eingehende Beurteilung von Vertragspraktiken vor, die einerseits Urheber und ausübende Künstler betreffen und andererseits Produzenten von audiovisuellen Werken. Obwohl gleichzeitig durchgeführt, erfolgten die Erhebung der Informationen sowie die Beurteilung der Praktiken, die Urheber und ausübende Künstler auf der einen Seite betreffen und Produzenten auf der anderen Seite, getrennt voneinander. Gleichzeitig führte das Studienteam eine Bestandsaufnahme und Analyse der rechtlichen Regelungen und Gesetze auf internationaler, EU- und nationaler Ebene durch. Diese Studienphase umfasste auch eine tiefer gehende Analyse der geltenden rechtlichen Bestimmungen und Gesetze in ausgewählten Mitgliedstaaten, namentlich in Belgien, Dänemark, Frankreich, Deutschland, Irland, Italien, den Niederlanden, Polen, Rumänien und Spanien. Diese Analyse der Rechtslage diente einerseits der Identifizierung von Gesetzeslücken und andererseits dem Herausarbeiten exemplarischer nationaler Lösungen in verschiedenen Mitgliedstaaten.

Die letzte Studienphase bestand aus einer Triangulation der aus den verschiedenen Quellen gewonnenen Erkenntnisse sowie der Identifizierung der größten Herausforderungen, denen Urheber, ausübende Künstler und Produzenten gegenüberstehen.

Trotz der Fülle der gesammelten Informationen stieß die Studie in ihrer Umsetzung an spürbare Grenzen. Die Literaturanalyse, die Tiefeninterviews und die Umfrage lieferten nur wenige Erkenntnisse für den Videospielsektor. Aus diesem Sektor war die Anzahl der Umfrageteilnehmer gering. Hinzu kam, dass einige Stakeholder aus den untersuchten Branchen aufgrund geltender Geheimhaltungsvereinbarungen nicht oder nur bedingt gewillt waren, über Vertragsklauseln zu sprechen. Dies hatte direkte Auswirkungen auf die Verfügbarkeit relevanter Informationen für die Analyse von Trends bei der Übertragung von Rechten.

Da sich die Studie in weiten Teilen auf Interviews stützt, sind Verallgemeinerungen nur begrenzt möglich. Zudem besteht die Möglichkeit der Voreingenommenheit seitens der Befragten.

Vertragspraktiken bei der Übertragung von Rechten und im Umgang mit Urhebern und ausübenden Künstlern

Die Analyse von Vertragspraktiken bei der Übertragung von Rechten von Urhebern und ausübenden Künstlern in Kreativbranchen hat **unterschiedliche Wahrnehmungen von der Verhandlungsposition in verschiedenen Branchen** offenbart. Die schwache Verhandlungsposition von Urhebern im audiovisuellen Sektor spiegelt sich in den Vertragsbedingungen wider. Dazu können komplette Buy-out-Verträge zählen, bei denen ein einmaliger Pauschalbetrag oder als niedrig empfundene Lizenzzahlungen/Tantiemen gezahlt werden. Im Gegensatz dazu berichten ausübende Künstler von einer Stärkung ihrer Verhandlungsposition dank der vermehrten Nutzung von Kollektivvereinbarungen, die von Gewerkschaften ausgehandelt werden. Laut den Umfrageergebnissen für die Musikbranche geben 41% der befragten Urheber und ausübenden Künstler an, dass sich ihre Verhandlungsposition ihrem Eindruck nach nicht verändert hat. Gleichzeitig antworten 38%, dass sich ihre Verhandlungsposition in den letzten fünf Jahren verschlechtert hat. Verhandlungen mit Vertragspartnern, bei denen es sich überwiegend um Plattenlabel und Musikverlage handelt, werden zum Großteil von den Urhebern und ausübenden Künstlern selbst geführt (83% der Befragten). Gleichwohl geben 63% von ihnen an, sich externe Unterstützung von Berufsverbänden, Anwälten und Verwertungsgesellschaften zu holen.

Im Bereich der bildenden Künste sind die meisten Urheber und ausübenden Künstler (49%) der Ansicht, dass ihre **individuelle Verhandlungsposition gleich geblieben ist**. Insgesamt 20% geben hingegen an, dass sich ihre Verhandlungsposition verschlechtert hat. Diese Wahrnehmungen sind möglicherweise durch zunehmenden Wettbewerb, die Existenz von Technologie und sozialen Medien sowie durch die verstärkte Nutzung von Künstlicher Intelligenz (KI) beeinflusst. Im Literaturbetrieb hängt die Verhandlungsposition, ähnlich wie in anderen in dieser Studie untersuchten Bereichen, von Faktoren wie Erfolg, Erfahrung und Ruf des Urhebers bzw. Autors ab. Dort, wo es an Verhandlungsmacht mangelt, ist dies häufig auf begrenzte Ressourcen, fehlende Unterstützung bei Vertragsverhandlungen und das inhärente Ungleichgewicht zwischen Verlagen und Urhebern bzw. Autoren zurückzuführen. Im literarischen Bereich profitieren 78% der Urheber bzw. Autoren nach eigenen Angaben nicht von Kollektivvereinbarungen. In einigen Mitgliedstaaten werden diese Vereinbarungen von vielen als wirkungslos empfunden. Demgegenüber geben 68% der Berufsverbände, die literarische Autoren vertreten, an, dass sie von Kollektivvereinbarungen profitieren. Im Videospielsektor scheinen andere Praktiken vorzuherrschen. Dort finden Verhandlungen in der Regel auf individueller Ebene statt, wobei Urheber mit mehr Erfahrung tendenziell mehr Verhandlungsmacht haben.

Im audiovisuellen Sektor **bestimmen nationale Gesetze und spezifische Vereinbarungen, welche Rechte übertragen werden dürfen bzw. welche Rechte tatsächlich übertragen werden. Dadurch variieren der Rechtsschutz und die gesetzliche Vergütung in den einzelnen Mitgliedstaaten.** Produzenten erwerben in der Regel umfassende Verwertungsrechte. Urheber und ausübende Künstler behalten hingegen begrenzte Exklusivrechte und unverzichtbare Vergütungsrechte.

Im Musiksektor übertragen Songschreiber häufig ihre Rechte an Musikverlage, während ausübende Künstler ihre Exklusivrechte häufig an Plattenlabel übertragen. Innerhalb dieser Branche scheinen Sessionmusiker in einer schwächeren Verhandlungsposition als die Hauptkünstler zu sein, die in der Regel Pauschalzahlungen erhalten. Urheber und ausübende Künstler in der Musikbranche berichten häufig von „Friss-oder-Stirb-

Situationen" bei Verhandlungen, insbesondere mit Video-On-Demand-Anbietern und Plattenlabels.

Im Bereich der bildenden Künste überwiegen Auftragsverträge. Diese können als problematisch erachtet werden, weil durch diese Eigentumsrechte sowie einige Verwertungsrechte gegen eine Pauschalzahlung übertragen werden, und zwar ohne dass Spielraum für weitere Verhandlungen besteht.

Im Videospielsektor vereinbaren Urheber in der Regel im Rahmen eines Anstellungsvertrags oder durch Unteraufträge eine vollständige und dauerhafte Übertragung von Rechten. Im Literaturbetrieb schließen Urheber bzw. Autoren für gewöhnlich Verträge mit Verlagen in Form von Lizenzverträgen ab. Buy-out-Verträge werden seltener genutzt.

Die **Existenz von Auftraggebern** (z. B. von Produzenten audiovisueller Werke oder von Plattenlabels) **wird indes nicht immer als problematisch wahrgenommen**, da Auftraggeber eine unterstützende Funktion für Urheber und ausübende Künstler haben können, sei es in finanzieller Hinsicht oder bei Verhandlungen mit weltweiten Streaminganbietern und Rundfunkanstalten.

Bei der Frage nach gerechter Vergütung ist eine einheitliche Wahrnehmung festzustellen. Die Mehrzahl der interviewten oder befragten Urheber und ausübenden Künstler hält die Vergütung, die sie erhalten, nicht für gerecht. In vielen Fällen werden als Gründe die Modalitäten der Rechteübertragung genannt (z. B. Übertragung gegen Pauschalzahlungen, bei denen es nicht möglich ist, den potenziellen wirtschaftlichen Wert von Arbeiten oder Darbietungen zu berücksichtigen). Im audiovisuellen Sektor halten 51% der Befragten die Vergütung selten für gerecht, während 33% diese niemals gerecht finden. Die Hauptgründe hierfür sind der Zeitpunkt der Verhandlungen (Vorproduktionsphase), die Verwendung branchenüblicher Honorare sowie Pauschalzahlungen. In der Musikbranche antworten 49% der Urheber und ausübenden Künstler, die an der Umfrage teilgenommen haben, dass sie die Vergütung selten gerecht finden. Insgesamt 23% der Befragten dieser Branche sind der Meinung, dass die Vergütung niemals gerecht ist. Die Befragten nannten als einen der Gründe für die ungerechte Vergütung den Umstand, dass Verträge in der Regel in der Frühphase verhandelt werden, d. h. bevor der tatsächliche wirtschaftliche Wert des Werks beurteilt werden kann. Wenn die Vergütung in Form einer Pauschalzahlung erfolgt, sehen sich Urheber im Falle eines Erfolgs ihrer Arbeit oder ihres Werks zudem nicht in der Lage, von diesem Erfolg finanziell zu profitieren. Ähnliche Trends lassen sich auch auf dem Gebiet der bildenden Künste beobachten. Insgesamt 51% der Befragten aus diesem Bereich halten die Vergütung selten für gerecht und 26% antworten, dass sie diese niemals gerecht finden. Als Gründe werden eine Unterbewertung des tatsächlichen oder potenziellen wirtschaftlichen Werts und die Folgen dessen für die finanzielle Tragfähigkeit genannt. Im Literaturbereich halten 43% der Befragten die Vergütung niemals für gerecht. Hauptgrund hierfür ist, dass der tatsächliche oder mögliche wirtschaftliche Wert des Werks oder der Arbeit nicht berücksichtigt wird. Für den Videospielsektor konnten keine aussagekräftigen Ergebnisse gewonnen werden.

Vertragspraktiken im Umgang mit Produzenten von audiovisuellen Werken

Die Studie hat Vertragspraktiken im Umgang mit Produzenten von audiovisuellen Werken untersucht. Genutzt wurden hierfür hauptsächlich eine Literaturrecherche, eine Analyse politischer Maßnahmen sowie Interviews.

Den Ergebnissen der Studie zufolge sehen sich Produzenten von audiovisuellen Werken mit erheblichen Schwierigkeiten bei Verhandlungen mit globalen Streaminganbietern und Rundfunkanstalten konfrontiert, da sie oft nur eine begrenzte Verhandlungsmacht haben.

Die interviewten Produzenten wiesen auf erhebliche Schwierigkeiten bei der Etablierung tragfähiger Geschäftsmodelle hin, wenn sie keine Rechte für eine künftige Verwertung besitzen, insbesondere in Fällen, in denen Auftraggeber Rechte halten, ohne Produktionen vollständig zu finanzieren. Die Ergebnisse der Interviews mit Produzenten zeigen, dass sie manchmal selbst dann keine Eigentums- und Verwertungsrechte haben, wenn sie Antragsteller sind und öffentliche Mittel durch Mechanismen wie Steueranreize einbringen oder in die Entwicklung investieren. Diese Praxis ist im Rahmen des Auftragsvergabemodells häufiger anzutreffen, bei dem die von den Produzenten beantragten öffentlichen Mittel manchmal im Gesamtproduktionsbudget enthalten sind.

Verschiedene Finanzierungsmodelle schränken die Eigentums- und Verwertungsrechte von Produzenten häufig ein. In den Interviews kristallisierten sich verschiedene Herausforderungen heraus. Dazu gehören vertragliche Fragen in Bezug auf die Rechtswahl und Gerichtsbarkeit, eine begrenzte Verhandlungsmacht bei der Verhandlung von Umkehrklauseln sowie eingeschränkte Möglichkeiten auf künftige Einnahmen aus Rechten an Derivaten und Formaten. Lange Lizenzzeiten wurden als spezifisches Problem im Rahmen von Co-Produktionen und Lizenzmodellen zur Finanzierung identifiziert. Darüber hinaus äußerten sich Produzenten besorgt wegen mangelnder Transparenz in Bezug auf Daten über die Verwertung audiovisueller Werke durch globale Streaminganbieter.

Die interviewten Produzenten wiesen darauf hin, **dass Auftragsvergabemodelle, bei denen die Geldgeber alle oder die meisten Rechte halten, gerade bei Verträgen über Fernsehfilmproduktionen häufig von globalen Streaminganbietern und privaten Rundfunkanstalten eingesetzt werden.** Im Gegensatz dazu gaben die interviewten globalen Streaminganbieter an, eine Abkehr vom Auftragsvergabemodell hin zu Lizenzmodellen oder Co-Produktionen zu beobachten. Ziel ist eine Verteilung von Rechten und Risiken in einem unsicheren Branchenumfeld. Hintergrund ist, dass diese Ansätze geringere Anfangsinvestitionen vonseiten der Streaminganbieter erfordern, als dies bei Auftragsarbeiten der Fall ist, bei denen eine vollständige **Übertragung von Rechten** vereinbart wird. Die Ergebnisse lassen insgesamt erkennen, dass es verschiedene Finanzierungsmodelle gibt, ohne eindeutige Hinweise darauf, dass ein Modell dominiert. Interviews mit Vertretern öffentlicher Rundfunkanstalten zeigen, dass diese überwiegend Lizenzierungs- und Co-Produktions-Modelle nutzen, die manchmal durch rechtliche Vorgaben geprägt sind. Nach Angaben von privaten Rundfunkanstalten nutzen diese eine Vielzahl unterschiedlicher Finanzierungsmodelle. Gleichwohl betonten diese, dass ein schrumpfender Markt erhebliche Herausforderungen bei der Gewinnung von Kofinanzierern darstellt.

Die Interviews zeigen auch die Bedeutung der Zusammenstellung eines Rechtekatalogs für Produzenten, um sich künftige Einnahmequellen zu erschließen und um ein langfristig tragfähiges Geschäftsmodell zu etablieren. Ohne Eigentumsrechte stehen Produzenten von audiovisuellen Werken vor erheblichen Hürden, wenn es um Investitionen in die Erstellung neuer Arbeiten geht. Die Entwicklung von Vermögenswerten mit langfristigem Wert ist daher von zentraler Bedeutung. Bei Finanzierungsmodellen im Rahmen der Auftragsvergabe, bei denen Produzenten nicht in der Lage sind, ihre Rechte zu behalten, sind sie in ihrer Fähigkeit, sich in der Branche zu etablieren und langfristig zu bestehen, erheblich eingeschränkt. Die mit Produzenten geführten Interviews untermauern die Ergebnisse des Media-Outlook-Berichts von 2023. Diese zeigen eine Entwicklung hin zur Übertragung aller geistigen Eigentumsrechte in Verträgen, insbesondere mit Streaminganbietern außerhalb der EU. Dies stellt insbesondere für kleine und unabhängige Produzenten eine Herausforderung dar, da sich diese in sehr prekären Situationen befinden. Zudem zeigt die Studie, dass **fehlende Schutzmechanismen Produzenten in eine schwächere Verhandlungsposition bringen**. Dies gilt insbesondere bei Verhandlungen mit finanzstarken Geldgebern, die die Möglichkeit haben, Vertragsbedingungen vorzugeben. Es konnte beobachtet werden, dass unabhängige

Produzenten mehr Rechte behalten, wenn es auf nationaler Ebene bestimmte Regelungen gibt, die ihnen bei Verhandlungen mit globalen Streaminganbietern und in geringerem Maße auch bei Verhandlungen mit Rundfunkanstalten eine bessere Verhandlungsposition sichern. Die Ergebnisse deuten darauf hin, dass **sich Produzenten von audiovisuellen Werken mehr Rechte sichern können, wenn zumindest in Teilen eine öffentliche Finanzierung erfolgt und ihnen diese aufgrund einzelner Finanzierungskriterien bestimmte Rechte garantiert.** Darüber hinaus mangelt es Produzenten in einigen EU-Märkten an Möglichkeiten zur Kapitalbeschaffung. Dies gilt insbesondere für kleine Märkte, wo ihnen der Zugang zu Bankkrediten verwehrt sein kann. Diese Situation kann sich aufgrund der geringen Anzahl an Auftraggebern, insbesondere in einigen kleineren Märkten, und der damit verbundenen Cashflow-Probleme für Produzenten noch verschärfen.

Restriktive Rechtevereinbarungen mit Streaminganbietern und Rundfunkanstalten, die es Produzenten erschweren, sich eine Vergütung zu sichern oder ihre Firmen am Laufen zu halten, stellen eine Bedrohung für die AV-Branche in der EU dar, weil dadurch die Zahl unabhängiger Produktionen sinken kann, mit negativen Folgen für die Vielfalt bei der Erstellung von Inhalten. Hinsichtlich der Auswirkungen äußerten einige der befragten Produzenten und europäischen Rundfunkanstalten die Sorge, dass die Übernahme des Auftragsvergabemodells durch globale Unternehmen in US-Besitz dazu geführt hat, dass das geistige Eigentum an europäischen Werken von europäischen Rechteinhabern auf US-amerikanische übergegangen ist. Nach den Erkenntnissen aus den Interviews hat die Unfähigkeit von Produzenten, Rechte an geistigem Eigentum zu besitzen, auch Auswirkungen auf die Vielfalt europäischer audiovisueller Werke, auf die Verfügbarkeit und vollständige Verwertung dieser Werke sowie auf die Vielfalt der Produktionsfirmen.

Analyse der Rechtslage

Im Rahmen der Studie werden internationale, EU- und nationale Regelungen für Verträge untersucht, die eine Übertragung von Rechten beinhalten, und dabei werden sowohl die normativen Mechanismen für Buy-out-Praktiken als auch die für Klauseln zu Rechtswahl und Gerichtsstand analysiert. Darüber hinaus zeigt die Studie Lücken in bestehenden Gesetzen auf, insbesondere bei der Abwägung zwischen Vertragsfreiheit und Gerechtigkeit sowie beim Umgang mit Machtungleichgewichten zwischen den Parteien.

Zwar legen internationale Übereinkommen allgemeine Grundsätze fest und gewähren Urhebern und ausübenden Künstlern Urheber- und Verwertungsrechte, allerdings berücksichtigen diese selten die Besonderheiten der Rechteübertragung. So sieht das EU-Recht – insbesondere die jüngste Richtlinie zum Urheberrecht und zu verwandten Schutzrechten im digitalen Binnenmarkt (DSM-Richtlinie) – zwar bestimmte Maßnahmen vor, um ein Rechtegleichgewicht zwischen Vertragsparteien sicherzustellen, allerdings legt das EU-Recht weder fest, wann Verträge über die Übertragung von Rechten verwendet werden können, noch enthält dieses verbindliche Bedingungen für solche Verträge. Die nationale Gesetzgebung in mehreren Mitgliedstaaten schreibt vor, dass die Übertragung von Rechten in Schriftform zu erfolgen hat. Darüber hinaus verbietet die nationale Gesetzgebung in mehreren Mitgliedstaaten – in Einklang mit der Berner Übereinkunft – bei der Übertragung von Verwertungsrechten/wirtschaftlichen Rechten den Verzicht auf Urheberpersönlichkeitsrechte. Zudem verbieten einige nationale Gesetze im Falle von Verwertungsrechten eine begrenzte Übertragung von Eigentumsrechten. Einige Mitgliedstaaten haben Mechanismen zur Verbesserung der Gerechtigkeit eingerichtet. Hierzu gehören beispielsweise die Beschränkung der Rechteübertragung auf das für den Vertragszweck erforderliche Maß oder das Verbot der Übertragung künftiger Werke oder unvorhersehbarer Rechte.

In puncto Vergütungsansprüche existieren auf internationaler Ebene bestimmte Regeln. Allerdings gibt es keine verbindlichen Bestimmungen für Pauschalzahlungen bei der Übertragung von Rechten. Auf EU-Ebene führt die DSM-Richtlinie den Grundsatz einer angemessenen und verhältnismäßigen Vergütung für Urheber und ausübende Künstler im Falle einer Rechteübertragung ein (Artikel 18). Gemäß der Richtlinie können auch Pauschalzahlungen eine verhältnismäßige Vergütung darstellen, allerdings sollten Pauschalzahlungen nicht gängige Praxis sein. Die Mitgliedstaaten können konkrete Fälle bestimmen, in denen Pauschalzahlungen geleistet werden können.Auf nationaler Ebene gibt es nur wenige Mitgliedstaaten, die im Einzelnen definiert haben, was eine verhältnismäßige Vergütung ist.

Auf EU-Ebene können die jüngsten Maßnahmen der DSM-Richtlinie Urhebern und ausübenden Künstlern bei der Übertragung ihrer Rechte zugutekommen, und zwar durch mehr Transparenz bei der Verwertung ihrer Werke (Artikel 19), durch das Widerrufsrecht bei mangelnder Verwertung (Artikel 22) sowie durch Vertragsanpassungsmechanismen (Artikel 20), die zusätzliche Vergütungsansprüche ermöglichen, wenn sich die ursprünglichen Zahlungen als zu gering erweisen. In der Praxis kommt es jedoch weiterhin selten zur Durchsetzung solcher Schutzmaßnahmen. Ursächlich hierfür ist die Zurückhaltung von Urhebern und ausübenden Künstlern, sich im Falle von Urheberrechtsstreitigkeiten auf Gerichtsverfahren einzulassen. Freiwillige alternative Streitbeilegungsverfahren für Streitigkeiten über die Transparenzpflicht und den Vertragsanpassungsmechanismus können sich zum Schutz ihrer Interessen als nützlich erweisen (Artikel 21).

Die Rechte von Urhebern und ausübenden Künstlern können entweder individuell oder kollektiv wahrgenommen werden. Eine kollektive Rechtewahrnehmung kann durch Gewerkschaften und unabhängige Verbände im Rahmen von Kollektivverhandlungen oder einer freiwilligen oder verpflichtenden Verwertung durch Verwertungsgesellschaften erfolgen. Urheber und ausübende Künstler können verschiedene Rechte an unterschiedliche Verwertungsgesellschaften abtreten, was zu komplexen Situationen auf nationaler Ebene führt. Hinzu kommt, dass bei einer vollständigen Übertragung von Exklusivrechten zu Vertragsbeginn – wie dies durch bestimmte Buy-out-Klauseln erfolgt – Verwertungsgesellschaften in ihrer Fähigkeit eingeschränkt sein können, Urheber und ausübende Künstler effektiv zu vertreten.

Für Produzenten von audiovisuellen Werken existieren unterdessen **begrenzt anwendbare internationale und EU-Vorschriften für die Regelung ihrer Vertragsbeziehungen mit Rundfunkanstalten und Streaminganbietern.**Grund hierfür ist, dass Produzenten bei Verhandlungen mit Rundfunkanstalten und Streaminganbietern im Allgemeinen eine stärkere Verhandlungsposition zugeschrieben wird als Urhebern und ausübenden Künstlern. Hier bieten die AVMD-Richtlinie und nationale Regelungen umfassendere Mechanismen, mit denen die ungleiche Verhandlungsposition von Produzenten ausgeglichen werden kann. Darüber hinaus können allgemeine Grundsätze des EU-Vertragsrechts und bestimmte nicht verbindliche Instrumente wie Musterregeln Schutz für schwächere Parteien in Vertragsbeziehungen bieten. Gleichwohl ist diese Form des Schutzes begrenzt und allgemein und bietet keine spezifischen Rechtsinstrumente für Produzenten audiovisueller Werke. Alles in allem bleiben die Verhandlungen den Vertragsparteien überlassen und werden durch das gewählte Finanzierungsmodell und die Risikobilanz der Finanzinvestition beeinflusst.Dies kann allerdings dazu führen, dass insbesondere kleine und unabhängige Produzenten benachteiligt werden.

In Bezug auf Rechtswahl und Wahl des Gerichtsstands sieht der aktuelle Rahmen des internationalen Privatrechts der EU keine spezifischen Mechanismen vor, die der Komplexität von Verträgen zur Übertragung von Rechten im internationalen Kontext gerecht werden. Zwar verweist die DSM-Richtlinie in Erwägungsgrund 81 auf Artikel 3 Absatz 4 der

Rom-I-Verordnung, wodurch Artikel 19, 20 und 21 der DSM-Richtlinie unter bestimmten Bedingungen Vorrang vor vertraglichen Vereinbarungen haben, allerdings greift dieser Mechanismus nur, wenn ein Vertrag eine Rechtswahl enthält und vor einem EU-Gericht verhandelt wird, vor dem die Rom-I-Verordnung Geltung hat. Ist keine Rechtswahl enthalten, gelten die allgemeinen Regeln der Rom-I-Verordnung, und Fragen der Gerichtsbarkeit fallen unter die Brüssel-Ia-Verordnung. Gleichwohl enthalten diese Rechtsrahmen keine maßgeschneiderten Bestimmungen für Verträge über die Übertragung von Urheberrechten. Dadurch unterliegen Autoren, ausübende Künstler und Produzenten allgemeinen Vertragsregeln. Diese schützen jedoch eher den Grundsatz der Vertragsfreiheit, anstatt potenzielle Machtungleichgewichte oder Schwachstellen in solchen Vereinbarungen zu beseitigen.

Zur Verbesserung des Schutzes von Urheber/Ausübenden und Produzenten von audiovisuellen Werken im Falle von EU-Fördermitteln oder in Fällen, in denen die Produktion oder Verwertung in der EU stattfindet, sind zwei Ansätze denkbar:Der erste Ansatz basiert auf dem im Bericht der französischen Ratspräsidentschaft enthaltenen Vorschlag und sieht die Ausweitung der Schutzregelungen für benachteiligte Parteien, wie sie beispielsweise Verbrauchern oder Beschäftigten zur Verfügung stehen, auf bestimmte Verträge zur Übertragung von Urheberrechten vor. Der zweite Ansatz basiert im Kern auf der Festlegung verbindlicher (materiell-rechtlicher) Regeln auf EU-Ebene zum Schutz von Urhebern im Sinne von Artikel 9 Absatz 1 der Rom-I-Verordnung.

RÉSUMÉ

Afin d'exercer leurs droits, les auteurs et les artistes interprètes ou exécutants transfèrent généralement ces droits à des tiers. Les règles et pratiques régissant ces transferts varient selon les États membres (EM) et les secteurs (musique, audiovisuel, arts visuels, œuvres littéraires ou jeux vidéo). En outre, il convient de noter que les questions liées au transfert de droits sont particulièrement pertinentes pour les producteurs dans l'environnement numérique, en particulier lorsqu'ils collaborent avec des plateformes de streaming mondiales et, dans une moindre mesure, avec les diffuseurs, comme le souligne également le rapport sur les perspectives des médias.

L'objectif de cette étude, menée par Verian Group, Milieu Consulting, NTT DATA et VUB pour le compte de la Commission européenne (DG CNECT), est de recueillir des informations et des éléments probants sur les pratiques contractuelles impliquant des transferts de droits d'auteur ou de droits voisins et d'évaluer les incidences de ces pratiques sur les auteurs, les artistes interprètes ou exécutants et les producteurs audiovisuels.

L'étude couvre les groupes de parties prenantes suivants :

- les auteurs et artistes interprètes ou exécutants des secteurs de l'audiovisuel, de la musique, des arts visuels, des œuvres littéraires et des jeux vidéo ;
- les producteurs du secteur audiovisuel.

L'étude poursuit plusieurs objectifs :

- recenser les pratiques contractuelles impliquant un transfert de droits affectant les auteurs et les artistes interprètes ou exécutants dans les secteurs créatifs couverts et évaluer les incidences de ces pratiques sur les auteurs et les artistes interprètes ou exécutants (chapitre 3) ;
- évaluer la capacité des producteurs à exploiter et à conserver les droits de propriété intellectuelle (PI) dans leurs accords contractuels avec les streamers et les diffuseurs, en s'appuyant sur les résultats du rapport sur les perspectives des médias (chapitre 4) ;
- recenser, aux niveau international, de l'UE et des États membres, les règles et la législation existantes qui s'appliquent aux contrats de transfert de droits d'auteur et de droits voisins, tels que les rachats, et les analyser (chapitre 5).

Méthodologie

L'étude repose sur les sources d'information suivantes :

- une analyse documentaire des études existantes sur les conditions des auteurs, des artistes interprètes ou exécutants et des producteurs ;
- des entretiens individuels avec des auteurs et artistes interprètes ou exécutants ; des entretiens individuels avec des producteurs audiovisuels, des diffuseurs, des streamers et des experts juridiques ; des entretiens avec des organisations-cadres représentant des auteurs et artistes interprètes ou exécutants ; des entretiens avec des organisations-cadres représentant des producteurs audiovisuels, des diffuseurs et des streamers ;
- une enquête menée auprès d'auteurs et d'artistes interprètes ou exécutants ;
- une cartographie juridique et une analyse des règles internationales, européennes et nationales, des instruments politiques et de la législation dans les États membres.

Les données collectées à partir de ces sources ont été utilisées pour analyser les principaux défis rencontrés par les auteurs, les artistes-interprètes ou exécutants et les producteurs dans les secteurs concernés.

Concrètement, la phase de collecte des données a consisté en 30 entretiens exploratoires avec des experts et des associations européennes ou paneuropéennes représentant les auteurs et les artistes interprètes ou exécutants, 25 entretiens approfondis avec des auteurs et des artistes interprètes ou exécutants ou des organisations représentant leurs intérêts (par exemple des OGC, des syndicats), 4 entretiens avec des organisations-cadres représentant les producteurs et 32 entretiens approfondis avec diverses parties prenantes concernées par la production audiovisuelle (producteurs, associations nationales représentant les producteurs, experts juridiques, diffuseurs publics et privés, streamers mondiaux, et organisations représentant les streamers et les diffuseurs). Par ailleurs, l'enquête diffusée auprès des auteurs et artistes interprètes ou exécutants de l'UE a permis de recueillir 747 réponses.

L'étude a été menée en plusieurs phases. En consultation avec la DG CNECT, la phase initiale de l'étude a été utilisée pour affiner la méthodologie. Au cours de cette phase, l'équipe a élaboré les modèles de collecte de données (y compris l'entretien, la conception du questionnaire d'enquête et les modèles pour la recherche documentaire nationale) et a réalisé une cartographie exhaustive des sources à utiliser tout au long de l'étude. La phase initiale comprenait également une cartographie exhaustive des parties prenantes à consulter pendant l'étude.

Après la phase initiale et l'achèvement du travail exploratoire, l'équipe chargée de l'étude a procédé à une évaluation approfondie des pratiques contractuelles affectant, d'une part, les auteurs et les artistes interprètes ou exécutants et, d'autre part, les producteurs dans le secteur audiovisuel. Bien que menées simultanément, la collecte des informations et l'évaluation des pratiques affectant les auteurs et les artistes interprètes ou exécutants et celles affectant les producteurs ont été évaluées séparément. Parallèlement, l'équipe chargée de l'étude a réalisé une cartographie juridique et une analyse des règles et de la législation aux niveaux international, de l'UE et des États membres, avec une évaluation approfondie dans un certain nombre d'États membres (Allemagne, Belgique, Danemark, Espagne, France, Irlande, Italie, Pays-Bas, Pologne et Roumanie). Cette analyse juridique visait à identifier les lacunes de la législation ainsi que des exemples de solutions nationales provenant de différents États membres.

La dernière phase de l'étude consistait à trianguler les preuves recueillies auprès de différentes sources et à identifier les principaux défis auxquels sont confrontés les auteurs, les artistes interprètes ou exécutants et les producteurs.

Malgré le volume important d'informations recueillies, la mise en œuvre de l'étude s'est heurtée à d'importantes limites. L'analyse documentaire, les entretiens approfondis et l'enquête ont apporté peu d'éléments concernant le secteur des jeux vidéo. L'enquête n'a généré qu'un nombre limité de réponses de ce secteur. De plus, certaines parties prenantes des secteurs visés par l'étude étaient réticentes à discuter de clauses contractuelles parce qu'elles avaient signé des accords de non-divulgation. Cela a eu une incidence sur la disponibilité d'informations pertinentes pour analyser les tendances en matière de transfert de droits.

Le fait que l'étude s'appuie sur des entretiens en limite la généralisation et risque de fausser les résultats en raison de la partialité des personnes interrogées.

Pratiques contractuelles impliquant un transfert de droits et des auteurs et artistes interprètes ou exécutants

L'analyse des pratiques contractuelles impliquant un transfert des droits d'auteurs et d'artistes interprètes ou exécutants dans les secteurs de la création a révélé des **perceptions différentes du pouvoir de négociation dans les différents secteurs**. Dans le secteur audiovisuel, le faible pouvoir de négociation des auteurs se reflète dans les clauses contractuelles, qui peuvent impliquer des contrats de rachat total avec une rémunération forfaitaire unique ou des paiements de royalties à des taux perçus comme bas. En revanche, les artistes interprètes ou exécutants font état d'une augmentation de leur pouvoir de négociation en raison du recours accru aux accords de négociation collective mis en œuvre par les syndicats. Dans le secteur de la musique, les résultats de l'enquête révèlent que 41 % des auteurs et artistes interprètes ou exécutants estiment que leur pouvoir de négociation est resté inchangé, tandis que 38 % déclarent qu'il a diminué au cours des cinq dernières années. Les négociations contractuelles avec les contreparties, principalement les maisons de disques et les éditeurs de musique, sont directement gérées par les auteurs et les artistes interprètes ou exécutants (83 % des personnes interrogées dans le cadre de l'enquête), bien que 63 % d'entre eux recherchent un soutien externe auprès d'organisations professionnelles, d'avocats et d'organismes de gestion collective (OGC).

Dans le secteur des arts visuels, la plupart des auteurs et artistes interprètes ou exécutants (49 %) estiment que leur **pouvoir de négociation individuel n'a pas changé**, tandis que 20 % signalent une diminution. Ces perceptions peuvent être liées à une concurrence accrue, à l'essor de la technologie et des réseaux sociaux, et à l'utilisation croissante de l'intelligence artificielle (IA). Dans le secteur des œuvres littéraires, comme dans les autres secteurs visés par la présente étude, le pouvoir de négociation est influencé par des facteurs tels que le succès, l'expérience et la réputation d'un auteur. Lorsqu'il existe un manque de pouvoir de négociation, celui-ci s'explique souvent par des ressources limitées, un manque de soutien dans les négociations contractuelles et un déséquilibre inhérent du rapport de force entre les maisons d'édition et les auteurs. Dans le secteur des œuvres littéraires, 78 % des auteurs indiquent qu'ils ne bénéficient pas d'accords de négociation collective, et beaucoup estiment que ces accords sont inefficaces dans certains États membres. En revanche, 68 % des organisations professionnelles représentant les auteurs littéraires déclarent bénéficier d'accords collectifs.Les pratiques dans le secteur des jeux vidéo semblent différentes, les négociations se déroulant généralement au niveau individuel, et les auteurs plus expérimentés ayant tendance à avoir un plus grand pouvoir de négociation.

Dans le secteur audiovisuel, **la législation nationale et les accords spécifiques déterminent respectivement quels droits peuvent être transférés et quels droits sont transférés, ce qui entraîne des degrés variables de conservation des droits et de rémunération statutaire d'un État membre à l'autre.** Les producteurs acquièrent généralement des droits d'exploitation étendus, tandis que les droits exclusifs et la rémunération garantie des auteurs et des artistes interprètes ou exécutants sont limités.

Dans le secteur de la musique, les auteurs-compositeurs transfèrent souvent leurs droits à des éditeurs de musique et les artistes interprètes ou exécutants transfèrent souvent leurs droits exclusifs à des maisons de disques. Au sein de ce secteur, les musiciens de studio semblent être dans une position plus fragile que les artistes interprètes ou exécutants, qui reçoivent généralement des montants forfaitaires. Les auteurs et les artistes interprètes ou exécutants du secteur de la musique affirment généralement avoir été confrontés à des situations « à prendre ou à laisser » lors des négociations, en particulier avec des services de vidéo à la demande (VOD) et des maisons de disques.

Dans le secteur des arts visuels, les contrats de commande prévalent et peuvent être perçus comme problématiques, car ils impliquent le transfert de la propriété et de certains droits d'exploitation en échange d'une rémunération forfaitaire, sans aucune marge de manœuvre pour des négociations ultérieures.

Dans le secteur des jeux vidéo, les auteurs procèdent généralement à un transfert complet de droits à perpétuité dans le cadre de contrats de travail ou de sous-traitance. Dans le secteur littéraire, les auteurs signent généralement des contrats d'édition sous la forme d'accords de licence, les rachats étant moins courants.

Toutefois, **la présence de commanditaires** (producteurs audiovisuels ou maisons de disques, par exemple) **n'est pas toujours considérée comme problématique**, car les commanditaires peuvent contribuer à soutenir financièrement les auteurs et les artistes interprètes ou exécutants, ainsi qu'à jouer un rôle dans les négociations avec les diffuseurs et streamers mondiaux.

Dans tous les secteurs, l'équité de la rémunération est perçue de la même manière : la plupart des auteurs et artistes interprètes ou exécutants interrogés dans le cadre d'un entretien ou de l'enquête estiment que la rémunération qu'ils reçoivent n'est pas équitable. Dans de nombreux cas, les raisons invoquées sont liées aux modalités de transfert des droits (par exemple, le transfert contre des montants forfaitaires qui ne permettent pas de rendre compte de la valeur économique potentielle des œuvres ou des prestations). Dans le secteur audiovisuel, 51 % des personnes interrogées pensent que la rémunération est rarement équitable, tandis que 33 % estiment qu'elle ne l'est jamais, principalement en raison du calendrier des négociations (phase de préproduction), du recours à des tarifs standard dans l'industrie et à des méthodes de rémunération forfaitaire. Dans le secteur de la musique, 49 % des auteurs et artistes interprètes ou exécutants ayant répondu à l'enquête estiment que la rémunération est rarement équitable, tandis que 23 % considèrent qu'elle ne l'est jamais. Les personnes interrogées expliquent que l'une des raisons de cette rémunération inéquitable est que les contrats sont généralement négociés au cours des phases initiales, avant que la valeur économique réelle du travail puisse être pleinement évaluée. En outre, lorsqu'une rémunération est reçue sous forme de montant forfaitaire, les créateurs peuvent se trouver dans l'incapacité de tirer un bénéfice financier si leur travail connaît un certain succès. Des tendances similaires sont observées dans le secteur des arts visuels, où 51 % des personnes interrogées considèrent que la rémunération est rarement équitable et 26 % pensent qu'elle ne l'est jamais, mentionnant comme raisons une sous-estimation de la valeur économique réelle ou potentielle et son impact sur la viabilité financière. Dans le secteur des œuvres littéraires, 43 % des personnes interrogées estiment que la rémunération n'est jamais équitable, principalement parce que la valeur économique réelle ou potentielle de l'œuvre n'est pas prise en compte. Aucun résultat concluant n'est disponible pour le secteur des jeux vidéo.

Pratiques contractuelles affectant les producteurs du secteur audiovisuel

L'étude a examiné les pratiques contractuelles affectant les producteurs du secteur audiovisuel, principalement par le biais d'une analyse documentaire, d'une analyse des mesures politiques et d'entretiens.

Selon les conclusions de l'étude, les producteurs audiovisuels rencontrent d'importantes difficultés dans les négociations avec les diffuseurs et streamers mondiaux, car leur pouvoir de négociation est souvent limité. Les producteurs interrogés soulignent les difficultés importantes à créer des entreprises durables lorsqu'ils ne sont pas propriétaires des droits d'exploitation future, en particulier dans les cas où les commanditaires conservent des droits sans financer entièrement les productions. Les conclusions des entretiens avec les producteurs montrent que, parfois, ces derniers ne peuvent pas détenir et exploiter les

droits, même lorsqu'ils sont demandeurs et qu'ils apportent un financement public par le biais de mécanismes tels que les incitations fiscales ou qu'ils investissent dans le développement. Cette pratique est plus courante dans le modèle de commande, où le financement public appliqué par les producteurs est parfois inclus dans le budget global de production.

La capacité des producteurs à détenir et à exploiter les droits est souvent limitée par les différents modèles de financement. Les entretiens ont mis en évidence différents problèmes, notamment des questions contractuelles liées au choix de la loi applicable et de la juridiction compétente, un pouvoir de négociation limité pour négocier des clauses de révision, et des possibilités restreintes de revenus futurs provenant de droits dérivés et de droits de format. Le fait que les licences soient de longue durée a été identifié comme un problème spécifique dans le cadre des modèles de financement par coproduction et octroi de licence. En outre, les producteurs se disent préoccupés par le manque de transparence concernant les données sur l'exploitation des œuvres audiovisuelles par les streamers mondiaux.

Les producteurs interrogés indiquent que **le modèle de commande, dans lequel les financeurs conservent la totalité ou la majeure partie des droits, est largement utilisé par les streamers mondiaux et les diffuseurs privés dans les accords contractuels pour la fiction télévisuelle.** En revanche, les streamers mondiaux interrogés ont noté une évolution du modèle de commande vers des modèles tels que ceux par coproduction et octroi de licence, dans le but de permettre un partage des risques et des droits au vu du contexte incertain du secteur, car ces approches nécessitent moins d'investissements initiaux pour les streamers que d'autres cas, tels que la commande d'œuvres avec un **transfert complet des droits.** Dans l'ensemble, les résultats indiquent que différents modèles de financement coexistent, sans qu'aucune preuve concluante ne montre la prédominance d'un modèle en particulier. Les entretiens avec les diffuseurs de service public ont révélé que ces derniers s'appuient principalement sur des modèles d'octroi de licence et de coproduction, parfois déterminés par des exigences réglementaires. Les diffuseurs privés expliquent qu'ils ont recours à divers modèles de financement, mais soulignent que le déclin du marché pose d'importants problèmes pour trouver des cofinanceurs de projets audiovisuels.

Les entretiens révèlent qu'il est important pour les producteurs de constituer un catalogue de droits afin d'établir de futures sources de revenus et d'assurer la viabilité à long terme de leurs activités. Sans la propriété des droits, les producteurs audiovisuels sont fortement limités pour investir dans la création de nouvelles œuvres. Il est donc essentiel de développer des actifs ayant une valeur à long terme. Toutefois, dans le cadre du modèle de financement par commande, les producteurs ne sont pas en mesure de conserver leurs droits, ce qui entrave gravement leur capacité à se développer et à maintenir leur présence dans l'industrie. Les entretiens avec les producteurs corroborent les conclusions du rapport sur les perspectives des médias (2023) qui met en évidence une tendance à inclure le transfert de tous les droits de propriété intellectuelle dans les contrats, en particulier avec les streamers situés dans des pays en dehors de l'UE. Ce défi concerne tout particulièrement les petits producteurs indépendants, qui se trouvent dans une position très vulnérable. L'étude souligne également que **l'absence de mécanismes de protection place les producteurs dans une position de négociation plus faible**, en particulier lorsqu'ils négocient avec des financiers puissants qui peuvent influencer les clauses contractuelles. On observe que les producteurs indépendants conservent davantage de droits lorsqu'il existe certaines règles au niveau national qui leur garantissent une meilleure position de négociation avec les streamers mondiaux et, dans une moindre mesure, avec les diffuseurs. Les résultats indiquent que les **producteurs audiovisuels peuvent obtenir plus de droits lorsqu'un financement public est impliqué, leur garantissant certains droits sur la base de critères de financement.** En outre, sur certains marchés de l'UE,

les producteurs n'ont pas la possibilité de lever des capitaux, en particulier sur les petits marchés, car ils peuvent ne pas être en mesure d'obtenir des prêts bancaires. Cette situation peut être exacerbée par le faible nombre de commanditaires, en particulier sur certains marchés plus petits, car elle peut entraîner des difficultés de trésorerie pour les producteurs.

Les accords de droits restrictifs conclus avec les streamers et les diffuseurs, qui limitent la capacité des producteurs à obtenir une rémunération ou à pérenniser leurs entreprises, menacent les industries audiovisuelles de l'UE, car ils risquent de réduire les productions indépendantes et d'avoir une incidence sur la diversité de la création de contenu. En termes d'impact, certains producteurs et diffuseurs européens interrogés s'inquiètent du fait que l'adoption du modèle de commande par des sociétés internationales détenues aux États-Unis prive les entités européennes de la propriété intellectuelle des œuvres européennes. D'après les éléments recueillis lors des entretiens, l'incapacité des producteurs à détenir des droits de propriété intellectuelle a également des effets sur la diversité des œuvres audiovisuelles européennes, sur la disponibilité et la pleine exploitation de ces œuvres, ainsi que sur la diversité des sociétés de production.

Analyse juridique

L'étude examine les règles internationales, européennes et nationales régissant les contrats impliquant le transfert de droits, en analysant à la fois les mécanismes normatifs régissant les pratiques de rachat et ceux régissant les clauses de choix de la loi applicable et de la juridiction compétente. L'étude identifie également les lacunes de la législation actuelle, notamment en ce qui concerne l'équilibre entre la liberté contractuelle et l'équité, ainsi que les déséquilibres des rapports de force entre les parties.

Les conventions internationales énoncent des principes généraux et accordent aux auteurs et aux artistes interprètes ou exécutants des droits moraux et des droits d'exploitation, mais abordent rarement les spécificités des transferts de droits. Si la législation européenne, et en particulier la récente directive sur le droit d'auteur et les droits voisins dans le marché unique numérique (directive DSM), prévoit certaines mesures pour assurer l'équilibre des droits entre les parties contractantes, elle ne fixe pas de limites quant au moment auquel les contrats de transfert de droits peuvent être utilisés et ne prescrit pas de conditions spécifiques pour ces contrats. Dans plusieurs États membres, les lois nationales exigent que les transferts de droits se fassent par écrit et, comme le permet la convention de Berne, elles interdisent la renonciation aux droits moraux lorsque les droits d'exploitation/économiques sont transférés. Par ailleurs, certaines lois nationales interdisent de limiter les transferts de propriété dans le cas des droits d'exploitation. Certains États membres ont mis en place des mécanismes visant à améliorer l'équité, tels que la limitation des transferts de droits à ceux qui sont nécessaires aux fins du contrat ou l'interdiction des transferts d'œuvres futures ou de droits imprévisibles.

En ce qui concerne les droits à rémunération, certaines règles existent au niveau international, mais il n'y a pas de dispositions normatives sur les montants forfaitaires en échange d'un transfert de droits. Au niveau de l'UE, la directive DSM introduit le principe d'une rémunération appropriée et proportionnelle des auteurs et des artistes interprètes ou exécutants en cas de transfert de droits (article 18). Selon la directive, les montants forfaitaires peuvent également constituer une rémunération proportionnelle tant qu'ils ne sont pas considérés comme une pratique habituelle. Les États membres peuvent définir des cas spécifiques pour l'application de montants forfaitaires. Au niveau national, quelques États membres définissent plus en détail la rémunération proportionnelle.

Au niveau de l'UE, les mesures récentes de la directive DSM peuvent bénéficier aux auteurs et aux artistes interprètes ou exécutants lors du transfert de leurs droits grâce à une

transparence accrue sur l'exploitation de leurs œuvres (article 19), au droit de révocation en cas de non-exploitation (article 22) et aux mécanismes d'adaptation des contrats (article 20) qui permettent de réclamer une rémunération supplémentaire lorsque les paiements initiaux se révèlent faibles. Toutefois, l'application de ces mesures de protection reste marginale en raison de la réticence des auteurs et des artistes interprètes ou exécutants à engager des poursuites en cas de litige sur les droits d'auteur. Des procédures alternatives de règlement des litiges (ADR) volontaires pour les litiges relatifs à l'obligation de transparence et au mécanisme d'adaptation des contrats pourraient s'avérer bénéfiques pour préserver leurs intérêts (article 21).

Les droits des auteurs et des artistes interprètes ou exécutants peuvent être gérés individuellement ou collectivement. La gestion collective peut être assurée par des syndicats et des associations indépendantes dans le cadre de négociations collectives ou d'une gestion volontaire ou obligatoire par les OGC. Les auteurs et les artistes interprètes ou exécutants peuvent céder des droits différents à divers OGC, ce qui crée des situations complexes au niveau national. En outre, lorsque les droits exclusifs sont entièrement transférés au début d'un contrat, comme dans le cas de certaines clauses de rachat, cela peut limiter la capacité des OGC à représenter efficacement les auteurs et les artistes interprètes ou exécutants.

En ce qui concerne **les producteurs audiovisuels, les règles internationales et européennes régissant leurs relations contractuelles avec les diffuseurs et les streamers sont limitées.** En effet, les producteurs sont généralement considérés comme étant en meilleure position de négociation que les auteurs et les artistes interprètes ou exécutants lorsqu'ils négocient avec les diffuseurs et les plateformes de streaming mondiales. Dans ce cas, la directive SMA et les règles nationales prévoient des mécanismes plus larges qui peuvent remédier au rapport de force défavorable dont pâtissent les producteurs. En outre, les principes généraux du droit européen des contrats et certains instruments non contraignants tels que les règles types peuvent offrir une protection aux parties plus faibles dans les relations contractuelles. Cependant, cette protection reste limitée et générale, sans instrument juridique spécifique adapté aux producteurs audiovisuels. Dans l'ensemble, les négociations sont laissées à l'appréciation des parties contractantes et sont influencées par le choix du modèle de financement et l'équilibre des risques dans l'investissement financier. Toutefois, cela peut laisser les petits producteurs indépendants dans une position particulièrement vulnérable.

En ce qui concerne le choix de la loi applicable et le choix de la juridiction, le cadre actuel du droit international privé de l'Union européenne offre des mécanismes limités pour répondre aux complexités des contrats de cession de droits d'auteur dans des contextes internationaux. Bien que la directive DSM fasse référence à l'article 3, paragraphe 4, du règlement Rome I (RIR) dans le considérant 81, permettant aux articles 19, 20 et 21 de la directive DSM de prévaloir sur les accords contractuels dans des conditions spécifiques, ce mécanisme ne s'applique que lorsqu'un contrat inclut un choix de loi applicable et qu'il est porté devant une juridiction de l'UE devant laquelle le RIR s'applique. En l'absence de choix de la loi applicable, les règles générales du RIR s'appliquent, et les questions juridictionnelles relèvent du règlement Bruxelles I bis. Toutefois, ces cadres ne prévoient pas de dispositions spécifiques pour les contrats de cession de droits d'auteur, laissant les auteurs, les artistes interprètes ou exécutants et les producteurs soumis à des règles contractuelles générales qui protègent le principe de la liberté contractuelle plutôt que de corriger les éventuels déséquilibres de pouvoir ou les failles potentielles de ces accords.

Deux approches peuvent être envisagées pour renforcer la protection des auteurs, artistes et exécutants des secteurs de l'audiovisuel en cas de financement par l'UE ou lorsque la production ou l'exploitation a lieu dans l'UE. La première, suggérée par le rapport de la Présidence française, consiste à étendre à certains contrats de cession de droits d'auteur

les régimes de protection des parties vulnérables, tels que ceux prévus pour les consommateurs ou les salariés. La deuxième approche consiste à établir, au niveau de l'UE, des règles impératives (droit matériel) pour protéger les créateurs au sens de l'article 9, paragraphe 1, du règlement Rome I.

1. Introduction

The study focuses on gathering information and evidence on the contractual practices affecting authors, and where relevant performers, as well as the contractual practices affecting audiovisual producers in arrangements with broadcasters and streamers, with a focus on challenges related to IP rights ownership.

Furthermore, the study maps and identifies the relevant framework applicable to transfers of copyright and related rights, and analyses to what extent certain contractual practices are allowed under EU law and private international law.

The study covers all EU Member States, while an in-depth analysis covers some selected Member States.

The study is structured as follows:

- Chapter 2 explains the methodology used to collect and analyse the data.
- Chapter 3 presents the main contractual practices affecting authors and performers, focusing on five key sectors: audiovisual, music, visual arts, literary works and videogames. For each sector, the chapter examines the main market trends influencing contractual practices, investigates the primary contractual practices and practices around rights transfers, and assesses their impacts.
- Chapter 4 focuses on contractual practices affecting audiovisual producers and investigates the main contractual practices, the market trends influencing these, the choice of financing models, the terms and conditions of contracts, the role of policy instruments and their effects, and concludes with the main impacts resulting from these practices.
- Chapter 5 includes a comprehensive legal analysis, focusing on the rules applicable to contractual practices involving rights transfers, as well as rules on choice of law and jurisdiction clauses.
- Chapter 6 provides conclusions on the trends and results from the practices affecting authors, performers and producers.

To facilitate a clear understanding of the terminology used in this report, Annex I provides the definitions used for key terms. Readers may refer to this table to clarify any unfamiliar terms as they navigate through the report.

2. Methodology

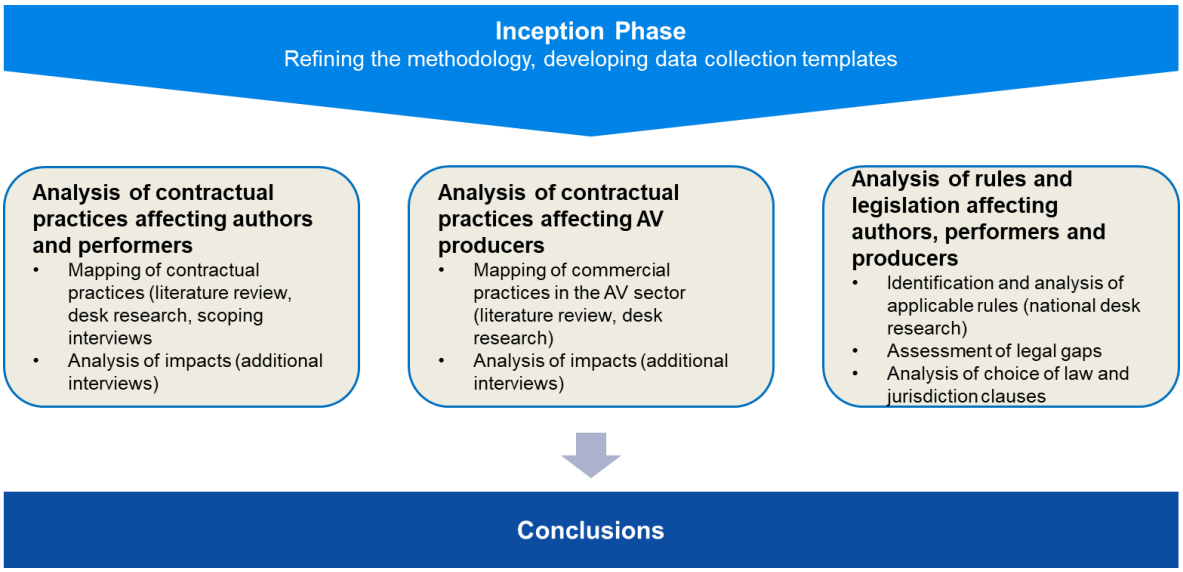
This chapter outlines our methodological approach to the study, which comprises an inception phase and four main tasks, as well as outlining the research limitations encountered during the course of the study.

2.1. Research process

The inception phase was used to fine-tune the methodology in consultation with DG CNECT. In this phase, the study team produced the data collection templates and created an exhaustive mapping of sources used throughout this study. The rest of the study was divided into four tasks: Task 1 (Chapter 3) involved mapping the contractual practices affecting authors and performers; Task 2 (Chapter 4) involved mapping the contractual practices affecting audiovisual producers; Task 3 (Chapter 5) involved conducting extensive legal mapping at national and EU levels; and Task 4 (Chapter 6) built on the results gathered

during the first three tasks and summarises the study's main conclusions. The figure below summarises the study methodology.

Figure 1: Study methodology



The subchapters below present the methodological approach in detail.

Inception phase

The first step for the study team was to conduct desk research to compile a list of the available literature on industry practices for authors, performers and producers. This desk research also aimed to identify the relevant industry stakeholders.

Based on the industry practices and stakeholders identified, the study team developed a questionnaire for scoping interviews to be conducted for the following chapters from the identified stakeholders. This research was also used to prepare a consultation strategy for the relevant chapters.

The data collected during the desk research was used to develop a questionnaire for exploratory interviews and preliminary questions for the survey and in-depth interviews. The collected information was also used to develop templates for the legal research at Member State level.

Analysis of contractual practices affecting authors and performers in different sectors

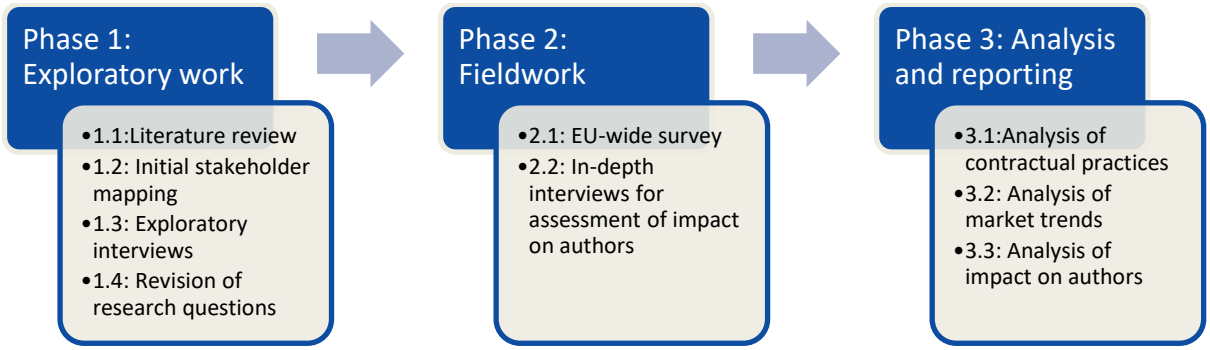
The work on Chapter 3 was divided into three phases. The first phase involved exploratory work, including an extensive examination of the literature mapped during the inception phase and introducing more literature resources regarding rights transfers. For this, additional data on market practices and characteristics of the sectors was collected via different sources of information. The study team also conducted 30 exploratory interviews using the questionnaire designed in the inception phase. These interviews were conducted with experts and EU/pan-European associations representing authors and performers. Based on the collected insights, the study team refined the research questions to gather the necessary data during the course of the fieldwork. Essentially, the survey questionnaire and the questionnaire for the in-depth interviews were finalised in this phase.

During phase two, based on the desk research and exploratory interviews conducted during phase one, the study team finalised the survey questionnaire and launched the fieldwork targeting authors and performers in the creative industries. To ensure comprehensive data collection, this was carried out in two steps. The team conducted 25 in-depth interviews with key stakeholders across the European Union. These interviews were conducted with CMOs (13), national and EU associations of authors and performers (4), trade unions (5) and individuals operating in these sectors (3).

In parallel, the team launched a pilot to ensure data quality and then rolled out an EU-wide survey, mainly targeting authors and performers across all of the creative sectors covered in the study. The aim of the survey was to capture trends in contractual practices involving rights transfers and assess the impact of such practices on the remuneration of authors and performers. A total number of 747 survey responses were received (for further details on the composition of the survey's respondents, please refer to Annex II).

The data collected in phases one and two was then used to analyse the common market trends and their impacts on authors and performers.

Figure 2: Overall approach to Chapter 3



Contractual practices affecting audiovisual producers

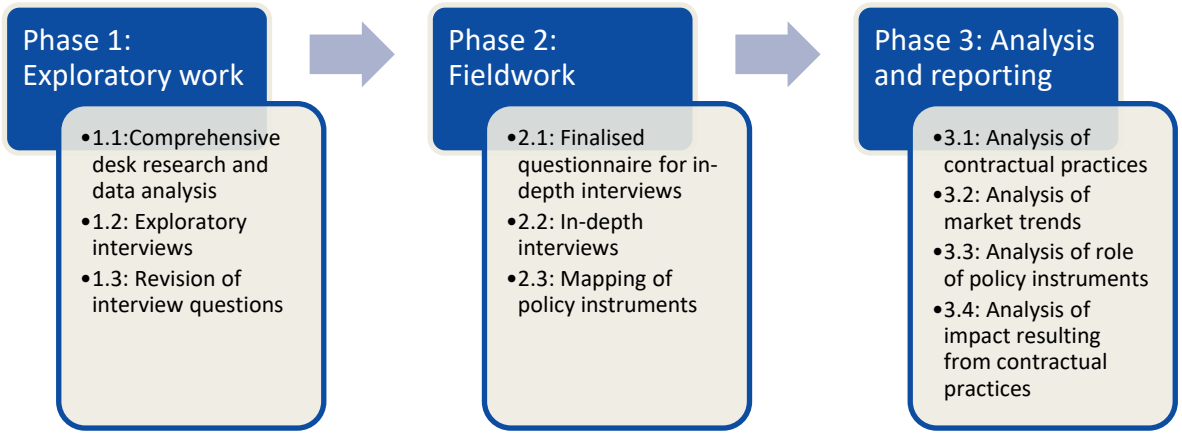
The research conducted under **Chapter 4** focuses on the contractual practices affecting audiovisual producers. Its organisation was divided into two sub-tasks. The first phase involved extensive in-depth desk research based on academic literature, industry and policy reports, and document analysis focused on the contractual relationship between producers and broadcasters/streamers. To complement the literature, the team also considered data that reflects industry trends and challenges in the audiovisual sector. As part of the first sub-task, exploratory interviews were conducted with the relevant stakeholders in the audiovisual sector. Based on the results of the exploratory interviews and the extensive desk research, the questionnaire for the in-depth interviews was refined and finalised. The second sub-task included in-depth interviews with the relevant industry stakeholders. In total, the team conducted 36 interviews with stakeholders in the audiovisual sector in the EU including: exploratory interviews with umbrella organisations representing producers (4), producers (13), national associations of audiovisual producers (3), lawyers/legal experts that represent producers, (2) public broadcasters (5), private broadcasters (3), global streamers (4), organisations representing commercial broadcasters and video-on-demand services (1), and organisations representing some global streamers (1).

Interviewees were selected to reflect the geographical diversity of countries and regions, as well as the different sizes of the audiovisual markets of the Member States. To enhance the validity of the analysis and gain deeper insights into contractual practices, the research team conducted interviews with producers that have experience working with both broadcasters and global streamers. Two producers reported that at the time of interviews, they were in the early stages of collaboration with global streamers and, therefore, lacked experience with past projects involving them. A large majority of the interviewed producers represented independent production companies, some of which were integrated with large 'indies'. The selection process for potential interviewees also ensured a balanced representation of stakeholders involved in contractual practices, whether as producers or financiers (broadcasters or streamers), legal experts or organisations representing these stakeholders. The interviews were conducted between March and May 2024.

The data collected from the interviews and desk research was used to analyse contractual practices affecting audiovisual producers in the EU, with a focus on challenges related to IP ownership and its impact on producers and industry sustainability. The desk research resulted in a comprehensive mapping of the policy instruments at Member State level that have an effect on contractual practices between producers and broadcasters/streamers. Based on the collected data on policy instruments in the audiovisual sectors at national Member State level, as well as on the empirical data from the interviews, the team identified best industry practices that may support audiovisual producers to own and exploit IP rights.

It is important to underline that under this task, we only interviewed global streamers that are US-based and did not include European streamers. However, the producers and other stakeholders interviewed also discussed contractual practices with local streamers. Given the difficulty in distinguishing some audiovisual groups as either streamers or broadcasters, the research team decided to classify as 'global streamers' those players that operate globally and commission European works mainly for their streaming services. This classification may include entities that also offer linear services.

Figure 3: Overall approach to Chapter 4



Legal analysis

The objective of **Chapter 5** was to map existing rules and legislation at international, EU and national levels on the transfer of copyright and related rights and to identify potential legal gaps. The focus of the legal mapping and legal analysis was on identifying provisions that enhance the ability of authors, performers and audiovisual producers to exploit their rights in the case of buy-out or similar contracts as well as contracts with a choice of foreign law and jurisdiction clauses. Two types of contractual relationships were considered:

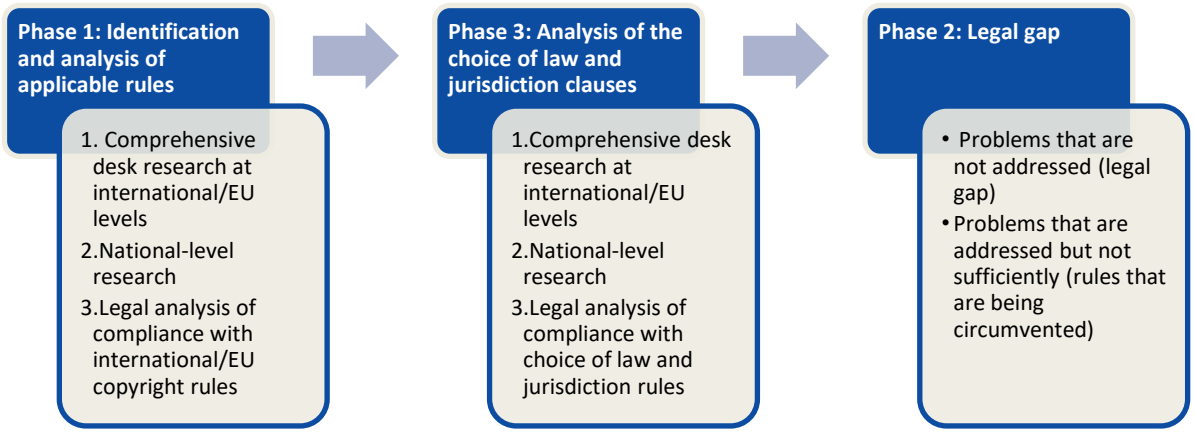
- the relationship between authors and performers and producers, broadcasters and streamers (examined in Chapter 3); and

- the relationship between audiovisual producers and broadcasters/streamers (examined in Chapter 4).

Work under Chapter 5 was divided into three sub-tasks, two of which were conducted simultaneously. For the first and third tasks (as shown in the figure below), templates drafted in the inception task were used. The results of the international and EU-level desk research were screened for their relevance with the help of a mapping table. Desk research included a review of legal documents, academic literature, case-law, reports and studies by international and EU institutions and bodies, as well as other available sources of information. At national level, the research was carried out by the national legal experts, who first of all filled out a brief Country Factsheet based on desk research from their respective countries. This first screening was done in all EU-27 Member States with the aim of selecting ten countries for an in-depth legal review and analysis. As a result, national experts in Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Romania and Spain prepared a more comprehensive country report. The horizontal analysis at national level thus mostly presents results from the ten Member States where comprehensive national research was undertaken, supplemented by results from the initial screening, where relevant.

Based on the rules and legislation identified, the team identified the legal gaps existing at national and EU levels. These were based on problems either not addressed or insufficiently addressed.

Figure 4: Overall approach to Chapter 5



Conclusion

Chapter 6 was also conducted in multiple steps. For step 1, the consortium team compiled the data collected in the main three chapters, including literature review, exploratory interviews, in-depth interviews and the stakeholder survey conducted among authors and performers in the different sectors. The compiled information was used to identify the issues pinpointed by the stakeholders. The team then grouped the information based on the sector. Where the issue affected all of the sectors, it was identified as such.

2.2. Research limitations

For each task certain limitations and challenges arose during the course of the study. These are summarised in the table below.

Table 1: Research limitations and challenges per task

	Challenges
Chapter 3: Authors and performers	- Limited evidence from the literature review, in-depth interviews and survey regarding the videogames sector. - Low number of contributions to the survey from representatives of the videogames sector (ten in total). All respondents from the videogames sector represented authors that fell outside the scope of this research. - Low number of contributions to the survey from music performers (a total of 39, out of which only eight answered the entire questionnaire, having transferred rights). - Many instances where it was not possible to determine the type of transfer (full transfer of ownership, or specific rights only) owing to limited data or lack of stakeholder knowledge.
Chapter 4: Audiovisual producers	- Reluctance of stakeholders to discuss contractual clauses because of NDAs. - Weaknesses related to interviews as a method, including limited generalisability and respondent bias. Related to this, risks of overlooking challenges that concern specific EU Member States.
Chapter 5: Legal analysis	- Lack of available information at national and international levels. - Fragmented legislation across the Member States.

3. Contractual practices affecting authors and performers in creative sectors

This chapter focuses on the analysis of contractual practices affecting authors and performers in different creative sectors, namely the audiovisual, music, visual arts, literary works and videogames sectors. Following a brief introduction to the key market trends influencing contractual practices involving rights transfers (Subchapter 3.1.), for each sector, an in-depth look at current contractual practices is presented, together with an analysis of the scope, duration, remuneration and choice of law linked to the rights transfer.[1]

1 Unless otherwise specified, a 'rights transfer' in this report refers to the transfer of all legally transferable rights, primarily exploitation rights (e.g. rights to use, reproduce, distribute or perform the work).

We then identify the main implications of the contractual practices depicted for authors and performers (Subchapter 3.7.), before presenting the key conclusions (Subchapter 3.8.).

3.1. Market trends influencing contractual practices involving rights transfers

The European creative industries are currently experiencing transformative changes, in particular related to the rise of streaming and digital services, which may influence the contractual arrangements for authors and performers across multiple sectors, including the music, audiovisual, visual arts, literary works and videogames sectors. There is however a lack of figures on the amount of transfers and the extent to which this represents a challenge to authors or performers in various sectors.

3.1.1. Rise of streaming and digital services in creative sectors

Audiovisual

The European VOD market has seen a significant rise in consumption, particularly during the COVID-19 pandemic, when many viewers turned to digital platforms.[2] On the other hand, measures to promote European works established in the legal framework of the Union have been implemented. These factors have led, inter alia, to a diversification of content, with over 8,500 European films available on average per country, 82% of which are non-national, emphasising the commitment to diverse European content.[3] Pan-European distribution is also increasing, with 63% of non-national European films accessible in more than ten countries, showcasing a strategic push for broader distribution.[4][5] Public support, such as Creative Europe MEDIA,[6] remains crucial for the industry in order to ensure sustainable production and distribution amid digitalisation and market concentration challenges. [7] [8]

The trends in the European VOD market significantly impact authors and performers, in particular when their works or performances are used by producers in audiovisual works. Increased consumption and content diversification have led to an imbalance favouring US

[2] European Commission, *European Media Industry Outlook*, European Commission, 2023, pp. 9-10, last accessed on 20/06/2024 and available *at: The European Media Industry Outlook|Shaping Europe's digital future (europa.eu)*
[3] *UNIC,* Film and *Audiovisual Sector Welcomes New European Audiovisual Observatory Study*, UNIC, 2023, last accessed on 18/07/2024 and available at: UNIC|The International Union of Cinemas|Detail (unic-cinemas.org)

[4] *Idem.*

[5] European Commission, *European Media Industry Outlook*, European Commission, 2023, pp. 9-10, last accessed on 20/06/2024 and available at*: The European Media Industry Outlook|Shaping Europe's digital future (europa.eu)*

[6] *See: Creative Europe MEDIA strand - Culture and Creativity (europa.eu)*

[7] *Huguenot-Noël, R., Audiovisual Media in the Digital Era: An Industrial Strategy Needed to Safeguard Cultural Diversity, European Policy Centre, 2018,* last accessed on 18/07/2024 and available *at: 180706_Audiovisualmedia_RHN.pdf (epc.eu)*

[8] *UNIC (2023), UNIC,* Film and *Audiovisual Sector Welcomes New European Audiovisual Observatory Study*, UNIC, 2023, last accessed on 18/07/2024 and available at: UNIC|The International Union of Cinemas|Detail (unic-cinemas.org)

content, with stronger markets such as Spain and Sweden benefiting more than weaker markets such as Romania[9] from investment.

Music

Similarly, the music sector has been also transformed by the rise of streaming services and the effects of COVID-19. On the one hand, in 2023, streaming accounted for 67.3% of global recorded music revenues, marking a substantial shift towards digital consumption, which was accelerated by the pandemic.[10] This digital transition reversed the long-term decline in music sales observed from the early 2000s to 2014. Major players in the streaming market, such as Deezer, Apple Music and Spotify, have driven this increase in demand for digital music consumption.[11] [12]

This shift has provided new audiences and opportunities for music authors and performers to distribute their work globally. However, it has also intensified discussions about the fair allocation of streaming revenues, where current models often favour platforms and record labels over individual artists, raising concerns about equitable remuneration.

Moreover, the COVID-19 pandemic severely disrupted live music events, which are crucial revenue sources for musicians. The cancellation of tours and live performances led to a 75% drop in audiences, pushing venues to organise online events to mitigate losses.[13] Consequently, musicians increasingly relied on digital streaming to earn income, with 90% of musicians and 92% of fans agreeing that live streaming is a viable way to reach audiences unable or unwilling to attend venues in person.[14] [15]

Other sectors

In recent years, the visual arts, literary works and videogames sectors have also been significantly transformed by digitalisation and the Internet. The visual arts sector has seen market consolidation, with major players such as Getty Images acquiring smaller agencies, making art more accessible online. Micro-stock photography agencies now offer low-priced, royalty-free content, making visual content affordable for individuals and small businesses.

Similarly, the literary industry has embraced digital platforms, with audiobooks, e-books and digital publishing becoming essential. Subscription services and e-book lending by libraries

[9] Iordache, C., *Netflix In Europe: Four Markets, Four Platforms? A Comparative Analysis of Audio-Visual Offerings and Investment Strategies in Four EU States*, Television & New Media, 2021, last accessed on 18/07/2024 and available at: 2021 - Iordache TVNM.pdf (vub.be)

[10] IFPI, *Global Music Report 2024*, International Federation of the Phonographic Industry, 2024, p. 4, last accessed on 25/11/2024 and available at: https://globalmusicreport.ifpi.org/

[11] Statista, *The impact of streaming on the music industry,* World Economic Forum, 2023, last accessed on 19/06/2024 and available at: Charted: The impact of streaming on the music industry|World Economic Forum (weforum.org)

[12] The Insight Partners*, Music Streaming Market Share, Size and Trends, The Insight Partners*, 2023, last accessed on 19/06/2024 and available at: Music Streaming Market Share, Size and Trends | 2031 (theinsightpartners.com)

[13] Live DMA*, The Survey*, Live DMA, 2023, last accessed on 20/06/2024 and available at: The Survey: Facts & figures of the live music sector - Live DMA (live-dma.eu)

[14] WQHS Radio, *COVID-19's Impact on Music: An Analysis of the Industry Post-Lockdown*, WQHS, 2023, last accessed on 19/06/2024 and available at: COVID-19's Impact on Music: An Analysis of the Industry Post-Lockdown – WQHS Radio (upenn.edu)

[15] UKRI, *What's the future of live events post-pandemic?,* UKRI, 2021, last accessed on 20/06/2024 and available at: What's the future of live events post-pandemic? – UKRI

are common, affecting authors' earnings.[16] [17] Advances in machine translation and AI are set to transform the field of translation, raising concerns about job security and quality.[18]

The videogames industry has grown steadily, driven by mobile games (51%), consoles (29%) and PC games (20%). In Europe, about 4,600 gaming companies exist, mostly small enterprises, with non-EU companies dominating distribution. Community-based and mobile games are evolving into platforms for commercial activities, boosting Extended Reality (XR). Additionally, collaboration with other audiovisual sectors is increasing, focusing on virtual production, and the industry created 85,000 jobs in Europe in 2021, up by 7,000 from 2020. [19] [20]

3.2. Audiovisual sector

This chapter focuses on the audiovisual sector, examining the various contractual practices involved in rights transfers for authors and performers (Subchapter 3.2.1.). It also explores the terms and conditions of the contracts governing transfers of rights, focusing on the scope, duration, remuneration and enforceability of these rights, and provides a comprehensive overview of how they are managed within the industry (Subchapter 3.2.2.).

3.2.1. In-depth look at contractual practices involving rights transfers

i. Contractual players in the audiovisual ecosystem

Copyright and related rights in the audiovisual sector are intricate, as the creation of an audiovisual work usually involves a wide range of rightholders at various points along its value chain (i.e. development, production and commercialisation). In addition, the wide range of available channels for the exploitation of artistic works (e.g. VOD platforms, theatre, broadcasting, streaming services, etc.) offers a broad variety of contractual practices for the transfer and exploitation of the rights of authors and performers.[21]

The audiovisual value chain starts with the development phase of the audiovisual work by authors. In this context, **screenwriters/scriptwriters** are usually the initial contributors to the value chain, as most of the television episodes, films and other creative projects produced in Europe (e.g. theatre) are written by them.[22] Then, **directors** usually get involved when the script is written, to make creative decisions in the artistic process by ensuring the aesthetic cohesion and artistic integrity of the work. Therefore, they also participate from the early stages of the production phase and are considered as audiovisual work authors.[23]

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[16] European Writers' Council, *EWC SURVEY RESULTS,* European Writers' Council, 2022, last accessed on 20/06/2024 and available at: https://europeanwriterscouncil.eu/wp-content/uploads/2022/06/EWC-SURVEY-EU-2019_790-RESULTS_FINAL130422_220622.pdf

[17] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

[18] European Parliament, *Buy-out contracts imposed by platforms in the cultural and creative sector*, IPOL | Policy Department for Citizens' Rights and Constitutional Affairs, 2023, pp. 53-57, last accessed on 19/07/2024 and available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/754184/IPOL_STU(2023)754184_EN.pdf

[19] European Commission, *European Media Industry Outlook*, European Commission, 2023, pp. 9-10, last accessed on 20/06/2024 and available *at: The European Media Industry Outlook | Shaping Europe's digital future (europa.eu)*

[20] European Games Developer Federation (EGDF), *Videogame Industry Report 2021*, EGDF, 2021, last accessed on 22/07/2024 and available at: EGDF-VGE-video-game-industry-report2021.pdf

[21] Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

[22] *Federation of Screenwriters in Europe, Job Screenwriter, Federation of Screenwriters in Europe, 2024,* last accessed on 22/07/2024 and available at: https://federationscreenwriters.eu/job-screenwriter/

[23] Article 2 of Directive 2001/29/EC and Recital 72 of Directive(EU) 2019/790.

Throughout the development phase, audiovisual performers (e.g. actors/actresses and voice actors) are included alongside the authors.

When music is incorporated into audiovisual works, several specific rights come into play. These rights ensure control over how the music is used - ensuring such uses are authorised - and facilitate proper remuneration. The first relevant set of rights concerns the musical composition, such as the melody, harmony, rhythm or lyrics. **Musical composition rights** are typically held by **music composers, lyricists** or a music publisher. This involves reproduction rights as permission is needed to make copies of the composition and to embed a song in a film soundtrack, as well as synchronisation rights as permission (typically a separate licence) is needed to sync the music with the visual elements or other media, and, where the audiovisual work is broadcasted or streamed, public performance rights are also needed.

Another set of rights relevant for incorporating music in audiovisual works concerns the **sound recording**, i.e. rights that protect a specific performance captured on a recording. These rights are typically held by the record label and the **performers**. Again, the producer needs the reproduction rights to get permission to copy the specific sound recording in the audiovisual work, the relevant synchronisation rights, and, where the audiovisual work is broadcasted or streamed, the producer also needs public performance right and (for streaming specifically) the making available right.

Musical soundtracks are included either in the initial or later stages of the production.[24] To integrate a musical soundtrack in an audiovisual work, the producer may choose to include pre-existing music, or ask a composer to create original music for the production. According to the interviews, in most audiovisual works the composer is usually commissioned to write an original soundtrack to accompany, support and enhance the visual and spoken parts of the film. In these stages of the value chain, producers play a crucial role, being the centrepiece in the production and exploitation of the audiovisual work.[25] Producers manage the exploitation process across various distribution channels and territories.[26] Therefore, in most cases, in this commercialisation stage, the producers sign agreements with users including distributors, aggregators, broadcasters, streaming services and VOD platforms (see Chapter 4).[27]

ii. Types of agreements

Audiovisual authors

EU copyright law grants authors of an audiovisual work exclusive rights. The Information Society Directive 2001/29 grant authors an exclusive right to authorise or prohibit the reproduction (Art. 2(a)) and the communication to the public and making available of works (Art.3(1)), as well as the distribution of works original or of copies thereof (Art.4(1)). Member States may have specific provisions on authorship in an audiovisual work. These rights may

[24] EU legislation recognises the principal director as the author of the audiovisual work. However, there are discrepancies in the legislation of EU Member States regarding the role of the other professionals. Audiovisual authors commonly considered in the legislation of Member States include directors, screenwriters/scriptwriters and music composers. There are exceptions in some Member States, such as in Ireland where the producer is considered as co-author. For the sake of this study, we will analyse the directors, scriptwriters/screenwriters and music composers as the main authors involved in the audiovisual works value chain. (https://www.cisac.org/services/reports-and-research/av-remuneration-study).

[25] International Confederation of Societies of Authors and Composers (CISAC), *AV Remuneration Study,* CISAC, 2018, last accessed on 22/07/2024 and available at: https://www.cisac.org/services/reports-and-research/av-remuneration-study

[26] Ibid.

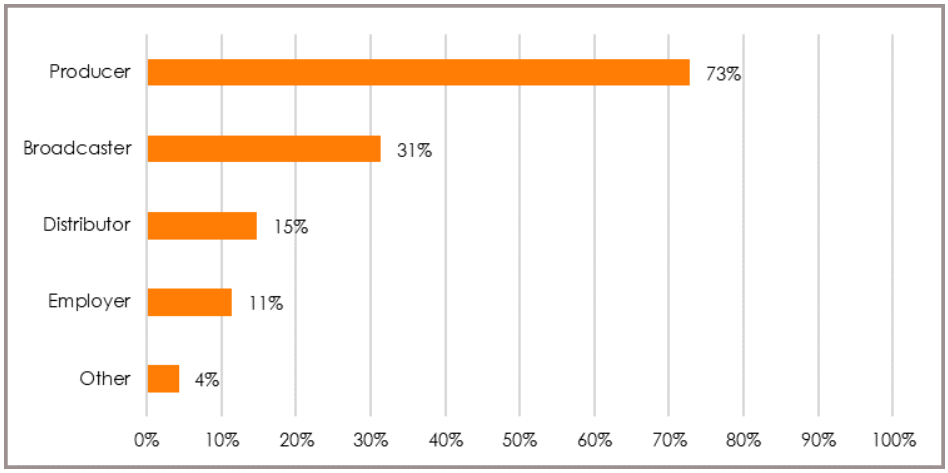
[27] Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

be subject to certain limitations or exceptions. In this chapter, we will refer to these rights as exploitation rights.

This means that to exploit a given work the producer, broadcaster or streamer must obtain from the authors all the rights related to the audiovisual work. Several Member States have implemented a presumption of transfer to facilitate the process of rights clearance for the exploitation of audiovisual works.[28] In practice, the transfer of rights from authors to producers in the audiovisual industry is often established in contracts,[29] in compliance with the law. These contracts set out the specifics of rights assignments and any rights retained by the authors.

Focusing on contractual practices involving transfers of rights, 82% of audiovisual authors responding to the survey indicated that they have transferred their rights to a counterparty. As indicated in the figure below, the survey results reveal that the counterparties most frequently selected by authors are producers (73%), followed by broadcasters (31%) and distributors (15%).

Figure 5: Contractual counterparties[30] in deals involving a rights transfer (Authors; Audiovisual) (n=210)



These results also show that 34% of the survey respondents selected more than one option, suggesting that respondents often transfer their rights to multiple types of counterparties during their career. However, producers appear as the primary counterparties of audiovisual authors. According to the insights gathered through interviews with audiovisual authors, producers usually centralise the rights to the work, facilitating negotiations with users, such as streaming platforms and broadcasters, for the exploitation and distribution of the work.

[28] In Luksan (C-277/10), the European Court of Justice clarified that rights to exploit a cinematographic work such as those at issue in the proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director. Consequently, national legislation cannot allocate those exploitation rights by operation of law exclusively to the producer of the work in question. The presumption of transfer typically does not apply to musical works incorporated in an audiovisual work, in particular if the musical work existed already independently of the audiovisual work. For these audiovisual exploitations of existing musical works, authorisation and remuneration may be agreed with the CMO, instead of the producer.

29 This may include reproduction, distribution, adaptation or other relevant rights. The contract should specify whether the transfer is exclusive or non-exclusive, which media formats and territories are covered, and whether it is transferred in perpetuity and the rights may or may not revert back to the author.

[30] The term 'employer' in this survey refers to any entity that maintains an employment relationship with authors and performers, such as producers, agencies and subcontractors.

Screenwriters/scriptwriters/directors

The agreements between screenwriters/scriptwriters/directors and producers typically take the form of **production contracts**, which generally set out the working conditions, roles and responsibilities of each party, and contain provisions governing the transfer of authors' rights. Such agreements are usually signed during the creation or the pre-production stages.[31]

In many EU jurisdictions, there is a statutory presumption that the rights of authors are transferred to the producer upon the signing of a contract. This means that unless otherwise stated, the producer is assumed to hold the rights to exploit the audiovisual work commercially.

Production contracts often entail a full transfer of exploitation rights to the producer. However, the scope of this transfer may vary significantly and largely depends on negotiations and on national legislation, as further detailed in Subchapter 3.1.2.2. Authors typically receive a lump-sum payment in exchange for this transfer, which may not take account of future earnings from various exploitation channels.

While many contracts involve the outright transfer of rights, a few may take the form of a **licensing agreement,** pursuant to which the author grants the producer permission to use their contributions for specified purposes and durations, but retains the ownership of the rights.

In some instances, the production contracts can be divided into two contracts: an employment contract and an additional contract specifically addressing the transfer of exploitation rights. The evidence gathered under this study demonstrates that, even though commissioning contracts are prevalent in the audiovisual sector, the authors are recognised as the first copyright owner of the work and they then transfer their rights to the producer. In some cases, for example in the Netherlands, authors' rights are transferred to producers either through an explicit agreement or via the presumption of transfer, where the exploitation rights are transferred to the producers[32].

Producers can engage in contracts with authors at different stages of the creative process. For screenwriters, producers can become involved once the script has been independently completed and pitched to the studio. In contrast, directors and actors are usually engaged during the production phase, which often involves a prolonged period of time. Accordingly, their contracts more frequently take the form of employment agreements, as indicated by interviewees representing both authors and producers.

Stakeholder organisations representing European audiovisual authors underlined issues in contracts with producers when the authors transfer their making available right[33], claiming a remuneration right[34]. This right has already been implemented in some Member States.[35]

[31] International Confederation of Societies of Authors and Composers (CISAC), *AV Remuneration Study,* CISAC, 2018, last accessed on 22/07/2024 and available at: https://www.cisac.org/services/reports-and-research/av-remuneration-study

[32] As per Clause 45d of the Dutch Copyright Act (DCA)

33 These issues include the fact that such contracts are signed at a stage when it is too early to accurately estimate the future on-demand exploitation of the work and thus attribute a fair economic value to the work, difficulties in harmonising the contractual practices across countries, and the difficulty for producers to trace and administer payments related to multi-channel distribution. See SAA, frequently asked questions, 2011, https://www.saa-authors.eu/file/116/download

34 SAA, 2024, https://www.saa-authors.eu/en/publications/896-advancing-audiovisual-authors-rights-in-europe-brochure

35 SAA, Audiovisual authors and the collective management of their rights in Europe, 2022, https://www.saa-authors.eu/file/1064/download

Direct contractual agreements between, on the one hand, directors/screenwriters/**scriptwriters** and, on the other hand, other exploitation and/or distribution entities are uncommon but, according to interviews with authors' representatives, they may be concluded under specific circumstances, for example when a streaming service also operates its own production company or for long productions such as animations.

Cases where contracts are directly negotiated and agreed between directors/screenwriters/scriptwriters and other exploitation and/or distribution entities (especially non-EU streaming platforms) predominantly take the form of **buy-out contracts,** where all exploitation rights are transferred in exchange for a lump-sum payment.[36] These contracts are typically identified by the following non-cumulative criteria:

- the use of a lump-sum payment for the rights transfer with a broad geographical and temporal coverage;
- the transfer of copyright covering any mode of exploitation without any obligation to inform the creator, which translates into a withdrawal of moral rights;
- the imposition of the above provisions because of an imbalance of bargaining power in favour of the counterparties.[37]

Music composers for audiovisual works

The agreements for transferring music rights in audiovisual works vary based on whether pre-existing music is used or new music is commissioned.[38] In particular:

- For pre-existing music, composers typically enter into synchronisation licensing agreements or/and master use licences with producers.
    - Synchronisation licensing agreements define the modes of exploitation of the musical composition, its geographical scope and its duration. In cases where composers have their work administered by a publisher under a music publishing contract, the right to grant the producer a synchronisation licence in respect of the musical work usually belongs to the publisher.[39] On the other hand, master use licences allow producers to incorporate existing sound recordings into audiovisual works, defining the exploitation modalities, geographical scope and duration of the licence.
- For new music specifically composed for audiovisual works, the typical agreement is a **commissioning contract**. According to the 2023 study of the European Composer and Songwriter Alliance (ECSA),[40] 52.6% of their members have been involved in **buy-out contracts**, with a reported increase in such contracts in the previous three years. These contracts often require composers to accept their work

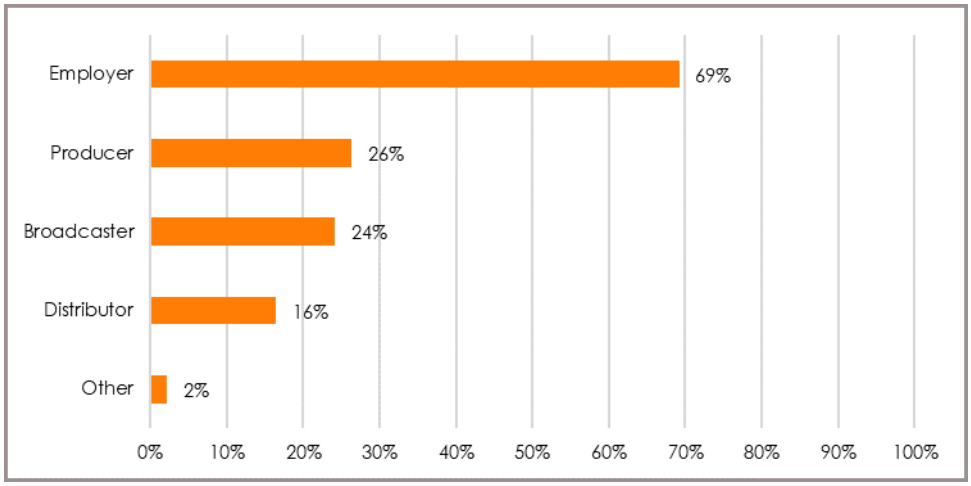
[36] European Parliament, *Buy-out contracts imposed by platforms in the cultural and creative sector*, IPOL|Policy Department for Citizens' Rights and Constitutional Affairs, 2023, pp. 53-57, last accessed on 19/07/2024 and available at: Buy-out contracts imposed by platforms in the cultural and creative sector (europa.eu)
[37] European Parliament, *Buy-out contracts imposed by platforms in the cultural and creative sector*, IPOL|Policy Department for Citizens' Rights and Constitutional Affairs, 2023, pp. 53-57, last accessed on 19/07/2024 and available at: Buy-out contracts imposed by platforms in the cultural and creative sector (europa.eu)
[38] Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c
[39] This is in line with the contribution of an organisation representing producers, which in the interview round stated that synchronisation contracts are established between music composers and producers for the use of music in audiovisual productions.
[40] European Parliament, *Digital Services Act (DSA): The fight against illegal content online*, European Parliament, 2023, last accessed on 22/07/2024 and available at: *2023-2024 Activity Report (composeralliance.org)*

as 'work made for hire' under non-EU law provisions. Moreover, according to the ECSA study a majority of audiovisual composers (66%) have been offered contracts which forced them to sign away partial rights, such as synchronisation or mechanical rights.

Audiovisual performers

In the case of performers, 79% of audiovisual performers responding to the survey conducted as part of this study indicated that they have transferred their rights to a counterparty. As indicated below, the survey results reveal that performers most often assign/transfer their rights to their employer (69%), followed by producers (26%) and broadcasters (24%). The term 'employer' in this survey refers to any entity that maintains an employment relationship with authors and performers, such as producers, agencies and subcontractors.

Figure 6: Contractual counterparties in contracts involving transfers of performers' rights (Performers; Audiovisual) (n=91)



These practices differ between EU Member States. For example, in Estonia, actors generally operate as self-employed people through their own companies. Producers enter into subcontracting agreements with these companies, creating a business-to-business relationship rather than a direct employment relationship with actors. Nevertheless, some actors enter into a direct contractual relationship with both public and non-public broadcasters. For public broadcasters, specific model agreements determine the proportionate remuneration for the rights transfer, whereas contracts with non-public broadcasters take the form of buy-out contracts.

iii. Negotiations

Negotiations between authors and producers[41] typically take place during the early production stages, often in pre-production phases where works and associated rights are yet to be fully established.[42] According to several interviewed organisations representing authors, this early engagement presents a challenge for authors in accurately assessing the economic value and potential success of their works. This uncertainty hampers their

41 The term 'producers' refers to any production entities, including broadcasters and streaming platforms, which may at some time have a direct contractual relationship with authors and performers.

42 Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

ability to negotiate favourable terms for rights transfers, thereby impacting their overall bargaining power. In this regard, authors responding to the study survey indicated that their bargaining power has either remained the same (43%) or decreased (36%) in the last five years. Some 16% of authors indicated that their bargaining position had strengthened.

Regarding the bargaining power of performers, the survey results indicate that it has mainly remained the same (52%) or increased (28%), unlike that of authors.

Figure 7: Changes in perceived bargaining power (Authors; Audiovisual) (n=135)

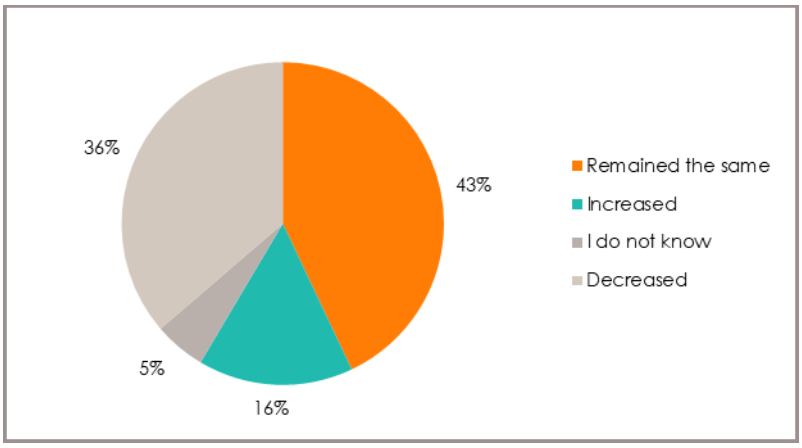
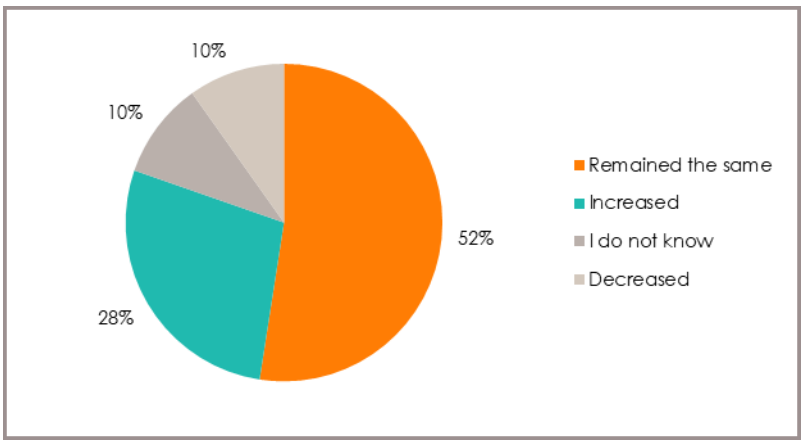


Figure 8: Changes in perceived bargaining power (Performers; Audiovisual) (n=61)



Negotiations involving main cast performers are commonly settled during the initial stages of development. However, for other performers (e.g. supporting actors, dubbing actors), the negotiations typically take place post-financing.

According to the interviews with organisations representing authors and performers as well as to the study's survey, negotiations with producers (and, where relevant, with other users) are predominantly conducted individually (according to 71% of authors and 78% of performers responding to the survey). When not conducted directly, negotiations take place through agents, particularly in countries with robust audiovisual sectors or established practices. Despite the presence of agents doubts remain as to their familiarity with both copyright law and applicable national labour law. This knowledge gap often leaves authors

and performers at a disadvantage, as producers have a comprehensive understanding of sector-specific regulations, which gives them a more advantageous position in negotiations.

Also, according to the survey, when negotiations occur, the primary focus is on terms and conditions related to remuneration (67%), followed by the duration of the rights transfer (36%), negotiations concerning the entire contract (31%) and the contract's geographical scope (12%).

In addition to asymmetrical bargaining positions, authors and performers frequently encounter challenges related to comprehension of the contract and to the fact that negotiation outcomes are strictly influenced by their reputation and experience. These factors collectively contribute to a heightened vulnerability among authors and performers, potentially resulting in the imposition of unfair contractual terms.

Influence of CMOs and trade unions in negotiations

Collective agreements have been in place in the European audiovisual sector for a long time (for instance in Germany, France and Denmark). These agreements usually delineate the agreements between authors and performers and other exploitation actors, with the aim of protecting the interests and rights of performers and authors (for further details, please refer to Subchapter 5.1.1.). The collective agreements can take the form of:[43]

- **CBAs,** either governing both the work conditions and the rights transfer, or only the rights transfer (as in the case of the Netherlands, Italy, Sweden and France). These collective professional agreements set out mandatory contractual standards and practices and may be enforceable in some countries (France). The survey results indicate that the benefits of CBAs are perceived differently by authors and performers. For 38% of authors and 65% of performers responding to the survey, collective agreements have resulted in improvements in their contracts.

- **Agreements with CMOs for royalty collection, which can arise in two ways:**

    - **Voluntary agreements:** in the audiovisual sector, these agreements are mostly signed with producers, but may also be concluded with other exploitation actors (e.g. broadcasters in Italy, VOD platforms in Denmark[44]).

    - Mandatory collective management agreements. In addition to voluntary agreements, some Member States have laid down specific arrangements, such as a statutory remuneration (e.g. Spain – unwaivable online making available right), or extended collective licensing for the exploitation rights.[45] The scope of collective agreements typically differs in terms of types of works, territories and remuneration covered.[46]

In addition, CMOs are sometimes parties to collective agreements with trade unions.[47]

[43] Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

[44] For instance, in Denmark, the relationship is governed by two distinct systems. On the one hand, the CopyDan CMO administers performers' economic rights through licensing agreements, while, on the other hand, Create Denmark [44] manages the relationship between performers with streamers through collective agreements with various streaming platforms.

[45] Based on Articles 8 and 12 of the DSM Directive.

[46] Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

47 Etude sur l'application des règles en droit d'auteur et droits voisins aux œuvres audiovisuelles, 2017, S.Depreeuw, A.Strowel, O.Braet, E.Van Passel; https://economie.fgov.be/fr/publications/etude-sur-lapplication-des

Based on insights gathered from the interviews with trade unions and CMOs in the audiovisual sector, authors and performers also rely on CMOs and professional organisations to seek support and information for individual contract negotiations. According to the survey results, when negotiating individually, authors (57%) and performers (71%) seek support when negotiating contracts, but the entities providing the support differ between authors and performers, as shown in the figures below. While in the case of authors, professional associations and lawyers are the main source of support during contract negotiations, performers mainly rely on professional associations and trade unions.

Figure 10: Entities supporting authors in negotiations (n=135)

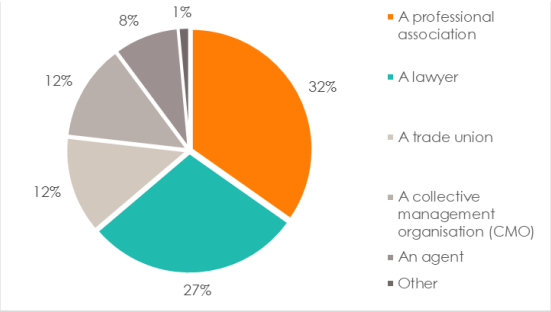
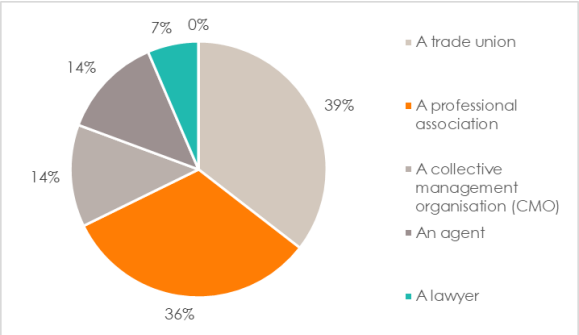


Figure 9: Entities supporting performers in negotiations (n=61)



In addition, the role of trade unions and CMOs varies significantly across Europe. In Member States such as France, the Netherlands, Germany, Spain, Italy and Denmark, the level of involvement of trade unions and CMOs is greater within the audiovisual sector, facilitating fairer contractual practices and adequate remuneration.

According to the stakeholders representing audiovisual performers and authors, an increasing number of producers are asking actors to sign an exoneration clause to prevent a number of exclusive rights being exercised collectively through professional organisations (e.g. CMOs), precluding the rights transferred to audiovisual producers being challenged by CMOs.

Example of an exoneration clause from an actor agreement with a producer in Estonia

If the Actor belongs to an association that represents said Actor in relation to the property rights created in the Actor's performance or has the right to represent the Actor in relation to their property rights, the Actor guarantees and confirms that this association does not have the right to carry out any transactions and/or operations or to submit claims to the Producer for these property rights which within the framework of this Agreement have been assigned to the Producer.

In addition, the organisations representing authors and performers interviewed reported that the existence of non-disclosure agreements makes it difficult for authors and performers to negotiate the remuneration and discuss the terms and conditions with their trade unions or the CMOs supporting them in contract negotiations.

3.2.2.Rights transfers: scope, remuneration, duration and enforceability

This chapter provides an in-depth analysis of the scope and duration of transfers of rights and uses, remuneration, choice of law, jurisdiction and enforceability.

i. Scope and duration of rights transfers and uses

The rights held by audiovisual authors and performers are shaped by EU law, national legislation and specific contractual agreements. According to the interviews conducted with organisations representing audiovisual authors and performers and according to CISAC's AV Remuneration Study,[48] the rights transferred to producers can vary significantly depending on the legal framework of each country and the stipulations of production, actor and/or composer contracts. In several Member States, there is a legal presumption of transfer for the exploitation rights to producers (e.g. Germany,[49] France and the Netherlands). This enables producers to finance and exploit the works effectively.[50]

While producers acquire a broad range of rights, audiovisual authors and performers often retain certain exclusive rights. This retention occurs either because these rights are not included in the statutory presumption of transfer or because they have been explicitly reserved in the contractual agreements. This can include rights to reproduce, distribute and publicly display the work. The scope of rights transferred can vary significantly. Some contracts may specify that all rights are transferred without limitation, while others may allow certain rights to remain with the author. The exact rights retained or transferred depend on the negotiations and the specific terms laid down in the contract.

When licensing or transferring rights that are managed by a CMO, the tariffs are set by the CMOs in accordance with the rules laid down in Directive 2014/26/EU and relevant national provisions.

There are different types of collective management. Voluntary collective management is based on the mandates authors or other rightholders voluntary give to a CMO, based on

48 International Confederation of Societies of Authors and Composers (CISAC), AV Remuneration Study, CISAC, 2018, last accessed on 22/07/2024 and available at: https://www.cisac.org/services/reports-and-research/av-remuneration-study

49 Section 88(1) and 89(1) UrhG: anyone who agrees to have their preexisting work used for the production of a film or audiovisual work ("Filmwerk") or agrees to participate in the production of such a work, in the event that he/she acquires a copyright in the work, in case of doubt grants the film producer the exclusive right to use the work, together with translations and other cinematographic adaptations or transformations of the work. In case a contributor to a film or audiovisual work has granted the right of use in advance to a third party, the author nevertheless always retains the right to grant this right to the producer of the film, either in limited or unlimited form (Section 89 (2) UrhG), available at: https://www.gesetze-im-internet.de/urhg/

50 International Confederation of Societies of Authors and Composers (CISAC), AV Remuneration Study, CISAC, 2018, last accessed on 22/07/2024 and available at: https://www.cisac.org/services/reports-and-research/av-remuneration-study

the exclusive rights granted to them by legislation. Some Member States have introduced mandatory collective management and/or an unwaivable right to remuneration in their national law.[51] For instance, in the Netherlands, the Dutch CMO for film and television directors (VEVAM) administers an unwaivable right to remuneration for directors and screenwriters.[52] Similarly, Spanish law (Article 90 TRLPI) grants audiovisual authors an unwaivable and non-transferable right to remuneration for the communication to the public and making available to the public of their work.[53]

According to the insights gathered from the interviews and the documentary review, contracts with producers often provide for a **worldwide transfer of broad exploitation rights** across all platforms (all formats) covering both current and, where allowed by national law, also future uses. This aligns with the survey results, as shown in the tables below, which reveal the extent of rights and purposes transferred indicated by authors and performers. In both cases, exploitation rights are predominantly always transferred (53%) or often transferred (26%), particularly for primary purposes of exploitation.[54] According to this data, although the transfer of rights for secondary purposes of exploitation[55] is common, it is not as widespread. It is important to note that the definitions and categorisations of primary and secondary exploitation can vary between contracts and may be subject to negotiation between producers and broadcasters/streamers. Contracts will typically lay out the rights, territories, durations and revenue-sharing arrangements for both primary and secondary exploitations.

Table 2: Extent of rights and purposes transferred (authors)(n=135)

	Extent of transfer of economic/exploitation rights	Transfer of primary purposes	Transfer of secondary purposes
Always	53%	61%	39%
Often	26%	21%	27%
Rarely	7%	4%	8%
Never	4%	4%	12%
I do not know	9%	7%	8%

51 Lacourt, A., et al., Fair Remuneration for audiovisual authors and performers in licensing agreements, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c
52 For more information, available at: https://www.vevam.org/english/about-vevam/#:~:text=VEVAM%20is%20the%20Dutch%20Collective,for%20film%20and%20television%20directors.
53 This right is paid by the user and subject to mandatory collective management. Boletín Oficial del Estado (BOE), Ley de Propiedad Intelectual, BOE, 1996, last accessed on 22/07/2024 and available at: https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930
54 In this study, primary purposes of exploitation refer to the main ways the content is intended to be used and are typically specified in the contract. They often represent the primary revenue streams for the content and are the central focus of the distribution strategy, for example: making the audiovisual work available for streaming on the platform as part of its main library, accessible to all subscribers, broadcasting the work, or a theatrical release.
55 In this study, secondary purposes of exploitation refer to additional, often supplementary ways the content may be used, usually after the primary exploitation has taken place or for additional revenue streams that are not the main focus. Secondary purposes are often subject to different terms and may kick in after certain conditions are met, such as after an initial exclusivity period. For example: home video (selling the content on DVD or Blu-ray); merchandising; syndication (selling the rights to the content to other broadcasters after the initial run on the primary channel/platform); international sales (selling the rights to the content to foreign markets for local distribution); making the content available on ancillary platforms, such as in-flight entertainment or hotel pay-per-view services; licensing the content for educational purposes or institutional use; or advertising and promotional uses.

	Extent of transfer of economic/exploitation rights	Transfer of primary purposes	Transfer of secondary purposes
Not applicable	1%	3%	5%
Total	100%	100%	100%

Table 3: Extent of rights and purposes transferred (performers)(n=61)

	Extent of transfer of economic/exploitation rights	Transfer of primary purposes	Transfer of secondary purposes
Always	52%	49%	26%
Often	26%	18%	25%
Rarely	11%	7%	5%
Never	0%	5%	15%
I do not know	8%	16%	18%
Not applicable	2%	5%	11%
Total	100%	100%	100%

However, the transfer of rights by authors/performers to producers follows specific patterns per stakeholder group concerned:[56]

- Directors typically transfer most of their exploitation rights to producers. These rights may include rights to cinema exhibition, television transmission, digital and internet distribution, DVD and Blu-ray distribution, videogames adaptation rights and various other media formats.[57]

- Screenwriters generally transfer most of their exploitation rights to producers (adaptation rights to different formats and genres, right to create derivative works, including sequels, prequels, spin-offs and remakes, distribution rights across various platforms, right to modify the screenplay for production purposes and right to translate the screenplay into different languages). However, they may retain specific rights, such as theatre rights (right to rewrite and adapt the script for the theatre).

- Actors generally transfer most of their rights to producers (including streamers where acting as producers) including performance rights (film, TV, digital media

[56] Note: without prejudice to the statutory remuneration rights and collective bargaining agreements in place in each Member State.
[57] Federation of European Screen Directors (FERA), Directors' Contract Guidelines, FERA, 2024, last accessed on 22/07/2024 and available at: https://screendirectors.eu/fera-directors-contract-guidelines/

performance rights depending on the audiovisual work), promotional rights and distribution rights.

Example of a contractual provision from an actor agreement between actor and producer

For the avoidance of doubt, the Parties have expressly agreed that all rights, incl. copyright, neighbouring rights, other intellectual property and other rights to the Film in which the Performance created by the Actor has been used belong to the Producer and other persons (including co-producers) throughout the world indefinitely in accordance with the agreements concluded between these persons. Neither the Service Provider nor the Actor has the right to the income from the sale of Film rights. The Producer has the right to use the Film containing the Performance created by the Actor without territorial, legal and temporal restrictions, including in the future unknown ways of use.

- Music composers create the music for an audiovisual work and they transfer most of their rights to the producers (including streamers where they act as producers) including synchronisation rights and distribution rights.

Example of a contractual provision in a composition agreement which entered into force in 2019

*In consideration of the payment by the Producer to the Contributor of the Fee (or part thereof), the Contributor with full title guarantee hereby irrevocably assigns to the Producer, by way of present assignment of **present** and **future** copyright, the **entire copyright** and **all other rights**, title and interest of whatsoever nature, whether vested or contingent (the 'Intellectual Property' rights) including the right to exploit in **all media** and by **all means now known** or **hereafter invented** and all rights of the Contributor in and to the Work Product and the Programmes and all allied and ancillary rights in the Programmes and to all of the products of the Services under this Agreement and to hold the same unto the Producer absolutely, throughout the world in all languages for the full period of copyright and all renewals, revivals, reversions and extensions and thereafter in perpetuity to the extent permitted by law whether the right to these renewals, revivals, reversions or extensions now exist or are hereafter created by the laws in force in any part of the world (the 'Rights').*

- Voice actors generally transfer most of their rights to producers including performance rights, promotional rights and distribution rights.

To protect authors and performers in contracts involving a full transfer of rights, some Member States have enacted legislative limitations. For instance:

- In Belgium, for each mode of exploitation, the author's and performer's remuneration and the scope and duration of the assignment or licence must be expressly

determined (Articles XI.167/1(4)-(6) and XI.167/2 CNRA [58]) (for further details, see Annex II).

- In Spain, the assignment of exploitation rights is considered null and void in respect of all works that may be created by the author in the future (Article 43 (3) under the Spanish Intellectual Property Law). In addition, the transfer of exploitation rights may not extend to methods of use or means of dissemination that do not exist or are unknown at the time of the transfer (Article 43 (5) T under the Spanish Intellectual Property Law[59]) (for further details, see Annex II).

Besides exploitation rights, the information derived from the interviews with organisations representing authors and performers, as well as from the documentary review, indicate that contracts with producers sometimes include provisions for waiving moral rights.

However, it must be noted that these clauses are not legal. In most EU Member States, moral rights are unwaivable as they are recognised, for authors, under the Berne Convention for the Protection of Literary and Artistic Works, which has been ratified by EU Member States, and for performers, under the WIPO Performances and Phonograms Treaty. These international conventions grant moral rights to authors and performers, independently of economic rights, even after the transfer of those rights. Under these conventions, moral rights cover the right to claim authorship of the work or to be identified as a performer, and to object to any distortion, mutilation or other modification of the work or performance which would be prejudicial.

Nevertheless, authors and performers sometimes lack the necessary knowledge and bargaining power to challenge such clauses. According to the survey results, 14% of authors and 17% of performers 'often' or 'always' transfer their moral rights to their counterparty. Attempting to undermine moral rights is problematic according to interviewed organisations representing performers, because it affects the personal and reputational interests of performers, risks the integrity and attribution of their work, and raises ethical concerns about the exploitation.

Broadcasting Production Agreement between an actor and producer which entered into force in 2021

Subject to being granted a credit on the broadcast of the Programme, the Artist agrees to ***waive all moral rights*** *in the Contribution.*

ii. Remuneration for rights transfers

The specific terms of remuneration vary widely and different mechanisms are in place for setting tariffs and distributing the remuneration for the use of these rights. The figure below

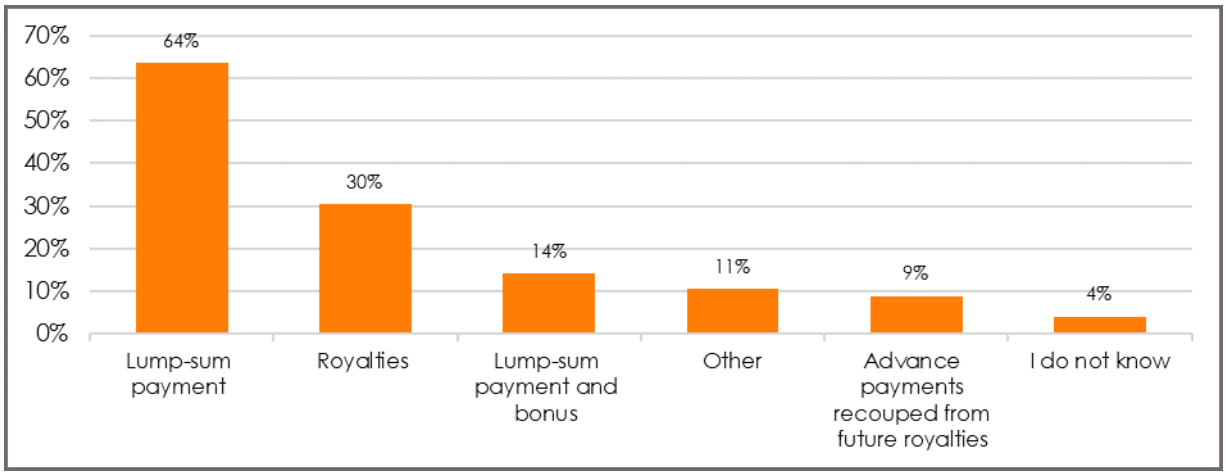
[58] Articles XI.167 §1(4)-(6) and §2, translation: The author's remuneration, the scope and duration of the assignment shall be set out explicitly for each mode of exploitation. The assignee shall be required to exploit the work in accordance with the fair practice of the profession. Notwithstanding any provision to the contrary, the assignment of rights in respect of yet unknown forms of exploitation shall be null and void. The assignment of economic rights relating to future works shall be valid only for a limited period of time and only if the types of works to which the assignment applies are specified. Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

[59] Boletín Oficial del Estado (BOE), *Ley de Propiedad Intelectual*, BOE, 1996, last accessed on 22/07/2024 and available at: https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930

shows the survey results on remuneration mechanisms in contracts between authors, performers and their counterparties.

In general, the most common mechanism is a single lump-sum payment (64%), occasionally supplemented with a bonus (14%), followed by the payment of royalties (30%).

Figure 11: Type of remuneration (Audiovisual (n=247)



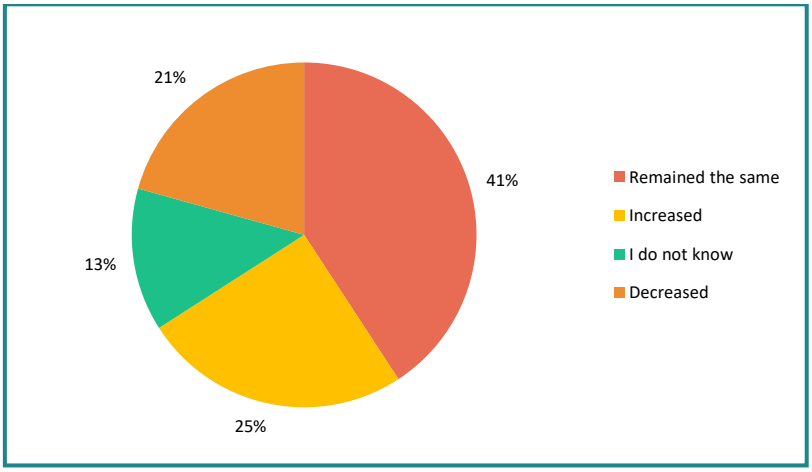
Based on the interviews with representatives of authors and performers respectively, in contracts concluded with producers[60] the majority of authors and performers transfer exploitation rights in return for a lump-sum payment which can, in some instances, be paid in several instalments. The payments are made directly by producers.

The survey results reveal that the authors and performers in the audiovisual sector that are remunerated by way of lump-sum payments consider that their situation regarding contractual practices involving a rights transfer against this form of payment has either remained the same (41%) or increased (25%). Nevertheless, a smaller group (21%) has experienced a decrease in such practices, as shown in the figure below.[61]

Figure 12: Changes in the use of lump-sum payments (Audiovisual (n=179)

[60] The term 'producers' refers to any production entities, including broadcasters and streaming platforms, which may at any time have a direct contractual relationship with authors and performers.

[61] The survey results for this specific question on the development of lump-sum payments should be treated with circumspection, since some responses seem to assess the changes in the quantity of lump-sum payments rather than changes in their use. This is particularly evident from some answers to the follow-up question, asking respondents to justify their answer, where some of them mentioned both inflation and increases in fees over time.



The data reveals mixed experiences among respondents, indicating no clear trend regarding changes in the prevalence of lump-sum payment contracts in the audiovisual sector.

Direct negotiation

A significant challenge perceived by organisations representing audiovisual authors and performers relates to remuneration in contracts with producers, specifically regarding its proportionality to the scope of rights and uses transferred, and their economic value.

Evidence from the documentary review and the interviews with authors' representatives indicates that the remuneration received by authors and performers may encompass both the working fee and the remuneration for the rights transfer, thereby integrating these elements into a unified payment. Interviewed stakeholders representing audiovisual authors and performers claimed that this integration may lead to a non-proportionate remuneration for rights transferred as it is then difficult to determine the exact value given to the rights transferred in the contract. In contrast, the producers interviewed perceive the remuneration to be proportionate, based on market value, experience, negotiation percentages and minimum wages set by collective agreements. Ultimately, it is not possible to draw any firm conclusion on this matter within the scope of this study, as there is not a universally applicable benchmark for audiovisual authors or performers and this can vary widely depending on various factors.

Moreover, under some contracts, an additional remuneration may be granted upon the fulfilment of specific conditions, such as a success-based remuneration once a performance threshold is met (e.g. based on the number of views, or additional remuneration for future sales). However, stakeholders representing audiovisual authors and performers feel that the conditions are not always realistic, and that the bonus is insufficient. In some cases, stakeholders representing audiovisual authors and performers were of the opinion that the transfer of all exploitation rights for the entire duration and all uses of the work is advantageous, particularly in cases where the audiovisual work has limited success, or when remuneration adjustments rely on specific performance thresholds being met.

CMO-based remuneration

In the event of **a statutory remuneration[62] collected by CMOs** (e.g. Spain – unwaivable online making available right) or **extended collective licensing for the exploitation rights by CMOs** (e.g. Denmark), the remuneration is based on the tariffs either set by the CMOs or negotiated between CMOs and user groups, depending on national rules. In the collective agreements with CMOs, the initial remuneration for work, additional remuneration for potential future uses and success-based remunerations are considered. It is then collected from users and distributed amongst the performers and authors.

For example, in Denmark, the Danish association Create Denmark has reached an agreement for Netflix-commissioned Danish drama series targeted at the writers, directors and actors involved in these works. This agreement is based on the articles 18-20 DSM Directive and Articles 52a(4) and 55 of the national Copyrights Act (for further details, see Annex II), and includes provisions on the initial rights payments as well as additional remuneration.[63]

Collective bargaining

In other instances, collective bargaining has proved to be effective in the Netherlands, especially in the VOD sector. Specifically, a scheme was in place from 2017 to 2020, where authors and performing artists transferred their VOD exploitation rights to producers, which ensured that VOD platforms paid proportional remuneration directly to CMOs. From 2020 onwards, all relevant VOD platforms agreed to extend the scheme. The latter resulted in a collective agreement in March 2024 on **fair** (i.e. proportionate and appropriate) **remuneration for VOD exploitation**, and on a condition that remuneration for a rights transfer is done via a third party. This collective bargaining agreement involved several relevant actors, such AS professional organisations of authors and performing artists, producers' associations, RoDAP and its member platforms, NVPI Film, and CMOs for remuneration collection and distribution.

Transparency on exploitation revenues

In its remuneration chapter, the copyright section in the DSM Directive (for further details, please refer to Subchapter 5.1.1.) lays down an obligation of transparency, with the stipulation that authors and performers must receive up-to-date, relevant and comprehensive information on the exploitation of their works and performances from the parties to which they have licensed or transferred their rights (Article 19). This applies to remuneration paid by producers for the exploitation of their works or performances. According to organisations representing these audiovisual authors and performers, with regard to transparency on the remuneration paid by producers, based on revenues generated by the exploitation of the work, there is a lack of detail regarding the exploitation of the screenwriter works or actor performances.

Additionally, directors claim that, while contractually entitled to reporting clauses on the success of their work, they frequently find these clauses unused or unfulfilled by their counterparties, particularly in the case of producers.

Nevertheless, there have been positive recent developments following the adoption of the DSM Directive. Some global streaming platforms are taking steps towards ensuring greater transparency by publicly sharing engagement reports, which provide authors and

62 A remuneration system which entitles creators, performers and rightholders to a payment for the use of their works, such as films, television shows or music, without requiring individual negotiations for each use. This type of remuneration is established by law and is designed to balance the interests of copyright owners with wider public access to cultural material.

[63] Lacourt, A., et al., *Fair Remuneration for audiovisual authors and performers in licensing agreements*, European Audiovisual Observatory, 2023, last accessed on 17/07/2024 and available at: https://rm.coe.int/iris-plus-2023-03en/1680adec3c

performers with meaningful data on global reach and viewer engagement, such as the Netflix Engagement Report 2023.[64] In Denmark, there are collective licensing agreements with certain streaming platforms that stipulate data sharing with the respective CMO. However, individual authors and performers lack direct access to this information because of confidentiality constraints, which means that they must rely instead on CMOs to ensure a fair distribution of the remuneration. In France, the transparency agreement signed in 2018 between trade unions of producers and authors represents a step towards transparency. The agreement provides for transparency obligations covering all French audiovisual production contracts (i.e. productions for TV & streaming, not film) between authors and audiovisual producers. It came into force on 1 January 2018 for an initial period of three years. It is renewed by tacit agreement for a successive period of one year until termination by any party.

iii. Choice of law, jurisdiction and enforceability

In the context of international audiovisual production, determining the choice of law and jurisdiction is a critical consideration. As a general trend observed by interviewed stakeholders representing respectively authors, performers and producers, production, composition or actor contracts are implemented with local or EU-based producers. This approach ensures the application of EU legislation and, in the event of litigation, EU jurisdiction.

In this regard, 80% of authors and performers responding to the survey indicated that the law of an EU country is usually applied in their contracts, while 15% apply non-EU law, and 5% are unsure. The most frequently applied non-EU jurisdiction mentioned in the survey was US law. When asked in the survey how they are affected by this, performers and authors indicated that the nature of US law and practices is less beneficial, as total buy-outs are standard and moral rights are not guaranteed.

In the cases where non-EU market players (i.e. non-EU broadcasters, producers or VOD platforms) are involved in European productions, this often involves co-production or a partnership with European or local producers. Consequently, despite their non-EU status, these entities comply with European laws when entering into agreements with European authors and performers, facilitated by local producers.

3.3. Music sector

This chapter focuses on the music sector, examining the various contractual practices involved in rights transfers for authors and performers (Subchapter 3.3.1.). It also explores the terms and conditions of rights transfer agreements. Focusing on the scope, duration, remuneration and enforceability of these rights, it provides a comprehensive overview of how they are managed within the industry (Subchapter 3.3.2.).

3.3.1. In-depth look at contractual practices involving rights transfers

i. Contractual actors in the music ecosystem

The music industry encompasses a wide range of actors and roles within its ecosystem. It is important to note that the authors of a musical work (those who write the music and lyrics)

[64] Netflix, *What We Watched: A Netflix Engagement Report*, Netflix, 2024, last accessed on 22/07/2024 and available at: https://about.netflix.com/en/news/what-we-watched-a-netflix-engagement-report

are not necessarily the same individuals as those who perform the song (featured and non-featured performers[65]).

Furthermore, they hold different rights: authors (and music publishers) hold copyrights for a musical work, while performers hold related rights to a performance or a sound recording, and therefore they engage in different contractual practices.

According to the type of rights that are held by music authors, Directive 2001/29 grants authors the exclusive right of reproduction right of the original and copies of their works, and performers the exclusive reproduction right of fixations of their performances (e.g. sound recordings). In addition, the Directive provides authors with the exclusive right on any communication to the public of their works, including making their works available to the public in such a way that members of the public may access them when and where they choose.

In streaming, the most relevant right is probably the exclusive right of making available. It is originally owned by the authors or performers, and may be transferred in certain contracts, such as in deals with record labels.

In respect of broadcasting and communicating to the public, performers have an exclusive fixation right, and the broadcasting or communication to the public of a phonogram published for commercial purposes entitles performers and producers to a single equitable remuneration[66].

In relation to the rights defined in EU law, the music industry has developed its own terminology, sometimes referred to as music industry rights. These are not different rights, but rather refer to the rights defined in the EU framework in a particular context. For instance, according to GoClip, mechanical rights is "*the music business term for the right of songwriters (and sometimes music publishers) to get paid when a musical work is copied and distributed, whether as a physical product or online through interactive streaming or downloading*". Under EU copyright law, mechanical rights include the right of reproduction and the right of distribution.[67]

In general, according to data collected through the documentary review and interviews, the transfer of the exploitation rights of authors and performers to other entities in the music industry is a common practice. This is supported by the survey results, according to which 73% of the music authors and/or performers say that they have transferred their rights to a counterparty.

The contractual relationship and main deals concluded by music authors, performers and self-publishing artists are discussed below.

ii. Types of agreements

Authors and their contractual counterparties

Authors in the music sector include, but are not limited to music composers, songwriters and lyricists. Our analysis reveals that authors engage in contractual relationships with different actors in the music value chain to exploit their compositions: music publishers,

[65] According to the definitions retrieved from GoClip.org: a f*eatured* **performer***,* also known as lead or primary artist, is a performer or group of performers credited as the artist mainly featuring on stage or on the sound recording, while a n*on*-**featured performer***,* also known as a session musician, is a performer who performs an instrument or provides vocals as part of a sound recording or live performance but who is not credited as the main or secondary artist.

[66] See to that effect Articles 7 and 8 of Directive 2006/115.

[67] https://goclip.org/en/music/music-creators-rights/music-creators-and-industry-rights

CMOs, audiovisual producers/streaming platforms and, more occasionally, other users such as festivals, broadcasters and music ensembles or orchestras. Below we outline the contractual relationship and main deals concluded with each of these actors.

a. Deals with music publishers

67% of individual music authors responding to the study's survey indicated that they typically transfer rights to a music publisher. Music publishers are companies that support the career development of authors, monetising musical works and protecting their copyrights.[68] Today, music publishers assist musicians with mechanical and synchronisation rights and collect royalties on their behalf for publishing-related copyrights. They also provide marketing assistance in some cases.[69] Most major labels have set up publishing companies (e.g. Sony music publishing, Warner Music group).

Authors and publishers can enter into various types of **music publishing deals.**[70] According to the interviews with authors and their representatives, these deals typically involve different levels of transfers of authors' rights. Music publishers own all or part of the rights to the musical works and manage their distribution and monetisation on behalf of songwriters, lyricists and composers. The remuneration that authors receive for the services provided by publishers comes from a share of the exploitation revenues (royalties), which is recoupable against the advance payments made by the publisher at the time the contract is signed.[71] According to ICMP, which represents the global publishing industry, the payment split is 70/30 on average in favour of songwriters.[72]

Regarding songwriting, publishing deals may have different splits for the songwriter's share of the copyright ownership, and therefore of the credits and royalties. As Goclip notes, different publishing deals may impact the percentage split songwriters get.[73]

Insights from the interviews with authors indicate that **full publishing agreements** can cover a set of musical compositions, sometimes in exclusivity (exclusive songwriter agreement), or a single song (single-song agreement), and these agreements can cover both finished and future compositions. According to Goclip.org, in full publishing agreements, the songwriter shares ownership of the musical works with the music publisher.

Moreover, with a partial transfer of rights, there are **co-publishing agreements**, in which a songwriter shares the publishing rights and royalties with a music publisher.[74] The choice between a full or partial transfer of rights may depend on the songwriter's career stage and goals, and the level of involvement and investment the publisher is willing to provide. The

[68] GoClip, What is a Music Publisher?, GoClip, 2024, last accessed on 22/07/2024 and available at: What is a music publisher? - CLIP (goclip.org)
[69] European Commission, Directorate-General for Education, Youth, Sport and Culture, Le Gall A, Jacquemet B, Daubeuf C, Legrand E, Miclet F, Price J et al. *Analysis of market trends and gaps in funding needs for the music sector: final report*, Publications Office, 2020, last accessed on 21/06/2024 and available at: Analysis of market trends and gaps in funding needs for the music sector - Publications Office of the EU (europa.eu)
[70] According to GoClip.org definition, a contract between a songwriter and a music publisher for the publishing rights typically specifies the details of their agreement, the royalty percentage each party will receive, the countries in which the publisher will represent the songwriter, and the length of the contract.
[71] UK Government, *Music Creators' Earnings Report,* UK Government, 2021, last accessed on 21/06/2024 and available at: Music Creators Earnings, the Digital Era, and On-Demand Streaming Revenues (publishing.service.gov.uk)
[72] https://icmpmusic.com/todays-music-industry

[73] https://goclip.org/en/music/songwriting/agreeing-on-splits-with-music-publishers

[74] GoClip, Music Industry Glossary, GoClip, 2024, last accessed on 22/07/2024 and available at: https://goclip.org/en/music-industry-glossary

interviews with authors indicate that co-publishing agreements are more usual in cases of more established authors. The interviews with authors also revealed that the scope of the rights transfer in these cases is partial because many composers have already assigned some of their rights to CMOs.

There are cases where agreements do not involve a rights transfer but instead authors assign rights to the publisher solely for management purposes. These are known as **administration agreements**. However, our analysis has not found evidence of the widespread use of these agreements.

Organisations representing authors highlighted the fact that, compared with other sectors, songwriters are not as pressured by market dynamics to sign publishing contracts for the exploitation of their works, as CMOs also play a prominent role in managing and licensing their rights. However, some authors who are also performers, indicated that, on some occasions when signing with record labels for music production (especially with major labels), the signature of publishing deals with the label's publishers was often an additional requirement. Indeed, these companies can pressure them into signing a publishing deal, with the company's publishing counterparty acquiring a significant share of the copyright of the author's work.

b. Deals with CMOs

According to the interviews with authors' representatives and CMOs authors usually entrust the management of their rights to CMOs on an exclusive basis. Authors assign mechanical and performing rights to CMOs, which manage their rights and collect royalties when musical works are used (public performance, broadcasting, reproduction and other uses). They collect and pay royalties for mechanical rights to their rightful owners (authors and music publishers) when their musical works are copied or reproduced in digital or physical format.

Songwriters join a CMO by signing a **membership agreement**, which usually includes the **assignment of specific rights to the CMO** for specific territories or worldwide, depending on the scope of the agreement and outreach of the CMO. Depending on the type of CMO, this may include:

- Mechanical rights organisations (MROs): rights related to the reproduction of the music in physical or digital formats.

- Performing rights organisations (PROs): rights related to the performance of the music in public venues, broadcasts and online streaming.

c. Deals with royalty-free music providers

Royalty-free music providers are platforms that offer music content that users can use in content without paying royalties to artists or rightholders every time it is played[75]. According to a report published by ECSA 'Mapping Royalty Free Music',[76] royalty-free music has become increasingly present in recent years, particularly in the online domain, for example in online advertising or edited content on YouTube, TikTok or Instagram.

[75] Epidemic Sound, *What is Royalty Free Music,* Epidemic Sound, last accessed on 21/06/2024 and available at: https://www.epidemicsound.com/blog/what-is-royalty-free-music/

[76] European Composer and Songwriter Alliance (ECSA), *Mapping Royalty-Free Music: ECSA Report on Royalty-Free Music Trends,* ECSA, 2021, last accessed on 21/06/2024 and available at: https://composeralliance.org/media/1479-mapping-royalty-free-music-ecsa-report-on-royalty-free-music-trends.pdf

According to the interviews with organisations representing authors and performers, authors often transfer their rights to these platforms through buy-out practices. This means that they sell the rights to a piece of music in exchange for a single lump-sum payment. According to the results of a questionnaire distributed by ECSA among its members in May 2023,[77] composers can quickly receive a relatively high one-off payment through royalty-free music providers with minimal administrative barriers. However, that report highlighted that these practices can negatively impact the long-term economic capabilities of authors, as they do not receive royalties for the continued use of their works.[78]

d. Deals with audiovisual producers/VOD platforms

Regarding music used in audiovisual works, several music composers responding to the survey indicated that they usually engage directly with audiovisual producers or VOD platforms acting as producers. Typically, commissioning contracts are used, under which the audiovisual producer or VOD platform commissions the creation of a musical work, and the authors receive a one-time payment against the transfer of all rights for the full duration of the copyright. These contractual practices are considered as buy-outs[79] and are further explored in Subchapter 3.2.ii.

Organisations representing authors expressed their concerns about the use of buy-outs for music works used in audiovisual works,[80] underlining that online audiovisual services and broadcasters, that are mainly US-based, force music creators to accept contracts, often governed by US law, which enforce a one-time payment in exchange for their rights.

e. Deals with other users

As observed in the contemporary music sector, composers also establish contractual relationships with other players. Interviewed authors in this sector explained that their usual counterparties are end-users such as festivals, broadcasters and ensembles. The type of contract typically established in these cases is a commissioning contract, under which users commission the composition of pieces for a determined amount of time and for specific purposes against a one-time payment.

Performers and their contractual counterparties

According to the interviews with representatives of performers and record labels respectively, performers traditionally enter into contracts with record labels to transfer their exclusive rights, while other rights, such as remuneration rights, are assigned to and managed by CMOs.

Record labels finance and manage the production of recordings of performances, support the development of the careers of artists and are in charge of the marketing and exploitation of the recordings. Record labels typically act as intermediaries between performers and streaming platforms.

Interviewees confirmed that both featured and non-featured performers enter into a direct contractual relationship with **record labels** concerning transfers of rights, but contractual

[77] Ibid.
[78] Ibid.
[79] European Composer and Songwriter Alliance (ECSA), *Mapping Royalty-Free Music: ECSA Report on Royalty-Free Music Trends,* ECSA, 2021, last accessed on 21/06/2024 and available at: https://composeralliance.org/media/1479-mapping-royalty-free-music-ecsa-report-on-royalty-free-music-trends.pdf
80 GESAC, https://authorsocieties.eu/policy/buy-out/

practices differ between different types of performers, especially regarding remuneration mechanisms.

The traditional industry model involves exclusive rights transfers from **featured performers** to record labels through **record (or recording) contracts**. This transfer means that the record label acquires the exclusive control of the performer's recordings. Prevalent remuneration practices in these contracts involve artists receiving advances (fixed sum) and royalties, being the level of remuneration received by performers tied to the services purchased from the label. This remuneration is subject to some deductions and the achievement of certain milestones or cost coverage (as presented in the chapter below on remuneration). These contracts may be individual or involve multiple parties, depending on the type of collaboration between artists. For example, in a band, there is typically a single contract that is managed and agreed upon by all band members. The distribution of royalties among the members is decided on the basis of internal agreements within the band.

Beyond standard record contracts, there are **360 deals**, which are long-term arrangements with a record label that include not only recording but also touring, promotion and other aspects of an artist's career. In return, the label takes a share of the rights involved. Interviewed associations and CMOs representing performers expressed concerns that the control exercised by record labels in these deals is too extensive, often imposed on emerging artists. However, the performers and record labels interviewed also pointed out that the prevalence of 360 deals has decreased in recent years because of enhanced awareness of fair practices among both performers and record labels.

Record label representatives asserted in interviews that contracts between performers and labels are increasingly becoming **licences** or **service agreements** (also known as distribution agreements), especially if artists wish to retain some of their rights. When performers were asked how they transferred they rights, the survey answers reveal that some performers may licence their rights to their contractual counterparty. However, the survey responses indicate that in practice, licensing between musicians and record labels often exists for recordings that were pre-financed by the performer and for which the performer therefore has the rights of producer of the first fixation. However, our analysis, based on the interviews conducted, has found limited evidence of this shift in contractual practices towards licensing, except for **synchronisation licences**. The latter are used when audiovisual producers wish to use a recording in their work, typically involving contact with the record label and the publishing company. Synchronisation licences do not directly involve the performer, as the record label acts as the licensor. However, according to the record labels interviewed, this specific right may contractually require special permission to be granted by the performer.

Based on the interviews with the representatives of record labels and performers respectively, **non-featured artists**, or session musicians, typically transfer their exclusive rights through the so-called buy-out contracts on a commissioning basis. These deals are formalised through session agreements, whereby the artists agree to perform or be recorded, and to fully transfer their performance rights. In return, they receive a lump-sum payment for a fixed amount of work. This practice differs significantly from the contractual arrangements of featured artists and music authors, as presented above, whereby the latter are compensated though recurring payments based on a work's exploitation.

For non-featured artists, buy-out deals are considered common practice, as reported by interviewees representing performers in the music sector. Once these rights are transferred to record labels, non-featured performers do not receive future royalties as featured performers. The abovementioned interviewees also claimed that there are cases where no formal contract is established, and the agreement is made verbally.

Self-publishing artists

Some authors choose to self-publish, meaning they handle promotion, distribution and copyright protection matters themselves. Interviewees representing performers and record labels noted an increase in the autonomy of authors owing to the significant presence of streaming platforms, observing a rise in self-production and in Do-It-Yourself (DIY) platforms. It is to be noted that 21% of individual music authors and performers responding to the survey conducted for this study indicated that they produce their own music.

For distribution on streaming platforms, **self-publishing** artists licence their rights to aggregators (distributors) through **distribution** deals, and these aggregators then licence their songs to Digital Service Providers (if the artist is not self-publishing this is done through the record label). According to the interviews with performers' representatives and CMOs, depending on the reputation of the artist, there is often little room for negotiation and DIY artists have no choice but to accept the distributor's general terms and conditions.

iii. Negotiations

According to the study's survey results, only 20% of authors and 25% of performers responding to the survey have not attempted to negotiate their contracts, mainly for the following reasons: terms were previously negotiated by major companies, the use of a standard contract and a lack of bargaining power. Some authors also did not negotiate because they did not perceive any need for negotiations, agreeing with the terms or considering them fair and standard.

Regarding those authors and performers who negotiate their contracts, the interviews with representatives from author and performer organisations revealed that negotiations with record labels and music publishers are primarily conducted either individually or through agents or managers. In line with this, the study's survey results reveal that 83% of music authors and performers negotiate their rights directly. When they do not negotiate their contracts directly with their counterparties, agents are the primary option for managing the negotiations on their behalf. However, in some fields, for example in the case of music composers, the interviews with authors revealed that there are very few well-known agents for music composers in Europe and that, accordingly, the involvement of agents is extremely rare.

Despite the involvement of agents, the evidence collected suggests that, in some cases, authors and performers lack the necessary knowledge in negotiations regarding copyright issues and they struggle to understand complex contract terminology. For instance, the interviews with record label representatives revealed that each label may employ a different contract model tailored to specific situations, and associations and trade unions indicated that industry model contracts are limited or absent, which prevents authors and performers from becoming familiar with a common terminology. In this regard, the study's survey results show that 63% of authors who directly negotiate the transfer of their rights seek external support. Among these, 34% turn to professional organisations, 29% consult lawyers and 26% rely on CMOs.

Also, according to the survey, when negotiations do take place, the primary focus is on terms and conditions related to remuneration (66%), followed by the overall contract (51%), the duration of the contract (40%) and its geographical scope (29%).

Within the music sector, the negotiation power of authors and performers varies. According to the interviews, a more established author or performer will have greater negotiation power in the case of rights transfer agreements, while emerging artists are more likely to face pressure, with the fear of being blacklisted if they do not accept the terms and

conditions offered. This was confirmed by all interviewees and is perceived as a significant obstacle to proportionate remuneration, in particular by non-featured artists. In this regard, the authors and performers responding to the study's survey indicated that their perceived bargaining power has either remained the same (41%) or decreased (38%) in the last five years. Only 8% of authors indicated an increase in their perceived bargaining position.

Influence of CMOs and trade unions in negotiations

The role of trade unions and CMOs varies significantly across EU Member States. In particular, trade unions can support contract improvements through clauses laid down in CBAs negotiated at national level. These agreements can play an important role in negotiations, especially for non-featured artists, by establishing minimum rates for work. The interviewed associations representing performers feel that CBAs are mostly effective when presented by a powerful and respected union with many affiliates, as seen in countries such as France, the Netherlands and Denmark. They consider that CBAs have not as yet produced a satisfactory framework to remunerate performers. The survey results indicate that, in general terms, benefits from CBAs are somewhat limited, with only 33% of authors and 13% of performers responding to the survey perceiving the benefits of collective agreements.

In the case of CMOs in the music sector, they do not directly participate in negotiations between authors/performers and publishers/record labels, but they provide legal advice when requested to do so by authors and performers. Their presence in the music ecosystem has increased significantly over time, and they even participate in collective bargaining. In some cases, for example in France, CMOs have even joined trade unions in the negotiation of CBAs.

3.3.2. Rights transfers: scope, remuneration, duration and enforceability

i. Scope and duration of rights transfers and uses

Authors' copyright and performers' related rights encompass moral rights and economic rights. Moral rights are independent of economic rights and are granted under international conventions (see Subchapter 3.2.2. above), even after the transfer of economic rights. However, the interviews with representatives of performers and authors respectively revealed instances where counterparties requested the transfer of moral rights, even if such a transfer is not legally permissible. As shown in the table below, 13% of the respondents to the study's survey indicated that they are often asked to transfer their moral rights.

Table 4: Extent of rights and purposes transferred (authors)(n=63)

	Extent transfer of economic/exploitation rights	Transfer of moral rights	Transfer of primary purposes	Transfer of secondary purposes
Always	21%	0%	40%	14%
Often	46%	13%	29%	24%
Rarely	14%	27%	13%	22%
Never	10%	46%	5%	21%
I do not know	10%	10%	11%	10%
Not applicable	0%	5%	3%	10%
Total	100%	100%	100%	100%

In the case of authors, the interviews revealed that in publishing deals **authors** transfer some of their rights to music publishers, entitling the latter to a share of the revenues collected from mechanical rights and performing rights. According to the answers to the study's survey, the rights transferred to publishers include the publishing rights (distribution

and reproduction) and, in some cases, a share of the mechanical rights (from 1/3 to 1/2). In contrast, commissioning contracts with audiovisual producers usually involve a full buy-out of rights in favour of the other counterparty, as explored in Subchapter 3.2.1.i.

According to the interviews with representatives of performers and producers respectively, **performers typically transfer all their exclusive rights to record labels** through contracts. These rights can include: the rights of fixation, rental and public lending, reproduction, distribution, broadcasting and communication to the public, including the right to make them available to the public. These contracts often include provisions for various forms of remuneration. The scope of rights transfer clauses covers all uses and channels of distribution, globally and for 'perpetuity' (the full duration of protection, i.e. 70 years).

According to an organisation representing producers and the answers to the survey, the extensive scope of this transfer is driven by the need of record labels to have full control over the production so as to exploit it effectively and generate revenues that cover their investment. According to them the level and scope of services an artist wants from the label - distribution/marketing/promotion/tour support, etc. - impacts the scope and content of the contract, including the royalty rates and level of advances. However, according to information provided by organisations representing performers, such a wide-ranging transfer is not always in exchange for a fair remuneration, which affects the ability of performers to control the exploitation of their work and receive economic remuneration based on the real benefits generated by it.

Nevertheless, the scope of this transfer can vary depending on the type of deal. For instance, transfers can go beyond IP rights, such as in 360 deals where promotion or image rights may also be included. Moreover, some performer organisations interviewed reported some cases in which labels attempted to negotiate contracts that included the transfer of non-transferable rights, such as some remuneration rights. Although contracts that include non-transferable rights are legally null and void, they may still be applied in practice if performers are unaware of their rights.

Some performers retain some exclusive rights and assign them to CMOs. In countries such as Spain and France, CMOs are entitled to manage exclusive rights if performers retain them, though this is reportedly uncommon according to interviewed CMOs. In this regard, record label representatives mentioned during the interviews that, while some rights are universally transferred, others may require the artist's separate consent, such as synchronisation rights for inclusion in audiovisual media.

These transfers typically cover all exploitation uses, both present and future. Interviewed CMOs highlighted the risks associated with including future use in contracts, especially with the rapid and unpredictable development of Artificial Intelligence (AI). The development of generative and non-generative AI is creating new methods of exploitation and business models. Including potential future uses in contracts severely limits the ability of performers to control their works in these new and unknown contexts.

ii. Remuneration for rights transfers

Authors

Music authors are remunerated through different mechanisms. According to respondents to the study's survey, the most frequently used methods are royalties (67% of respondents) and lump-sum payments (41%) (see graph below).

Figure 13: Type of remuneration (Music (n=87)

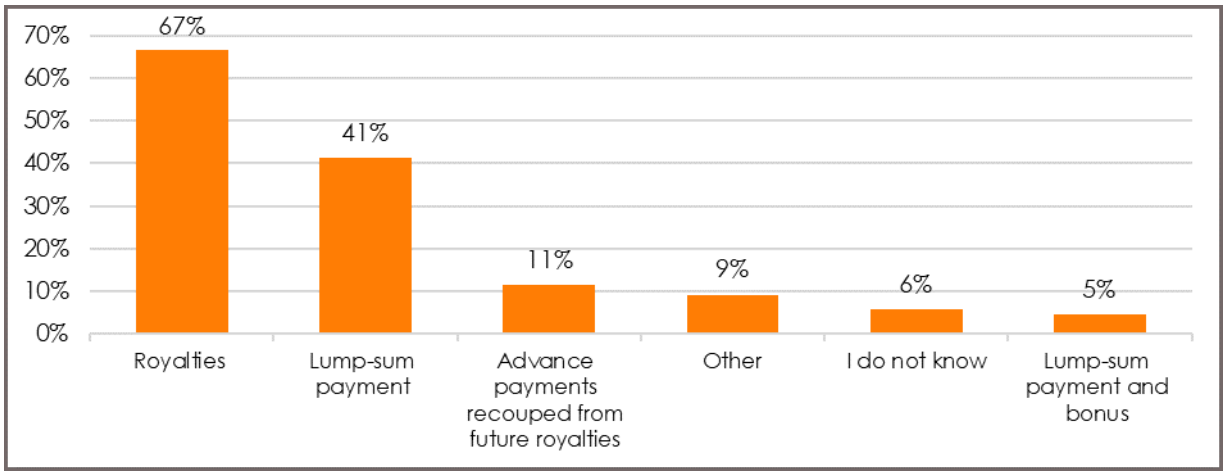
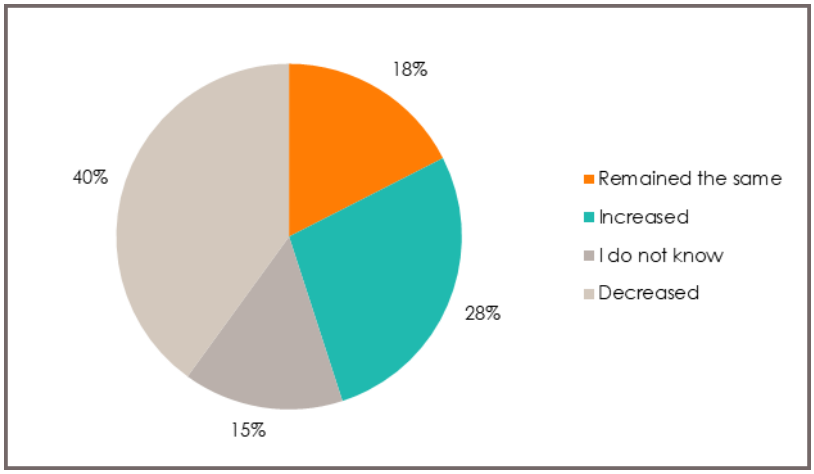


Figure 14: Changes in the use of lump-sum payments (Music (n=40)



As regards the authors and performers remunerated by way of lump-sum payments in the music sector, the survey results reveal a varied landscape, with a noteworthy proportion of respondents (40%) indicating a decrease while 28% reported an increase[81].

Based on the information gathered through the interviews with authors and their representatives and a documentary review, the remuneration method largely depends on the type of counterparty and type of deal concluded by the authors. In **publishing deals**, authors are remunerated for the rights transferred by way of an entitlement to receive a share of royalties from various revenue streams, including physical/digital sales, on-demand streaming, downloads, broadcasting and public performances. According to the interviews

[81] The survey results for this specific question on the development of lump-sum payments should be treated with circumspection, since some responses seem to assess changes in the quantity of lump-sum payments rather than changes in their use. This is particularly evident from some answers to the follow-up question asking respondents to justify their answer, where some of them mentioned both inflation and increases in fees over time.

with authors' representatives, authors typically receive advances upon signing the contract, which are recoupable against future royalties.

The split of royalties between authors and publishers is negotiated on a case-by-case basis, varying according to the type of rights and distribution channels involved, such as performing rights, mechanical rights, streaming and synchronisation rights.[82] Most of these royalties are collected by CMOs and distributed to authors and publishers according to the agreed split, typically 50/50 according to the interviewed authors and their representatives. However, the interviews with authors indicate that, while this split is standard in the market, it is based on established music industries and the negotiated remuneration for composers can be lower in smaller markets. For instance, a 50/50 split might be feasible in the US owing to a higher revenue potential, but could impact the income of composers in regions with limited market size or revenue streams.

The interviews with authors and their representatives highlighted that, when entering into **commissioning contracts**, authors receive an upfront fee (creation fee) for their work, which is intended to cover the time and effort spent by the creators as well as all related expenses, such as studio hire, working with sound engineers, session musicians, tools and travel costs. Additionally, authors receive royalties based on their authors' rights (copyright) every time their work is broadcast, streamed, downloaded, etc.

In this context, the interviews with contemporary music authors highlighted several challenges posed by commissioning contracts with users such as festivals and music ensembles. These authors are remunerated per creation, and the fee is based on the average time required to compose a song. However, they reported difficulties in gauging the time needed to compose a song, often resulting in unfair payments in relation to the time spent on it. Furthermore, contracts typically do not cover additional working time required, such as rehearsals where the composer needs to be present to assist the performers.

As analysed in Subchapter 3.2.2.ii of this report, the interviews with music authors revealed that in the audiovisual sector, authors are often subject to 'buy-out' or 'work-for-hire' agreements. In these cases, one-off payments are made for both the commissioning of the work (creation fee) and the use of the work (copyright royalties), replacing the payment of royalties based on usage.

Music performers

EU copyright law grants several rights to performers. Article 2(b) of the Information Society Directive 2001/29 grants performers an exclusive right to authorise or prohibit the fixation of their performances on a sound recording by a record label, typically as part of a contract. By itself, this authorisation to fix the performance does not affect other rights, and performers continue to own other rights in their fixed performances, which they may or may not transfer to the record label or a CMO.

To allow the sound recording to be performed, for example streamed, broadcasted (radio or TV), or played in hotels or restaurants, requires other performing rights that may include the right of broadcasting and the right of communication to the public set out in Article 8.1

[82] UK Government, *Music Creators' Earnings Report,* UK Government, 2021, last accessed on 21/06/2024 and available at: Music Creators Earnings, the Digital Era, and On-Demand Streaming Revenues (publishing.service.gov.uk)

of the Rental and Lending Directive,[83] and the right of making available to the public, which are also established in the Information Society Directive.[84] In addition, distribution rights will be needed to distribute a sound recording online, for example through downloading of digital copies and interactive streaming.

Performing rights in performances are owned and split between the performers, who may also share their performing rights split with their record label. Performing rights in sound recordings are owned by the rightholders of the sound recording, which may be either a record label or an independent self-releasing artist.

Performing rights in sound recordings should not be confused with performing rights in musical works, which relate to authors' rights, and are typically managed by CMOs (sometimes called Performing Rights Organisations (PROs)) and licensed.

Based on the insights gleaned from the interviews with representatives of music performers and record labels respectively, typically, **featured performers[85] transfer their performing rights in sound recordings to record labels in exchange for recurring payments or royalties based on the ongoing exploitation of their works**. These payments are often covered by advance payments. Record labels then acquire the ownership of those rights. According to representatives of performers, the transfer of performing rights in the sound recording is often a condition for work.[86]

Alternatively, though less frequently, some 'independent' creators, such as self-releasing artists who produce their own recording, negotiate deals that allow them to own their sound recordings and keep their rights.

Performers' rights **in performances** are owned and split between the performers, who may also share their performing right split with their record label.

The percentage of royalties is negotiated individually in each contract. According to the interviewed performers and labels, **royalty rates typically range between 10% and 20% of revenues generated, but can be as high as 50%**. The exact rate depends on the performer's bargaining power: more established artists can negotiate better remuneration terms, while emerging performers often transfer their rights for a lower royalty rate.

Within the contract remuneration, core business areas (e.g. currently streaming, previously physical copies) are subject to the standard royalty rate agreed between the parties. However, there are provisions in recording contracts for ancillary uses (e.g. special licences), where revenues can be shared 50/50. For example, in the interviews record label representatives reported some cases in which streaming was once considered an ancillary use when it was still developing, but has become part of the core business over time.

[83] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006L0115

[84] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Available at https://eur-lex.europa.eu/eli/dir/2001/29/oj

[85] Performers whose names are credited on a recording, as opposed to session musicians, also called non-featured artists.

[86] AEPO Artis Performers' rights study, 2022, https://www.aepo-artis.org/wp-content/uploads/2022/11/AEPO-ARTIS_Performers_Rights_Study_2022_digital.pdf

In addition, **contracts provide for various deductions that are applied to the royalties received by featured performers.** The type and conditions of these deductions can vary in each contract. Some deductions identified by performers' organisations interviewed include:

- advertising and international sales: if a recording is advertised on TV or sold in another country, deductions will apply before royalties are paid to the featured artists;
- packaging charges: deductions for packaging and similar charges may still be applied, even though the relevance of such charges is very limited in the digital environment (downloads or streaming);
- overheads and marketing costs: labels may deduct up to 25% for overheads throughout the contract's duration and up to 30% for marketing costs, even if no marketing is carried out in each of the years covered by the contract.[87]

These deductions make it challenging for many artists to earn a significant income from streaming, as their royalty payments can be reduced significantly by various charges and deductions.

Non-featured performers (session musicians) are remunerated differently than featured artists. According to the interviews with performers and record label representatives respectively and based on the documentary review, in respect of streaming, **non-featured performers are typically paid a fixed price (session fee), in exchange for the transfer of their exclusive right of making available**, regardless of the music's subsequent exploitation. Thereafter, non-featured artists receive no royalty payment when their performances are streamed. This is different from when their songs are broadcasted or performed publicly. For this kind of exploitation, the abovementioned EU legal framework provides a single equitable remuneration right and featured and non-featured artists both receive royalties.

In some countries, such as France and the Netherlands, collectively negotiated session fees exist and are usually used as minimum fees. As reported during the interviews with record label representatives, departing from the minimum fees, more established or skilled musicians typically negotiate higher fees. In France, not only the amount of the session fee is regulated, but also the scope of the payment in the proposed terms in the contracts of non-featured performers. According to French law, buy-outs must include two differentiated payments: one covering the work performed during the recording session (i.e. the hours worked) and another covering the transfer of exclusive rights.

According to a survey conducted by IAO and AEPO-ARTIS[88], to which over 9,542 performers across the European Union responded, 71.3% of session musicians believe that the session fees they receive do not fairly compensate them for their contribution to recordings. 64% of session musicians usually enter into verbal agreements for these sessions, and 43.5% have never signed a written contract, leaving session musicians in a significantly weak position.

Influence of CBAs on remuneration

[87] More examples can be found in: https://dx.doi.org/10.2139/ssrn.4089749

[88] AEPO-ARTIS, Streams and Dreams: Part 2, 2024, last accessed on 22/07/2024 and available at: https://www.aepo-artis.org/wp-content/uploads/2024/06/STREAMS_AND_DREAMS_PART2-1.pdf

According to the CMOs interviewed, progress has been made recently in some countries in the inclusion of remuneration adjustment mechanisms in CBAs. In France, for instance, an agreement reached in May 2022, resulting from the negotiations between musicians' unions, phonogram producers' unions and their respective CMOs, provides for an additional guaranteed minimum remuneration for all featured and non-featured performers when their recordings are used in the form of streaming. Within this framework, non-featured artists are expected to receive very small additional payments in respect of future recordings.[89]

In the Netherlands, music producers and performers have been in talks since 2018 with a view to agreeing on contract recommendations at music sector level regarding artist contracts, licensing contracts and a model agreement for session musicians. The highlighted measures of this collective bargaining package includes a 'best seller' clause for session musicians, ensuring additional remuneration if the music achieves a significant commercial success, and additional equitable remuneration for session musicians for music streaming, starting from a threshold of 1,000,000 streams.

The study's survey results show that CBAs have had a clearly positive influence on remuneration, with 85% of music respondents believing that collective bargaining agreements are important in order to ensure a fair remuneration for authors and performers in Europe. They argue that the leverage of CBAs in collective negotiation is crucial to increase individual bargaining power.

The **level of transparency** regarding exploitation revenues in contracts between authors, performers and their counterparties varies according to the type of remuneration mechanisms agreed upon.

Directive 2014/26 lays down provisions regarding the information provided by CMOs to rightholders on the management of their rights (notably Articles 18 and 20). In order to ensure that CMOs can comply with these obligations, users should provide CMOs with all necessary information, including relevant information on the use of the rights represented by the CMOs (Articles 16(1) and 17). Where CMOs grant multi-territorial licences for online rights in musical works, the directive requires CMOs to provide online service providers and rightholders with transparent and up-to-date information upon request (Article 25). Moreover, Directive 2019/790 entitles authors and performers to relevant and comprehensive information on the exploitation of their works and performances from the parties to which they have licensed or transferred their rights (Article 19).

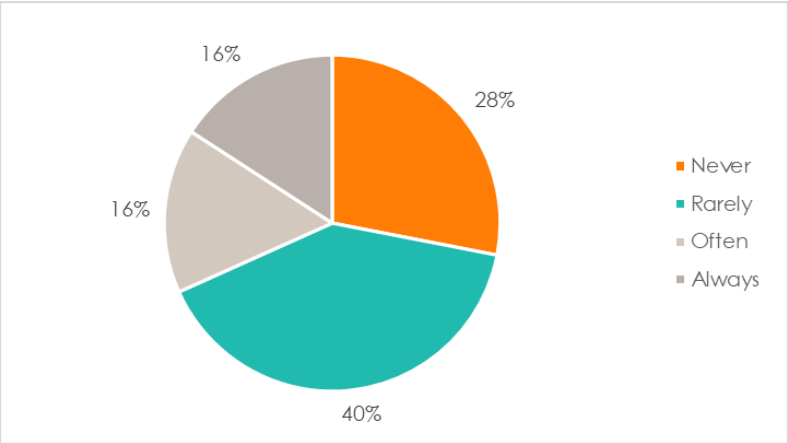
The interviews with organisations representing authors and performers revealed several key points about transparency. Authors and performers who receive royalties managed by CMOs benefit from information contained in individual royalty clearance statements and mandatory annual transparency reports. In addition, featured artists are usually entitled to receive royalty statements as part of their deal, theoretically ensuring transparency since they receive regular reports on their earnings. On the other hand, non-featured performers and authors working under commissioning contracts for lump-sum payments typically do not receive revenue reports. Consequently, they lack transparency on the revenues generated by their work.

In general, the level of transparency revealed by the study's survey results is rather limited; 68% of the respondents supposed to receive transparent information from their

[89] AEPO Artis Performers' rights study, 2022, page 42, last accessed on 25/11/204 and available at: https://www.aepo-artis.org/wp-content/uploads/2022/11/AEPO-ARTIS_Performers_Rights_Study_2022_digital.pdf

counterparties never or rarely receive such information, while 32% of them always or often receive it.

Figure 15: Transparency level indicated by music authors and performers (n=82)



Despite this data, according to the interviews with organisations representing performers and record labels respectively progress in the area of transparency has been made over the years. However, some challenges in transparency clauses between performers and record labels have been identified, especially with regard to the complexity and type of data reported by record labels.

On the one hand, the performers' organisations interviewed reported that record labels often overwhelm performers with extensive Excel sheets detailing the revenues generated by their works. This data can be overly complex and difficult for performers to interpret. For example, one trade union interviewed reported that collective agreement negotiations in 2015 highlighted that excessive detail in streaming reports made them unreadable for performers and revealed a need for simplification. Insights from the survey conducted by AIO and AEPO ARTIS[90] indicate that, given the complex nature of the contemporary music economy, it is plausible that some artists may encounter difficulties in understanding the reporting. The survey results show that 36.7% of performers find the information provided by record labels easy or very easy to understand, while 22.2% of them find it difficult or very difficult to understand. This trend towards simplification is supported by insights provided during the interviews by record label representatives who argued that technological advancements are making revenue data more comprehensible. According to them, many labels now provide digital and dynamic dashboards for data visualisation.

On the other hand, organisations representing performers have noted that, in some cases, the data reported by record labels reflects only what they pay to performers and does not include information on the amounts labels receive from the actual distributors of the records (e.g. streaming services or social media platforms). Some national trade unions interviewed indicated that labels justify the non-inclusion of this data on the basis of the exception provided for in Article 19 of Directive (EU) 2019/790, which allows exemptions '*where the*

[90] AEPO-ARTIS, Streams and Dreams: Part 2, 2024, last accessed on 22/07/2024 and available at: https://www.aepo-artis.org/wp-content/uploads/2024/06/STREAMS_AND_DREAMS_PART2-1.pdf

administrative burden of transparency obligations would be disproportionate to the revenues generated by the work or performance'.[91]

iii. Choice of law, jurisdiction and enforceability

According to the interviews with authors, performers and label representatives, the jurisdiction governing the contract is typically determined by the location of the label or publisher. Performers and authors usually sign with independent labels or local branches of major labels in their own countries, thus providing for local jurisdiction in contracts.

The jurisdiction applied in the contracts of the survey respondents is primarily that of an EU country (70%). Among the 15% of respondents applying non-EU country jurisdiction, some apply the law of an EEA country (such as Switzerland or Norway), while others use US law, particularly in contracts with major VOD platforms acting as producers. In this vein, the main concern for organisations representing authors and interviewed authors relates to the 'buy-out' contracts signed by music composers with US streamers that are governed by US law (see Subchapter 3.2.2.iii). In addition, organisations representing performers indicated that, even if the choice of law is that of an EU country, there are situations in which even European record labels use US standard contracts, which can lead to terminology which in some clauses can be confusing or not totally aligned with EU law.

3.4. Visual arts sector

This chapter focuses on the visual arts sector, examining the various contractual practices involved in rights transfers for authors (Subchapter 3.4.1.). It also explores the terms and conditions of rights transfer agreements, focusing on the scope, duration, remuneration and enforceability of these rights, and provides a comprehensive overview of how they are managed within the industry (Subchapter 3.4.2.).

3.4.1. In-depth look at contractual practices involving rights transfers

This chapter analyses contractual practices involving transfers of rights in the visual arts sector by focusing on the contractual actors in the visual arts ecosystem, types of agreements and negotiations.

i. Contractual actors in the visual arts ecosystem

Authors in the visual arts sector mainly include **graphic designers, illustrators** (e.g. cartoonists), **fine artists** (e.g. painters, sculptors, craft makers) and **photographers.**[92,93] Other professional roles include printmakers, comic authors and cartoonists, all engaging in both traditional and contemporary art forms. Additionally, there are specialised roles, such as theatre stage and costume designers, architects, filmmakers, film directors and directors of photography. The sector also includes individuals who develop participatory art installations, often involving community interaction.

[91] Article 19(3) of Directive (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32019L0790#d1e1321-92-1

[92] *Kretschmer, M., et al.,* The Relationship between Copyright and Contract Law*, DACS, 2010,* last accessed on 22/07/2024 and available at: DACS-Report-Final1.pdf (bournemouth.ac.uk)

[93] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at: Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works | Shaping Europe's digital future (europa.eu)

In this ecosystem, there are three key players in the industry value chain: the visual artists, the visual art exploiters (principally publishers, corporate entities,[94] media agencies,[95] galleries, museums, and art institutions)[96] and the intermediate suppliers that engage in the commercial trade of usage rights in exchange for a contractually agreed share of the royalty payments.[97]

Within this value chain, each visual artist engages with various entities in a contractual relationship involving a rights transfer:

- **Graphic designers** typically engage with corporate entities and media agencies. Graphic designers are often employed by companies to provide a coherent visual message for an ad campaign or to help a company develop a visual brand identity, including website design, product packaging and logos, although they can also work independently as a freelancer.[98] [99]

- **Illustrators** typically work with publishers for books, comics and other literary works, as pointed out by 65% of the survey respondents. Nevertheless, they work across different industries, such as publishing, advertising, editorial and entertainment, and might work on commercial projects such as product packaging, book illustrations, graphic novels and logos.[100] [101] Therefore, other counterparties engage with illustrators including corporate entities, as indicated by 23% of the individuals responding to the survey, and sometimes with media agencies and museums and art institutions, as mentioned by a smaller proportion of individuals.

- **Fine artists**, such as painters and sculptors, often engage with galleries, museums and art institutions. These artists produce original works of art and frequently exhibit their works in galleries and museums, which are primary venues for showcasing their art. Sometimes they also engage with individuals for private commissions and with media agencies.[102]

- **Photographers** often engage with publishers and corporate clients,[103] as noted by 53% of the survey respondents. Nevertheless, 23% of respondents also indicated that they engage with media agencies and galleries, museums and art institutions respectively. They may work in various sectors, including commercial, fashion and

[94] *Kretschmer, M., et al.,* The Relationship between Copyright and Contract Law*, DACS, 2010,* last accessed on 22/07/2024 and available at: DACS-Report-Final1.pdf (bournemouth.ac.uk)
[95] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009*
[96] Streul, C., Management of Rights for Visual Arts and Photography, IP Key, 2021, last accessed on 22/07/2024 and available at: PowerPoint Presentation (ipkey.eu)
[97] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works|Shaping Europe's digital future (europa.eu)
[98] *James Young, What Does a Graphic Designer Do? Skills, Duties, and More, Bunny Studio, 2024,* last accessed on 19/06/2024 and available at: www.bunnystudio.com/blog/what-does-a-graphic-designer-do-skills-duties-and-more
[99] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works | Shaping Europe's digital future (europa.eu)
[100] Teal Labs, Inc., *What is an Illustrator? Explore the Illustrator Career Path in 2024*, Teal HQ, 2024, last accessed on 19/06/2024 and available at: www.tealhq.com/career-paths/illustrator
[101] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works | Shaping Europe's digital future (europa.eu)
[102] ATX Fine Arts, What Is A Fine Artist? & What Does A Fine Artist Do?, ATX Fine Arts, 2024, last accessed on 19/06/2024 and available at: www.atxfinearts.com/blogs/news/what-is-a-fine-artist
[103] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009*

editorial photography, providing visual content for magazines, advertising campaigns and corporate publications.[104] [105]

The primary ways photographers, illustrators and graphic designers exploit their work include similar methods within the value chain. They sell directly to end users through personal websites or offer wholesale collections to digital and physical retailers, and collaborate with exploiters such as publishers and media agencies for commissions or pre-produced content. Moreover, photographers specifically use counterparties such as stock agencies for distribution, which is advantageous for those who are less well established. They also partner with photographic cooperatives for market access and support, enhancing their visibility and opportunities. [106]

Similarly, graphic designers also engage with counterparties for wider distribution, which is particularly beneficial for newer designers aiming to reach broader audiences. This approach helps them establish their presence and effectively grow their client base. [107]

ii. Type of agreements

Visual authors usually work as freelancers, handling both the creative and business aspects of their profession.[108] [109] This also emerged from the study's survey, where 96% of the respondents representing visual authors classified themselves as independent workers.

On a freelance basis, there are two main ways in which visual artists can exploit their work:

- First, they can distribute their work through intermediate suppliers that licence the use of pre-produced visual content to exploiters for specific purposes.[110]

- Secondly, they can transfer rights directly to visual art exploiters, including the counterparties mentioned in the previous chapter, meaning direct commissions. They prepare the visual content for use in a wider work (e.g. a series of illustrations for a children's book or a photograph of a live sporting event for inclusion in a newspaper article). Contracts with exploiters detail the rights transferred, the duration, geographic scope and remuneration.[111]

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[104] Sokanu Interactive Inc., *What does a commercial photographer do?*, CareerExplorer, 2024, last accessed on 19/06/2024 and available at: www.careerexplorer.com/careers/commercial-photographer

[105] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works | Shaping Europe's digital future (europa.eu)

[106] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works|Shaping Europe's digital future (europa.eu)

[107] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works|Shaping Europe's digital future (europa.eu)

[108] *Kretschmer, M., et al.,* The Relationship between Copyright and Contract Law*, DACS, 2010,* last accessed on 22/07/2024 and available at: DACS-Report-Final1.pdf (bournemouth.ac.uk)

[109] Streul, C., *Management of Rights for Visual Arts and Photography*, IP Key, 2021, last accessed on 22/07/2024 and available at: *PowerPoint Presentation (ipkey.eu)*

[110] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works|Shaping Europe's digital future (europa.eu)

[111] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of

Based on the documentary review, **commissioning contracts** are the most common form of contract where the rights are transferred in the visual sector. Under such contracts an author is commissioned by a specific client to create a specific piece of work.[112] However, the survey results show that **licensing** rights for a work to a counterparty is the most common practice among the respondents, representing almost 45% of the total responses, followed by commissioning contracts which are the second most common method, accounting for around 19% of responses. Licensing agreements grant the licensee specific rights to use the artwork under certain conditions, such as reproduction, distribution and display rights. In the case of photographers, who are the most frequent users of licensing according to the survey results, this method reflects the nature of their work, which often requires retaining rights, while allowing others to use their photographs under specific terms. On the other hand, fine artists producing paintings or sculptures, do not usually sign contracts until the work is sold upon completion, as mentioned by an organisation representing authors from different creative sectors.

In addition to the abovementioned contracts, a variety of agreements co-exist in this ecosystem serving different purposes and addressing various aspects of business and creative processes. In fact, the following contracts do not typically involve the transfer of copyright to their counterparties:

- **artist representation agreement,** a contract between an artist and a gallery;
- **exhibition agreements** which detail the terms for displaying an artist's work in a gallery for a specific exhibition;
- **collaboration agreements** which specify the terms for a joint project between artists or between an artist and another entity;
- **public art contracts** which specify the creation and installation of artworks in public spaces, among others.

According to the documentary review and the interviews conducted, commissioning contracts are perceived as problematic since they provide for the transfer of ownership with the **transfer of all or some of the exploitation rights in exchange for a lump-sum payment, meaning a buy-out contract.[113]**

Visual artists can also earn revenues from secondary use contracts, where CMOs play a role in collecting and distributing royalties for such secondary uses. This includes in particular remuneration collected for reprography, private copying, retransmissions, public lending and resale rights. In most cases, these rights cannot be exercised individually (i.e. they cannot be transferred to a contractual party) and are subject to mandatory collective management.

In some Member States, some rights can be licensed by CMOs instead of an assignment to the counterparties through an agreement with CMOs. These licences with CMOs may involve book publications and other print media on covers and inside, school textbooks and other educational materials, broadcasting and still-images in audiovisual works in contracts

authors of books and scientific journals, translators, journalists and visual artists for the use of their works|Shaping Europe's digital future (europa.eu)

[112] European Parliament, Contractual arrangements applicable to creators: Law and practice of selected Member States, European Parliament, 2014, last accessed on 22/07/2024 and available at: Contractual arrangements applicable to creators: law and practice of selected Member States (europa.eu)

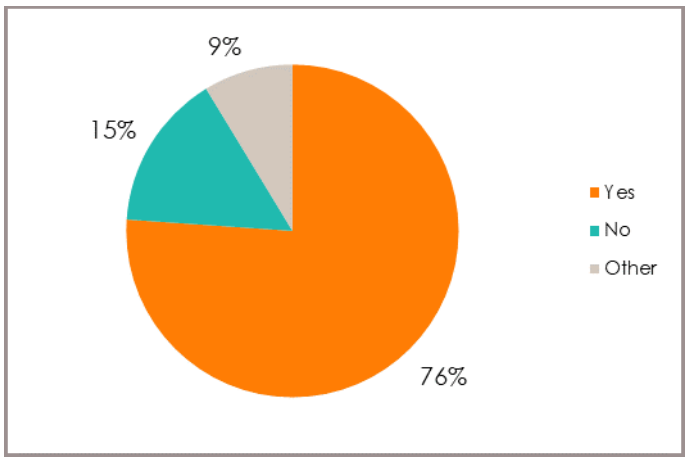
[113] European Parliament, *Contractual arrangements applicable to creators: Law and practice of selected Member States*, European Parliament, 2014, last accessed on 22/07/2024 and available at: Contractual arrangements applicable to creators: law and practice of selected Member States (europa.eu)

with producers, cable transmission, photocopying, social and sharing media platforms through the one-stop-shop, merchandising products and advertisement. Their aim is to ensure that visual artists receive fees through collective licensing schemes for the abovementioned uses (e.g. when a character designed by an illustrator is used in a film or merchandise).[114]

iii. Negotiation

Visual artists often find themselves **directly engaging in contract negotiations** with third parties, without the involvement of agents or intermediaries.[115] This is confirmed by the study's survey results, with 76% of participating visual artists indicating that they engaged in direct negotiations.

Figure 16: Direct negotiation of visual authors (n=46)



The survey respondents mentioned various challenges involved in directly negotiating their contracts, such as the fear that the counterparty might walk away from a deal, and perceptions of limited rights. On the other hand, some respondents mentioned that they rely on organisations to negotiate on their behalf, which may alleviate issues found in direct negotiation. In professions such as art and architecture documentation, contracts typically include pre-determined rates and conditions, thus limiting the scope for negotiation.

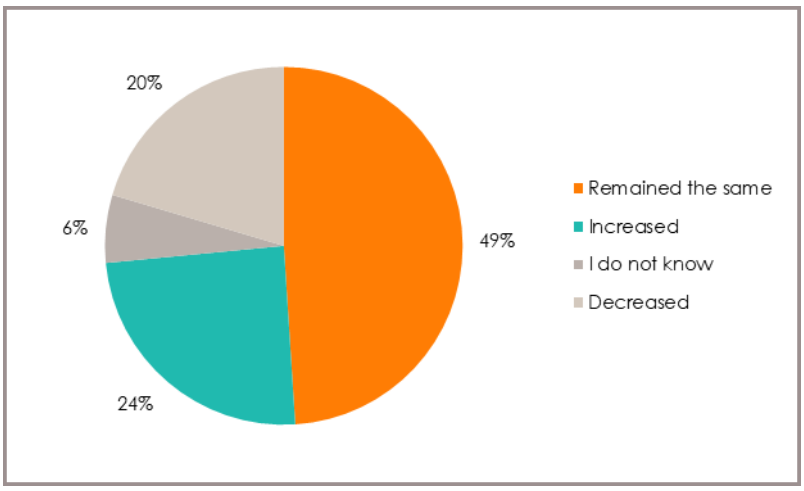
Legal complexities further complicate matters, since in some contracts, particularly those involving rights transfers, legal departments or agencies handle the negotiations, which may formalise the negotiation and make it difficult for independent artists to argue their case. Additionally, some contractual terms and conditions, such as deadlines and additional rights (such as adaptations for other media), often follow industry standard practices to automatically include certain rights, and, as such, are difficult to challenge. Experiences with contracts including a wide scope of rights, where they are retained indefinitely by the other party, have also made some visual authors wary of attempting to negotiate because of the unequal bargaining power and the already established terms of the contract.

[114] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works|Shaping Europe's digital future (europa.eu)

[115] Streul, C., *Management of Rights for Visual Arts and Photography*, IP Key, 2021, last accessed on 22/07/2024 and available at: *PowerPoint Presentation (ipkey.eu)*

Over the past five years, some changes have been observed in the perceived bargaining power of visual artists when negotiating rights transfer agreements, as shown in the figure below.

Figure 17: Changes in perceived bargaining power (Authors, Visual Arts)(n=49)



Although 49% of the survey respondents indicated that there had been no change in individual bargaining power over a period of five years, 24% of them reported an increase in their bargaining power owing to factors such as greater professional recognition and organisational support.

A minority of 20% of the survey respondents consider that their bargaining power has decreased, mainly due to increased competition in the market and the rise of new technologies, such as AI, that can generate cheap content that may compete with the author's work. This may have contributed to this perception of a lack of bargaining power when negotiating contracts.

Influence of CMOs and trade unions in negotiations

Regarding the benefits of collective agreements in the visual arts sector, only 24% of visual artists indicated that they have benefitted from such agreements, while 67% have not. Survey respondents mentioned that they generally appreciate collective licensing because it simplifies remuneration, by avoiding prolonged negotiations, and that they valued organisational support when dealing with publishers.

Finally, CMOs provide template contracts and model agreements to help standardise terms and protect visual artists' rights. These templates can be useful in negotiations, offering a benchmark for what artists should expect in terms of rights and remuneration. In the case of illustrators, model contracts help authors compare offers since each publishing house has its own version, as emerged during an interview with an illustrator. However, the acceptance and implementation of these templates can vary, with some counterparties opting to draft their own contracts that may not be favourable for the artist.[116]

3.4.2. Rights transfers: scope, remuneration, duration and enforceability

[116] Streul, C., *Management of Rights for Visual Arts and Photography*, IP Key, 2021, last accessed on 22/07/2024 and available at: *PowerPoint Presentation (ipkey.eu)*

This chapter provides an in-depth analysis of the scope and duration of transfers of rights and uses, remuneration, choice of law, jurisdiction and enforceability.

i. Scope and duration of rights transfers and uses

The survey results show that transferring economic or exploitation rights in visual arts contracts is a common practice: 35% of respondents always transfer them and 41% often do so. According to an association representing visual artists and the survey results, the rights transferred include **communication to the public rights** (e.g. TV, internet), **reproduction rights** (e.g. prints, merchandise), **distribution rights** (e.g. renting, copying), **adaptation rights** (e.g. cinema, videogames), **right of access, right to modification of work** and **translation rights** in the case of visual works containing text. According to an organisation representing visual artists these rights might be accepted by authors without a full understanding of their implications, especially in commissioning contracts, which frequently stipulate a full transfer of rights. Additionally, the reasons why authors usually accept the transfer of such rights include an individual's lack of bargaining power or specific legal knowledge. For example, 59% of the survey respondents indicated they were not fully aware of the extent of the rights they were transferring, often owing to the complexity of the agreements or because they felt pressured to conform to standard practices, fearing potential repercussions, such as missing out on opportunities or facing blacklisting.

According to the survey results, in some cases, the rights transfer is perceived as necessary for the primary exploitation of the work, such as publishing a book or including artwork in a museum collection. However, 59% of respondents said that they subsequently regretted these transfers, typically because they came to understand the broader implications or they realised that they had alternatives that could have been explored at the time of the agreement. According to the survey respondents, this is particularly true when the rights are rarely or never utilised by the new rightholders, leaving the original creators feeling that they have unnecessarily relinquished too much control over their own work.

Moreover, the survey results show that broader economic rights are sometimes transferred under misleading circumstances, for example when creators are led to believe that they are only transferring rights for primary use when, in fact, the agreement covers more extensive uses, including exploitation/distribution through all forms of media, whether currently known or developed in the future.[117] For instance, clauses often secure broad rights for the counterparty, resulting in the artist losing future remuneration opportunities from secondary uses.

In the visual sector, all remuneration rights are transferable, except from the Artist's Resale Right (right to a small percentage of the resale price of an original artwork if an art market professional takes part in the resale), which is usually managed by collective management organisations (e.g. in Finland, it is managed by Kuvasto). This right arises at the time of the transaction and the counterparty should make payment for it. Nevertheless, as reported by an organisation representing visual artists, remuneration rights introduced in certain countries (e.g. Germany, Belgium) in the context of the implementation of Article 17 of the DSM Directive are unwaivable.

Moreover, contracts for visual artists may include clauses that can be interpreted as a waiver of moral rights or demanding extensive rights transfers without fair remuneration, making them hard to contest, as mentioned by a French visual artist during an interview. For photographers, such waivers have become common in the contracts they sign, while

[117] Streul, C., *Management of Rights for Visual Arts and Photography*, IP Key, 2021, last accessed on 22/07/2024 and available at: *PowerPoint Presentation (ipkey.eu)*

illustrators face variable terms. For example, some contracts ensure credits (Eddison Sadd 1998, Harcourt 2003), while others allow alterations (Bridgewater Books 2003, Cico Books 2008).[118] [119] However, French and German laws provide stronger protection as they do not permit permanent waivers of moral rights.

Example of a waiver of moral rights between a publisher and a photographer, in Spain

"THE PHOTOGRAPHER authorises and transfers to PUBLISHER each and every one of the rights related to the photographs […] PUBLISHER is the only owner of all rights arising […]"[120]

Table 5: Extent of rights and purposes transferred (n=49)

	Extent of transfer of economic/exploitation rights	Transfer of moral rights	Transfer of primary purposes	Transfer of secondary purposes
Always	35%	4%	45%	20%
Often	41%	6%	20%	27%
Rarely	18%	20%	14%	27%
Never	2%	47%	2%	14%
I do not know	0%	10%	12%	4%
Not applicable	4%	12%	6%	8%
Total	100%	100%	100%	100%

The duration of these transfers is also notably extensive, as mentioned by both an association representing visual artists and an individual visual artist in France. According to the same association representing visual artists, many contracts specify that the rights are transferred for the lifetime of the author plus seventy years, or fifty years in the case of photography,[121] effectively covering the entire copyright period.[122] In some cases, the duration is even extended to perpetuity, meaning the rights are transferred indefinitely without any expiration.[123] [124]

[118] *Kretschmer, M., et al.,* The Relationship between Copyright and Contract Law*, DACS, 2010,* last accessed on 22/07/2024 and available at: DACS-Report-Final1.pdf (bournemouth.ac.uk)
[119] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[120] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[121] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[122] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[123] [123] *Kretschmer, M., et al.,* The Relationship between Copyright and Contract Law*, DACS, 2010, last accessed on 22/07/2024 and available at: DACS-Report-Final1.pdf (bournemouth.ac.uk)*
[124] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*

Even though the commissioning of rights in the visual arts sector is prevalent, contracts with photographers may take the form of exclusive licences[125] for an excessively long period or in perpetuity, turning the contracts into buy-out contracts owing to the extensive scope and duration of the transfer.[126]

Specific examples from various contracts are presented below and illustrate the extensive scope and duration of rights transfers.

Example of a contract including the assignment of all patrimonial rights in images, allowing for their reproduction and representation in all forms and media, both known and unknown, in perpetuity

The delivery of photographic work, entirely or in unity, means for the photographer the express acceptance of an exclusive assignment of his patrimonial rights in the images to the counterparty, including in particular: i) the right to reproduce and represent images, to adapt, for remuneration or for free, in all forms and means, by any means and process whether known or unknown at present […], and in any medium by any process, whether known at present or to be discovered in the future […].[127]

Example of a contract involving a photographer entailing the transfer of all usage rights of the photographs for fifteen years, with the company able to use and transfer these rights to third parties worldwide

The photographer authorises and transfers to the counterparty each and every one of the rights related to the photographs taken of the models and the counterparty shall be able to use these photographs in the manner set forth in the present contract for a period of fifteen years from the date of the signing of the same, as well as transferring their reproduction or dissemination to any media or company.[128]

Additionally, automatic renewal clauses are sometimes included, which extend the contract annually unless one party cancels it within a specified notification period.[129] Such provisions ensure that the counterparty's control over the work remains robust and uninterrupted.

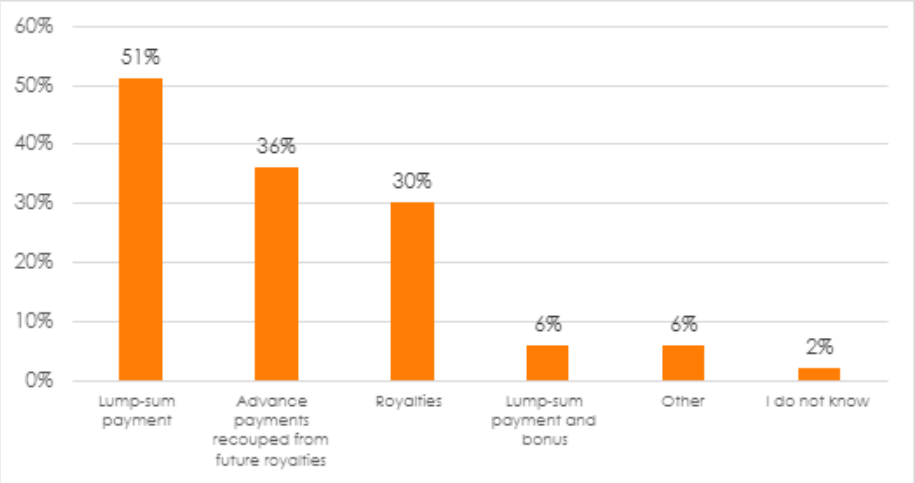
However, legal safeguards in national laws provide some level of protection for artists, as mentioned by an association representing visual artists. For instance, Spanish law deems null and void any assignment of exploitation rights that includes future works or methods of dissemination unknown at the time of transfer (Article 43 (5) under the Spanish Intellectual Property Law)[130] (for further details, see Annex II). This legislative protection aims to prevent the overreach of contractual agreements and to safeguard the future rights of artists.

[125] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[126] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[127] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[128] *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*
[129] *BBK,* Guide to Fees for Visual Artists*, BBK, 2014, last accessed on 22/07/2024 and available at:* BBK_Guide_Fees_Visual_Artists_E.pdf (igbk.de)
[130] Ministry of Justice, *The Intellectual Property Act (Ley de Propiedad Intelectual)*, Ministry of Justice, 2021, p.17, last accessed on 21/06/2024 and available at:

ii. Remuneration for rights transfers

In the visual arts sector, remuneration in contracts between artists and exploiters involving transfers of rights typically takes two main forms: **one-off payments and royalties**.[131] Looking at the survey results, 51% of respondents consider that the most common form of remuneration is a lump-sum payment, a one-time payment made upfront for the rights transfer, which typically is not contingent on future earnings or usage. This is followed by advance payments recouped from future royalties (36% of responses), which are especially common in the book sector, such as comic strip illustrators. Royalties, calculated as a percentage of the revenues derived from the exploitation of rights, are the third most common type of remuneration, as indicated by 30% of respondents. Other forms include lump-sum payments supplemented by bonuses and milestone payments.

Figure 18: Type of remuneration (Visual Arts) (n=53)



One-off payments or lump sums involve a one-time fee paid to the artist for the rights transfer, which typically also includes the costs of the work, as exemplified by the clause below.

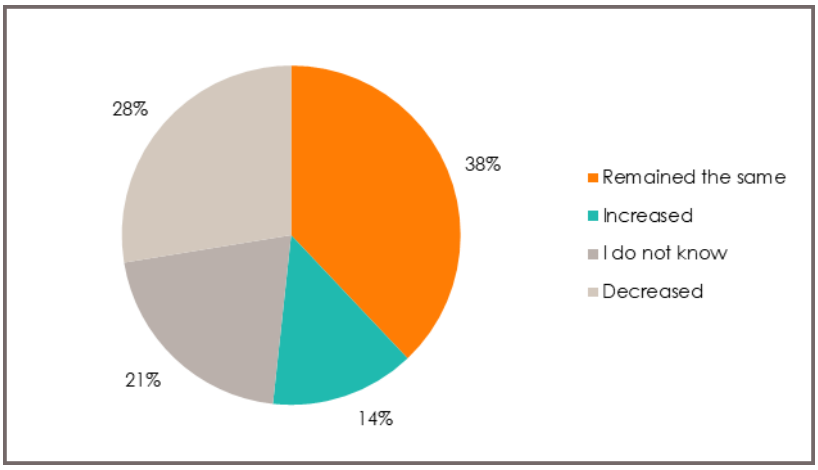
When asked about the perceived development of lump-sum payments over time, 38% of the visual artists participating in the study's survey said that they have remained the same, while 14% said they have increased, and 28% believe they have decreased.[132]

Figure 19: Changes in the use of lump-sum payments (n= 29)

https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/The_Intellectual_Property_Act_%28Ley_de_Propiedad_Intelectual%29.PDF

[131] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works | Shaping Europe's digital future (europa.eu)

[132] The survey results for this specific question on changes in lump-sum payments should be treated with circumspection, since some responses seem to assess changes in the quantity of lump-sum payments rather than changes in their use. This is particularly evident from some answers to the follow-up question asking respondents to justify their answer, where some of them mentioned both inflation and increasing fees over time.



CMOs manage additional income through licensing fees and levies, thereby ensuring that artists receive fair remuneration for their work across various platforms and uses.[133]

Photographers receive low remuneration rates, with commissions often paying only €150-180 for daily assignments and €300 for magazine orders, according to an organisation representing photographers. These rates encompass rights for both print and online usage, and occasionally include redistribution within the same media group.

On the other hand, in the case of illustrators, they are typically remunerated through both lump-sum payments and revenue shares, as mentioned by an illustrator interviewed. For comic books, payments are staged: part upon signing, part during creation and the final part upon completion, along with advance payments recouped from sales.

According to an illustrator interviewed, royalties for children's books, which typically amount to 5-7%, are lower than for other sectors such as fiction or comics, which can be 10% or more.

Moreover, authors only start earning royalties after reimbursing the advance from their sales. Nevertheless, payment methods depend on the type of work, exploitation method, and publisher resources. Established authors or those with agents often secure better terms, as pointed out by an established illustrator.

In relation to the remuneration of visual artists for the use of their works in exhibitions, different practices have been reported. According to the 'Symposium Documentation: Exhibition Remuneration Right in Europe 2018' Report, for exhibition contracts, the remuneration varies between countries:[134]

- Sweden: the MU Agreement has mandated fees for artist participation and exhibitions since 2009, but compliance is voluntary owing to insufficient public funding.

[133] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020,* last accessed on 22/07/2024 and available at*:* Commission study on remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works | Shaping Europe's digital future (europa.eu)

[134] *Internationale Gesellschaft der Bildenden Künste (IGBK),* Symposium Documentation: Exhibition Remuneration Right in Europe 2018*, IGBK, 2019,* last accessed on 05/07/2024 and available at: Symposium_Documentation.pdf (earights.org)

- Germany: the Berlin Model (2016) allocates €400,000 annually for artist payments in municipal galleries, with self-regulated institutions and regular financial adjustments.

- Norway: since 1978, Norway's scheme has included exhibition fees and production cost coverage, and was recently reformed to ensure greater transparency and equality.

- France: legal provisions for exhibition rights exist, but implementation is weak, with low budgets and slow progress despite government support since 2011.

- Netherlands: the Convenant Kunstenaarshonoraria compensates artists for various activities, with public funds incentivising compliance.

- Finland: traditional copyright fees (€60-100) are supplemented by a State-run test period (2017-2019) covering 80% of exhibition remuneration costs.

- United Kingdom: the a-n's guidelines advocate fair payments, but 71% of artists still do not receive exhibition fees.

In the visual arts sector, according to the survey results authors face numerous challenges regarding remuneration for the transfer of their rights, including difficulties in negotiating better terms, delayed payments, lack of transparency from publishers about sales and increasing piracy. Furthermore, new technologies and expanded usage rights covered by low lump-sum payments exacerbate these issues. Additionally, some artists also struggle with understanding how to draw up contracts and stipulate an appropriate remuneration.

58% of the survey respondents consider collective bargaining agreements crucial for ensuring fair remuneration for visual artists in Europe. Collective bargaining helps set minimum remuneration standards and enhances bargaining power, thus levelling the playing field. Indeed, as indicated by some survey respondents, guidelines can lead to better adherence to fair pay since self-employed creatives often lack resources for legal representation, making collective agreements even more essential. These agreements can ensure minimum fees, protect rights and provide support, legitimacy and clear negotiation guidelines.

In Austria, the 'Pay the Artists Now!' campaign also seeks to establish standard payments, as the country currently lacks a national model. The CMOs and trade unions are working together to obtain fair and appropriate remuneration by drafting guidelines.

In Germany, guidelines recommended by BBK Bundesverband (Federal Association of Visual Artists) suggest applying a fee rate of 70 euro per hour for the services of visual artists, ensuring that their remuneration covers both project-related and other costs such as operating expenses and social security contributions.[135]

According to a visual artist from France and an interviewed association representing visual artists in Germany, the cost of the materials the author needs are often included in the lump-sum payment, but the amount is usually not reasonable.[136]

[135] *BBK,* Guide to Fees for Visual Artists*, BBK, 2014*, last accessed on 22/07/2024 and available at*:* BBK_Guide_Fees_Visual_Artists_E.pdf (igbk.de)

[136] *BBK,* Guide to Fees for Visual Artists*, BBK, 2014,* last accessed on 22/07/2024 and available at: BBK_Guide_Fees_Visual_Artists_E.pdf (igbk.de)

Contract adjustment mechanisms are essential to address changes in the economic value of transferred rights and ensure a fair remuneration. According to organisations representing visual arts authors, these mechanisms include clauses that allow for the renegotiation of terms based on the success of the work, such as **best-seller clauses** which provide additional remuneration if certain sales thresholds are achieved.[137]

However, according to the survey results, the ability to **re-negotiate remuneration terms is rarely or never granted.** This was indicated by 83% of respondents. This is due to several factors, including the selective acceptance of changes only for top authors and a lack of transparency regarding the commercial success of works, which hinders the activation of best-seller mechanisms. Additionally, institutional contracts often dictate terms, making renegotiation difficult, and signed agreements are generally binding, preventing further negotiation. Artists often find themselves in weak bargaining positions and fear losing future opportunities if they attempt to renegotiate. Furthermore, verbal agreements, as opposed to written contracts, complicate renegotiation efforts.

Transparency on remuneration

According to the survey results, 64% of respondents indicated that **transparency regarding revenue information is rarely or never provided**. Financial statements and sales reports are common methods of providing this information. However, visual artists often face difficulties in verifying the accuracy of the data provided. Legal transparency obligations are sometimes disregarded by counterparties for various reasons, including the high costs of extracting and providing the data. As a result, visual artists frequently receive incomplete reports and have limited means to address issues of non-compliance, making full transparency difficult to achieve.

According to an interviewed organisation representing visual artists, one of the reasons behind the lack of transparency is the varying levels of information about the economic value of the rights they transfer and the potential revenues of the actors involved in negotiations. While some contracts include clauses for additional benefits, such as best-seller clauses, visual artists often face challenges in accessing sufficient information to effectively avail themselves of these provisions, as was mentioned during an interview with an association representing visual artists. This asymmetry of information can weaken the bargaining position of visual artists, as they may lack transparency regarding the future exploitation of their works and the revenue generated.

iii. Choice of law, jurisdiction and enforceability

A professional organisation representing visual artists mentioned during an interview that the choice of law in rights transfer agreements for visual artists is a concern in the visual arts sector, particularly regarding the extent to which non-EU jurisdictions are involved. In some instances, contracts specify that the governing law will be that of a **jurisdiction which permits broader transfers of rights** than would be allowed under the artist's home country's law. The choice of law in the visual arts sector, especially in photography, is exemplified by the clause below.

Example of a clause which sets Singaporean law as the applicable law to benefit from more permissive copyright laws, allowing copyright assignment

[137] Streul, C., *Management of Rights for Visual Arts and Photography*, IP Key, 2021, last accessed on 22/07/2024 and available at: *PowerPoint Presentation (ipkey.eu)*

The contract is governed by the laws of Singapore, which allows for an assignment of copyright.[138]

The jurisdiction clause in contracts often favours the commissioning party, typically a corporation with significant bargaining power. For instance, contracts in the visual arts sector frequently stipulate that disputes will be resolved under the law of the counterparty's home jurisdiction, which might be outside the EU. According to an interviewed association representing visual artists, this is particularly common with US clients, where the legal framework might not recognise certain rights, such as the Artist's Resale Right, thereby disadvantaging the artist.[139]

Moreover, differing legal frameworks across jurisdictions pose a challenge to visual artists who work on a crossborder basis, for example through digital platforms or international exhibitions, as mentioned by an interviewed association representing visual artists.

According to the survey results, 28% of visual artists consider that often they have no say in the choice of law or jurisdiction in contracts, while another 33% do not know whether or not it is open to discussion, as these contracts are typically pre-written by publishers and by default they favour the publisher's location.

In many cases, visual artists find it challenging to enforce their rights owing to their limited knowledge of the corresponding legal system, the difficulty of enforcing rights, and the inclusion of clauses favouring publishers, as mentioned by some survey respondents. For example, in the EU, there are specific provisions designed to protect artists, such as those found in the German Copyright Act (UrhG) (for further details, see Annex II), which include rights to adequate remuneration and provisions affording protection against overly broad grants of future rights.[140] However, these protections can be circumvented by contractual terms that exploit the artist's lack of bargaining power, such as counterparties imposing lump-sum payments under the assumption that these constitute fair remuneration, as mentioned by an interviewed association representing visual artists.

86% of the survey respondents have not instituted legal proceedings against their counterparties. Those who had done so often found the process unsatisfactory because of high costs, lengthy procedures, complexity and a lack of effectiveness. Specific cases, such as suing for illegal use of works, took many years to resolve. Therefore, legal proceedings are typically instituted by well-known artists with more resources.

Regarding ADR mechanisms, 66% of the survey respondents have not used such mechanisms owing to a lack of knowledge, fear of blacklisting, or because they believe they would not be effective. However, some have used ADR mechanisms, such as arbitration or mediation, often with mixed results. Such recourse is more likely to be successful when backed by legal or organisational support.

138

Zimmerman, C., & Thomas, G., Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*

139 European Visual Artists, *Statement on Limitations and* Exceptions WIPO SCCR 44, EVA, 2024, last accessed on 18/06/2024 and available at: WIPO-SSCR-44-statement-EL.pdf (evartists.org)

140 *Zimmerman, C., & Thomas, G.,* Whose Rights?*, Pyramide Europe Ltd. and Fundación Arte y Derecho, 2009.*

Table 6: Alternative dispute resolution mechanism(s) used in visual arts, according to the survey respondents (n=12)

Alternative dispute resolution mechanism	*Usage*
Arbitration	*Has been used by 17% of respondents to resolve disputes. It was chosen for its potential to be less formal and quicker than litigation. However, arbitration can still be costly and complex, and outcomes can be uncertain.*
Mediation	*Has been used by 58% of respondents to reach an amicable resolution. Mediation can be effective, especially when both parties are willing to negotiate. It is generally less adversarial and can preserve professional relationships. However, the success of mediation depends heavily on the willingness of both parties to cooperate and reach a mutual agreement.*

3.5. Literary works sector

This chapter focuses on the literary works sector, examining the various contractual practices involved in rights transfers for authors (Subchapter 3.5.1.). It also explores the terms and conditions of contracts for transfers of rights, focusing on the scope, duration, remuneration and enforceability of these rights, and provides a comprehensive overview of how they are managed within the industry (Subchapter 3.5.2.).

3.5.1. In-depth look at contractual practices involving rights transfers

i. Contractual actors in the literary works ecosystem

In the literary works sector, for the purpose of this study, **authors** include **writers** and **literary translators.** All authors sign contracts with **publishing houses** (also called publishers). Channels of distribution have developed in complexity over time to include not only print distribution, but also online publications, e-books and audio recordings. This chapter analyses the contractual practices involving rights transfers in the literary works sector by focusing on specific authors: writers and literary translators, the types of deals they engage in and the negotiation landscape of these contracts.

ii. Types of agreements

A. Writers

Writers engage in **publishing** contracts with publishing houses, in the form of a **licence agreement,** as was confirmed by an umbrella organisation representing writers. The publishing contract presumes both the creation of the work itself and the distribution of the work. However this contract structure is considered unfair and debilitates the potential for proportionate remuneration, because writers are only being **remunerated** for 'publishing' and not for the creation of their work, as was pointed out by several interviewed organisations representing authors and writers.

Different forms of publishing contracts, such as multi-book contracts (two-three works per contract), are possible once an author has reached a certain level of success and built a

reputation in the following genres: children, mystery and romance, as specified during an interview with an umbrella organisation representing authors.

In general, **buy-out contracts** are not used for writers. An umbrella organisation representing writers specified that they are used only in very particular cases, such as for ghost writers, where they receive a one-time lump-sum payment, without royalties. The European Writers' Council (EWC) Writers' Contracts survey found that buy-out style contracts are typically only offered by non-reputable publishers to debut authors.[141]

B. Translators

Translators, like writers, engage in publishing contracts with publishing houses.[142] The legal survey of the European Council of Literary Translators' Association (CEATL)[143] revealed that most publishing contracts are drafted individually and not based on model contracts. The survey differentiates between two main types of deals used in **some** countries for literary translators: a '**typical'** contract and a '**standard'** contract based on model agreements (see table below). According to CEATL, '**typical' contracts** are defined as translation contracts framed by law as a publishing contract and '**standard' contracts** are model agreements between a publishers' association and writers' associations that should be signed by all members of the respective associations, securing equal and fair treatment.

Table 7: Type of contracts for literary translators in various EU countries from CEATL survey (2022)

Type of Contract	*Countries*
Typical Contracts	*France, Italy, Bulgaria*
Standard Contracts	*Sweden, the Netherlands, Germany, Austria, Iceland*
Neither	*Portugal, Spain Belgium, Denmark, Finland, Poland, Lithuania, Czechia, Slovakia, Hungary, Slovenia, Croatia, Romania*

An example of a standard contract would be the German 'Normvertag', which has been agreed on by the publishers' association (Börsenverein) and the translators' association. This standard contract is recommended to members of both associations. However, because of the non-mandatory nature of the recommendation, it is left to the discretion of parties whether to use such a standard contract as a template.

As is the case for writers, buy-out contracts are not common practice for translators. However, there are terms and conditions that will be analysed below that make contracts resemble buy-out style contracts.

[141] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at:https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/

[142] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

[143] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

iii. Negotiations

Contract negotiations within the EU are primarily carried out individually by authors (writers and translators). Support from other entities, such as writers' or translators' associations, is provided in some cases.

According to the study's survey results, 87% of authors *directly* negotiate their contracts, only 7% use an agent and 38% rely on professional organisations for negotiations. This was also borne out by the interviews with literary works authors and organisations representing them who mentioned that using agents in this sector is not a common practice in Europe, and is considered more of an American practice.

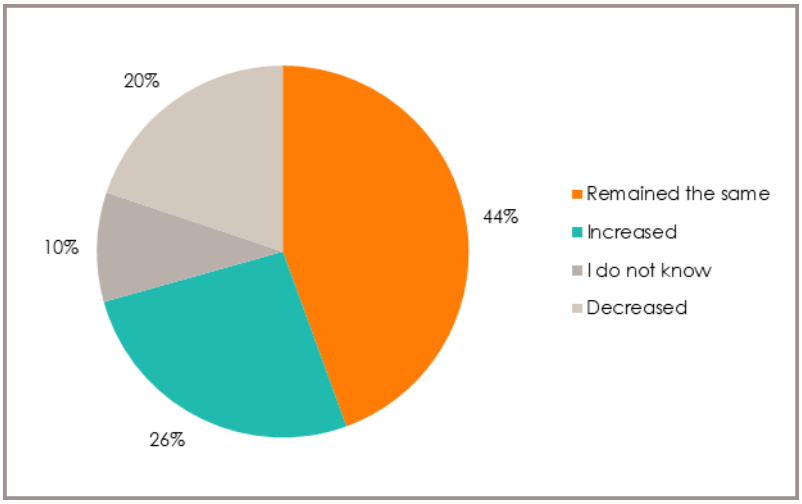
In the literary works sector, CMOs are not usually involved in negotiations. According to interviewed associations representing literary works authors, although **CMOs do not participate in the exploitation of primary rights, they participate in the exploitation of secondary rights.** They act as an intermediary for other rights such as public lending rights and private copying.

Literary works authors are often placed in a weaker position than their counterparties, i.e. publishing houses. According to several interviewed organisations representing writers and translators, larger publishing houses tend to impose their in-house contracts. If authors do not possess the legal background necessary to understand contracts, they face obstacles in negotiating a favourable agreement. Most of the interviewed writers, translators and associations representing literary works authors, mentioned that authors are not in a position to refuse contract terms and conditions, out of fear of being blacklisted and/or losing the opportunity to publish their work. Smaller, newly established publishing houses are more likely to accept a model contract from the author's side. Only when authors have acquired a considerable reputation within the sector do they have leverage in contract negotiations.

Overall, the interviewees representing authors' associations indicated that there is a lack of mediation and collective bargaining in the literary works sector. This aspect was confirmed by the study's survey results, since 74% of literary works **authors** feel that they do **not** benefit from collective agreements. In contrast, 68% of **professional organisations** indicated that they ***do*** benefit from collective agreements.

The figure below presents the survey results on the development of perceived bargaining power over time by literary works authors. While 44% of them consider that such bargaining power has remained the same over time, another 26% indicated that it has increased.

Figure 20: Changes in the perceived bargaining power (Authors, Literary works) (n=126)



A. Writers

As emerged from an interview with a writer, it is difficult to negotiate within the children's books genre, where in most cases terms and conditions are pre-established and non-negotiable.

Writers call on some third-party entities for contract negotiations, but rarely rely on agents. In the 2023 SGDL/SCAM barometer on author-publisher relations in France, only 40% of authors surveyed called upon external advice: in 53% of cases they seek advice from a writers' association, 44% turn to a lawyer, 28% to a third party and 8% to an agent.[144] This is in line with the study's survey results which found that only 7% of literary works authors called on agents for support in contract negotiations. In addition, the EWC Writers' Contracts 2024 survey found that only six out of 23 organisations surveyed indicated that representation by an agent was a common practice.[145]

On the other hand, writers tend to consult with their assigned publisher within the publishing house. This intermediary often has a limited legal background, which creates obstacles in streamlining drafting and negotiating contracts in the writer's favour.[146] Another obstacle to contract negotiation is the lack of clarity regarding concepts of appropriate and proportionate remuneration between publishers and authors.

B. Translators

According to interviewed associations representing translators, there are different reasons why translators may not necessarily **negotiate** a proposed contract. Translators may suffer from a lack of knowledge of their rights, a lack of resources (in terms of time, legal advice and financial resources at both individual and collective levels), or finally the contract terms might be satisfactory and not necessitate negotiation. Also, contracts typically involve a strong time constraint for translators (in order for them to carry out the translation after the original work is published), which reduces negotiating power. On the other hand, translators

[144] Société des Gens de Lettres (SGDL), 9e Baromètre des relations auteurs/éditeurs, SGDL, 2023, last accessed on 22/07/2024 and available at: https://www.sgdl.org/phocadownload/Barom%C3%A8tre_auteurs-editeurs/9e_Barometre_VDEF_13_03-2023_pageApage.pdf

[145] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/

[146] Bensimon, M., *La notion de déséquilibre significatif au sein du contrat d'édition,* 2024, last accessed on 04/05/2024.

are a close-knit community compared with other creative sectors, which offers some leverage in negotiations by means of efficient mobilisation and activism, as mentioned by an interviewed umbrella organisation representing translators.

Model contracts and **codes of good practice** are tools for translators in the rights negotiation process. Below is a list of countries where model contracts and codes of good practices are used.

Table 8: Model contracts and code of good practices for literary translation contracts in some EU countries (source: CEATL survey (2022)

Name	Countries
Model contract	Poland, Austria, Hungary, Croatia, Bulgaria, Spain, Portugal, Denmark,
Code of good practices	Czechia, Belgium, Finland
Both	France, Italy, Germany, Lithuania, Romania

3.5.2. Rights transfers: scope, remuneration, duration and enforceability

Terms and conditions governing rights transfers are similar for writers and literary translators. Authors can decide to **transfer** or **license** their rights, entering into an exclusive or non-exclusive licence. In most cases, according to the interviews conducted with various individuals (writers and translators) and organisations (associations that represent writers and/or translators), authors enter into **exclusive licensing agreements.** These agreements tend to be large in scope and detailed. Interviewed associations representing writers and translators mentioned that the disadvantage for authors with licensing rights is that authors will still license a **majority** of their rights, resembling a full transfer of rights rather than a licence, leaving the publisher with full control of exploitation of primary and secondary rights. Licensing a majority of rights impacts the author's autonomy and limits not only their control over their works but also potential future remuneration. While there are exceptions, the EWC Writers' Contracts 2024 survey found that buy-outs are no longer a common practice.[147]

Table 9: Extent of rights and purposes transferred (n=126)

	Economic/exploitation rights	Moral rights	Primary purposes	Secondary purposes
Always	54%	1%	72%	32%
Often	21%	3%	15%	28%
Rarely	12%	10%	7%	13%

[147] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/

Never	6%	58%	2%	12%
I do not know	4%	15%	2%	9%
N/A	3%	13%	2%	6%
Total	100%	100%	100%	100%

According to the study's survey results, 72% of literary works authors **always** transfer their **primary** rights, while a total of 60% of them either always or often transfer their **secondary** rights.

According to an interviewed umbrella organisation representing authors, publishers are often found to maximise the number of rights over which they can have ownership, even if they do not necessarily exploit all these rights (as can happen for translation rights transferred by writers to publishers). This is especially evident through sublicensing clauses to third parties (as shown in the box below), such as audiovisual producers or to distributors, such as Amazon and Audible.[148] Many clauses include uses for *all* countries and *all* languages, using a broad stroke of exploitation uses. All-encompassing artificial intelligence uses clauses do not appear in publishing contracts in the literary works sector. However, there are concerns within the sector that this could become a future practice.[149]

i. Scope and duration of rights transfers and uses

A. Writers

The content of the contracts varies depending on the genre involved, such as children's books or comic books, young adult, fiction, etc. Most of the time, **writers** in the literary works sector transfer the exclusive publishing rights, **both primary and secondary rights**. This was confirmed in the study's survey and in the various interviews with individuals and umbrella organisations representing writers and translators, as well as in the European Writer's 2024 survey results. Primary rights include the right to make or have copies of the work, to make the work available to the public, the distribution of the work and the transfer of rights to use the work to third parties. Secondary rights include **adaptation rights** for derivative works such as translations, film and television adaptations, audiobook rights, adaptation to graphic novel and videogames. The EWC 2024 Writers' Contracts survey concluded that secondary rights are **not** transferred in the contract for sublicensing exploitation in only six of the 27 countries surveyed.

Other transferable rights that the publisher may request are: the rights to certain names of characters or to elements of the 'universe' created in the book.[150] Some publishing contracts even stipulate the transfer of rights for merchandising, as noted in a French contract clause shared through the study's survey. According to an umbrella organisation representing authors, it is only in exceptionally small publishing houses (e.g. publishing around 20 books

[148] European Writers' Council, *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/

[149] European Writers' Council, *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/

[150] Bensimon, M., *La notion de déséquilibre significatif au sein du contrat d'édition,* 2024, last accessed on 04/05/2024.

a year) that contracts deal **solely** with primary rights. The EWC Writers' Contracts 2024 survey concluded that, when negotiable, rights relating to TV and dramatic adaption, merchandising or radio plays remain with the author, except in France, where only merchandising rights can be retained. Digest and condensation rights, graphic novel rights or rights to reprint for visually impaired persons are also sometimes retained.

In **France**, there are two rules unique to the sector: the transfer of digital rights must be provided for in a specific part of the publishing contract, and the transfer of **audiovisual adaptation rights** is subject to a **separate** contract.[151] Publishers usually give an ultimatum by saying that authors must sign the second contract on the audiovisual adaptation rights or the first one on publishing their work will be revoked – presenting them with a 'take it or leave it' offer.[152] However, this trend has decreased in recent years: in 2023 in France, 49.5% of respondents to a barometer[153] reported that they had simultaneously signed a publishing contract and an audiovisual adaptation contract, versus 53% in 2020 and 55% in 2018. **Unknown rights** are also transferred, as explicitly mentioned in the clause below provided by a respondent to the survey carried out for this study.

Clause in agreement between graphic novel publisher and author

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Below is an example of the rights transferred in a Finnish contract between a writer and a publisher. Included are the rights that the translators transfer exclusively to the publisher, which include primary and secondary rights. Many contracts contain **reversion** clauses, as seen below, whereby rights can be reverted after 18 months if the publisher has not made the work available. However, the results of the EWC Writers' Contracts 2024 survey concluded that primary rights cannot be easily recalled.

Extract from a publishing contract

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[151] Bensimon, M., *La notion de déséquilibre significatif au sein du contrat d'édition,* 2024*,* last accessed on 04/05/2024.
[152] Bensimon, M., *La notion de déséquilibre significatif au sein du contrat d'édition,* 2024*,* last accessed on 04/05/2024.
[153] Société des Gens de Lettres (SGDL), *9e Baromètre des relations auteurs/éditeurs*, SGDL, 2023, last accessed on 22/07/2024 and available at: https://www.sgdl.org/phocadownload/Barom%C3%A8tre_auteurs-editeurs/9e_Barometre_VDEF_13_03-2023_pageApage.pdf
[154] Contract provided by umbrella organisation that represents writers. Clause translated internally.

The duration of the rights transfer typically falls under the copyright protection duration, which is the entire lifespan of the writer plus 70 years, which can therefore reach more than 100 years.[155] Almost all writers interviewed for this study confirmed that this is the case, and that unexpectedly some contracts do not stipulate specific limits on the duration of rights, meaning that the default is 70 years after the death of the author. According to the EWC 2024 Writers' Contracts 2024 survey, 75% of fiction writers grant their rights for 'the full length of authors' rights or copyright legislation'.[156] As for derivative rights, such as rights to create audiobooks, the same survey found that they are often transferred for the same duration as the main contract. However, the duration can vary significantly between Member States. For example, in Germany audiobook licences are granted for an average of 12 years, and in Denmark, audiobook rights are usually granted for the full period of copyright.

Whenever limited and sublicensed, the term varies and ranges from under three years to a period most often of three, five, seven or ten years.[157] As for the print format, 75% of respondents grant rights for an additional 50/70 years after death. The duration of the contract can be limited to a certain number of years between seven and 20 in some countries such as Spain, Sweden, Belgium, Denmark and Finland.[158]

B. Translators

In the majority of cases rights are transferred between **translators** and publishers by way of an **exclusive licensing agreement**.[159] In many of the countries surveyed in CEATL's Legal Survey, licences are detailed by including clauses on a variety of uses such as e-book and audiobook rights. Rights that are typically transferred in these licences between translators and publishing include: 'the reproduction right and the right to make the work

[155]Bensimon, M., *La notion de déséquilibre significatif au sein du contrat d'édition,* 2024*,* last accessed on 04/05/2024.
[156] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/
[157] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/
[158] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/
[159]European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

available, including digital and online exploitation on any type of platform. This is common practice, not a presumption established by law.'[160] CEATL's Legal Survey results provided Poland's response to the survey as an example; 'the law requires every field of use to be mentioned explicitly in the contract, and in practice it results in a long list of fields of use covering all possible areas'.[161] As for writers, transfers of rights can last for the duration of the intellectual property right, but the duration is limited in some Member States. Overall, the duration of the rights transfer falls under the two categories presented in the table below.[162]

Table 10: Duration of licence of rights

Trend	Definition	Countries
1	Rights usually licensed by contract for the duration of the intellectual property	France, Belgium, the Netherlands, Germany, Austria, Denmark, Portugal, Finland, Iceland
2	Licence usually limited in time (usually 5-10 years, up to 15 years for Spain and 20 for Italy)	Spain, Italy, Slovenia, Croatia, Hungary, Romania, Bulgaria, Slovakia, Czechia, Poland, Lithuania, Sweden

One finding of a survey carried out by the Polish Association of Literary Translators was that the share of contracts with an **unspecified** duration of the rights transfer decreased in 2020–2022 to 25% versus 35% in 2018–2019.[163] This demonstrates a trend towards limiting the duration of the rights transfer.

Below is a clause outlining the assignment of rights in an Italian contract, one of the countries where licences are typically detailed and include electronic adaptation rights and where the duration of the transfer can be as long as 20 years. In this clause, the exclusive licence is for a period of ten years for a transfer of all economic rights. Secondary rights in this clause include several uses such as: translation, audiovisual, radio, television, film, audio-only formats and sub-transfers. All-encompassing terms used in the clause below include 'print in any form', 'any means known to date or made available by technology' and 'extend to Italy and all countries in the world'.

Extract from a literary translator contract (2024)

Point 2. Assignment of rights and duration

[160] *European Commission,* Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, European Commission, 2020, (p.89),* last accessed on 22/07/2024 and available at*:* https://digital-strategy.ec.europa.eu/en/library/commission-study-remuneration-authors-books-and-scientific-journals-translators-journalists-and

[161] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

[162] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

[163] Polish Literary Translators' Association., *Wynagrodzenia w branży tłumaczeń literackich w latach 2020–2022 [Salaries in the Literary Translation Industry] 2020-2022,* 2022, last accessed on 20/06/2024 and available at: https://stl.org.pl/wp-content/uploads/2022/12/Wynagrodzenia-w-branzy-tlumaczen-literackich-2020-2022.pdf

[164] Clause provided by an umbrella organisation representing literary translators (translated internally).

2.1 The Translator, acting for themselves, their heirs and assigns under any title, assigns to the Publisher, on an **exclusive** basis, for the duration of **10** (ten) years from delivery, all rights of economic use of the Translation as set forth in Sections 2.2 and 2.3.

2.2 The exclusive right of publication in the press in any form (volume, periodicals, handouts, appendix, etc.) and by any means known to date shall be deemed to be assigned under this agreement. 2.2 The exclusive right is hereby assigned to the undersigned to publish the Translation in print in any form (volume, periodicals, handouts, appendix, etc.) **and by any means known to date or made available by technology**; to use parts of the Translation in anthologies, compendia, collections, dictionaries, encyclopaedias, etc.; to reproduce the Translation, even if only in audio, on any type of electronic, magnetic or optical medium or on any other medium that allows it to be read, reproduced, transmitted, listened to and enjoyed by any media; to adapt and process it for use in electronic format and on electronic media; and to adapt, process and use it for radio and television, film, **audiovisual**, theatrical and audio-only formats and/or podcasts.

2.3 The exclusive right is also understood to be assigned for the direct or indirect distribution of the Translation, including by means of rental, broadcasting and putting it on the market or in circulation or in any case at the disposal of the public by any means currently known or that may be made available by technology; for the direct or indirect broadcasting and distribution, including through telematic networks, depending on its use by means of electronic downloading, viewing and reading devices such as e-books, PCs, tablets, etc., for rental, reproduction and transmission through all media currently known or that may be discovered in the future.

2.4 All the aforementioned exclusive rights relate to the Translation both as a whole and in each of its parts, include the Publisher's **right to sub-transfer to third parties** and extend to Italy and all countries in the world. The minimum print run of each printed edition shall be 1,000 copies.

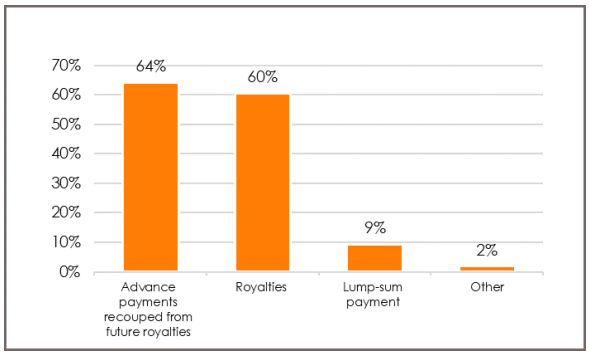
2.5 The Publisher reserves the right to reproduce and disseminate on electronic media, directly or indirectly, free of charge, extracts and/or parts of the translation for promotional purposes.

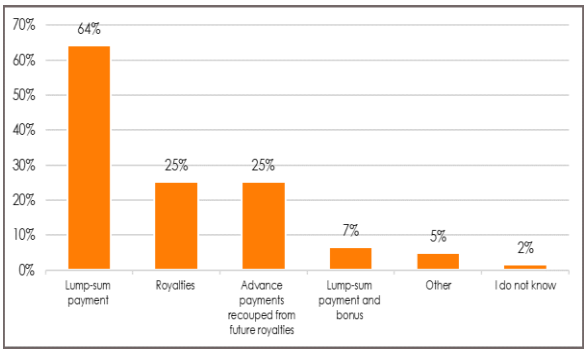
ii. Remuneration for rights transfers

The remuneration for literary works authors depends on the literary genre in which they publish, their reputation and their previous sales. The study's survey results reveal differences in the types of remuneration writers and translators receive.

Figure 21: Type of remuneration (writers)(n=53)

Figure 22: Type of remuneration (translators)(n=59)





While writers typically receive advance payments recouped from future royalties (64%) and royalties (60%), translators are usually offered a single lump-sum payment (64%), and, in less frequent cases, royalties (25%). A more detailed analysis of remuneration is provided below.

A. Writers

Writers typically receive **royalties** and **advance payments** in exchange for the licensing of the rights described above. It is not usual for them to receive single lump-sum payments. Low remuneration is considered one of the challenges faced by writers, and there is a lack of coherence on what appropriateness and proportionality mean with regard to advance payments and royalties. The remuneration for a rights transfer is determined on a contract-by-contract basis, as there are no established rates. However, there are general industry common practices in terms of royalty percentages and a range of advance payment amounts.

According to an interviewed umbrella organisation representing writers, an advance payment will be recouped and needs to be 'sold-off' before the royalty is paid to the author. A publication commissioned by the French Ministry of Culture reported that 70% of writers in France receive an **advance**, 70% of which is below €3,000.[165] This is in line with the results from the EWC Writers' Contracts 2024 survey which found that the amount paid by small and medium-sized publishers generally ranges between €500 and €5,000 euro.[166] Moreover, the latter found that non-refundable advance payments were **not** the rule, and that advance payments were routine in only 44.5% of cases, meaning that as a result 55% of fiction writers do **not** or only rarely receive an advance payment. This study's survey found a higher percentage rate of writers (64%) who claimed that they received an advance payment recouped from future royalties. This result confirms that it is more of a standard practice for writers than for translators to receive an advance payment. In an interview with an umbrella organisation representing authors, it was mentioned that some writers in specific genres also receive **lump-sum** payments, notably in the case of children's books.

Royalty payments, which typically accompany the advance payment for writers, are shares of revenue from net sales prices in print form, but they can also originate from digital sales. Fixed book price law[167] stabilises the remuneration of an author by stabilising the price of books through various measures such as minimum rates. According to an interviewee from an association representing writers this means that countries that do **not** have a fixed book

[165] Racine B., *L'auteur et l'acte de création,* 2020, last accessed on 19/07/2024 and available at: https://www.artcena.fr/sites/default/files/medias/rapport_%20Racine_JANVIER_V2.pdf
[166] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/
[167] In France, the legislation on fixed prices for books is law number 81-766, colloquially known as the 'Lang Law', and in Germany it is known as the Buchpreisbindung.

price law tend to have more volatile royalty rates. The EWC Writers' Contracts 2024 survey shows that 12 countries have a fixed book price framework for print books and suggests that this regulation can serve as a basis for proportionate remuneration.

Royalties can vary between different genres, as is demonstrated in France, in the SGDL/SCAM barometer, which showed that the royalty rate for general literature is 9%, compared with 6% for the young adult genre and 7% for comic books.[168] According to the EWC Writers' Contracts 2024 survey, the average royalty rate is around 8% for fiction books for countries with fixed book prices. For children's books, the royalty rate can be as low as 2-4% owing to the fact that there are usually two authors (an illustrator and a writer). Royalty rates can be higher for hardcover editions with an average of 10% on the sales price in countries such as Belgium, Germany, Greece and Portugal.[169] In conclusion, royalty rates do not provide a stable means of remuneration for writers and vary between countries and between literature genres.

As mentioned during an interview with an organisation representing writers, in some countries the royalty percentage is not based on the book price, but on what publishers receive as net income. Some authors interviewed consider that a percentage of the publisher's income is a better option than a percentage based on the book price, because in the latter case, publishers tend to take out commissions before calculating the percentage to be granted to authors, and in the end the amount is often less than the percentage used on the basis of the book price. In some contracts, writers have **staggered rights**, so when a writer sells a certain number of copies, the royalty rate is increased. This is confirmed in clauses from contracts received in relation to the study's survey, where for example a contract stipulated an 8% royalty rate for the first 10,000 copies sold, rising to 9% from 10,001 copies to 30,000 copies, and then to 10% from 30,001 copies upwards.

The box below presents an extract of a remuneration clause from a publishing contract. In this contract, the advance payment is called the 'advance of rights of authorship'.

Extract from a publishing contract

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3.1 Ten (10) percent of the selling price to the public at all times, according to the catalogue and without VAT, on the copies sold in hardcover or paperback formats.

3.2 Five (5) percent of the retail price, according to the catalogue and without VAT, for each copy sold in economic, pocket or newsstand formats. It is considered that the possible edition in a Book Club is only another marketing system. THE AUTHOR will receive 60% of all advances and collections received by the PUBLISHER for this type of marketing. From special sales or with a special price (book clubs, etc.), with a discount equal to or greater than 65% that the EDITORIAL sells directly to another entity, the AUTHOR will receive 50% of what is stipulated in the clause 3.1 of this contract for each of the copies sold, on the PVP without VAT. For the assignment of the rights mentioned in this contract, the AUTHOR will receive, as an advance of rights of authorship, one

[168] Société des Gens de Lettres (SGDL), *9e Baromètre des relations auteurs/éditeurs*, SGDL, 2023, last accessed on 22/07/2024 and available at: https://www.sgdl.org/phocadownload/Barom%C3%A8tre_auteurs-editeurs/9e_Barometre_VDEF_13_03-2023_pageApage.pdf

[169] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/

thousand euros gross (€1,000 gross), which will be delivered once the EDITORIAL has approved the original entire WORK and the AUTHOR has submitted the corresponding invoice.[170]

Another example of a remuneration clause below shows the royalty percentages for printed books and audiobooks. This Finnish clause aligns with the findings from the EWC Writers' Contracts 2024 survey where the most common royalty rate received for digital revenues for audiobooks was found to be between 20 and 25%.[171] In this contract, the advance fee in this clause is called a 'copyright fee', referring to the copyright transferred in exchange for this advance fee and royalties.

Remuneration clause from a contract between writer and publisher

The royalty percentages are:

Printed book, excluding pocketbook: 23 %.

Pocketbook: 15 %.

E-book (and sale of rights to use it): 23 %.

Audiobook (and sale of licences): 23 %.

(…)

The Publisher shall pay the **Copyright Fee as an advance** of EUR 3,000, which shall be paid once this Agreement has been signed. The royalty advance is deducted from the sales account.[172]

An interviewed umbrella organisation representing authors mentioned that, for authors, **secondary rights remuneration** may be reduced in relation to primary rights, without any explanation being given to the author. It was also mentioned that books can be sold outside the country of origin and the advance payment may be halved from 8% to 4% in countries that share the same language. For example, a French author selling books in francophone countries such as Belgium, Luxembourg and Switzerland, will see their percentage remuneration halved, without the possibility for authors to negotiate this percentage.

Two associations representing writers interviewed in the context of this study mentioned '**hidden buy-out'** clauses, where publishers offer advances that are not sufficient to cover either the time or the cost involved in creating a work. This also emerged during an interview with an association representing writers, where it was mentioned that this occurs in particular in the case of the comic book genre.

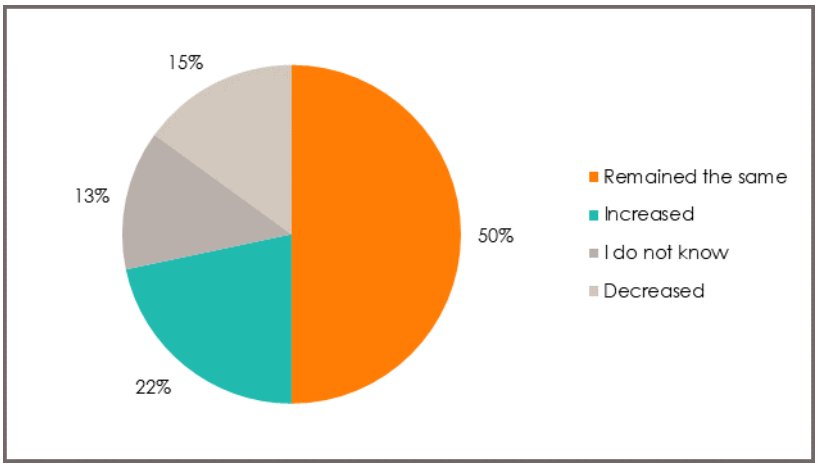
B. Translators

[170] Clauses translated internally.
[171] European Writers' Council., *Writers' Contracts: An Overview of Contractual Clauses in Publishing Agreements in the European Book Sector 2024 Survey Results,* 2024, last accessed on 22/07/2024 and available at: https://europeanwriterscouncil.eu/writers-contracts-ewcsurvey-2024/
[172] Clause translated internally.

Literary translators are primarily paid for their work by way of a lump-sum **advance** payment. In addition, in some countries they are entitled to **royalties** under certain conditions.[173]

When asked about the perceived development of lump-sum payments over time, 50% of the translators who have received lump-sum payments said that such payments have remained the same, while 22% and 15% indicated that they have increased or decreased respectively.[174]

Figure 23: Changes in the use of lump-sum payments (Translators, Literary works) (n=60)



Whether translators receive royalties depends on the country in which they work. The table below categorises countries by type of royalties.[175]

Table 11: Country categorisation of royalty remuneration for translators

Category of royalty remuneration for translators	Countries
No royalties	Portugal, Italy, Sweden, Finland, Poland, Lithuania, Denmark, Czechia, Slovakia, Austria, Italy, Hungary, Romania and Bulgaria
Royalties after the initial fee has been recouped	Spain, France and the Netherlands
Royalties after a specified number of copies sold	Belgium, Germany and Croatia

[173] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

[174] The survey results for this specific question on changes in lump-sum payments should be treated with circumspection, since some responses seem to assess changes in the quantity of lump-sum payments rather than changes in their use. This is particularly evident from some answers to the follow-up question asking respondents to justify their answer, where some of them mentioned both inflation and increasing fees over time.

[175] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

In three countries (Belgium, Germany and Croatia), royalties are implemented after a specific number of copies have been sold, and in three others (Spain, France and the Netherlands) royalties only enter into effect once the amount of the initial lump-sum fee has been recouped through sufficient sales of the translated work. This is considered problematic according to interviewed translators and associations representing them, as sales rarely surpass this fee, which makes the contractual conditions **equivalent to a buy-out.**

Remuneration for **secondary uses** is not always stipulated in contracts for literary translators. In fact, in half of the countries that CEATL surveyed, translators did **not** receive remuneration for the transfer of secondary uses.[176]

The box below provides examples of remuneration clauses from French and Polish model contracts for literary translators; both include a staggered payment of the advance payment. The French model clause sets a two month deadline for the advance payment, whereas the Polish clause has a one month deadline.

Clause on remuneration from a literary translation model contract (updated November 2023):

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[176] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

[177] Association des Traducteurs Littéraires de France (ATLF), Modèle de contrat de traduction, ATLF, 2023, last accessed on 22/07/2024 and available at: *https://atlf.org/wp-content/uploads/2023/12/ATLF-Modele-contrat-de-traduction-sans-commentaires-MAJ2023.pdf*

[178] Clause translated internally.

A clause on remuneration from a literary translation model contract (licence agreement)

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The findings of the CEATL legal survey reveal that sometimes **advance fees** were not paid. In half of the countries surveyed, it was found that the initial fee was not fully paid 60 days after delivery of the work. Additionally, it was highlighted that in two-thirds of the countries surveyed, translators did **not** receive an advance fee upon signing the contract, which is presumed to be 'good practice' (see table below).[180]

Table 12: Countries where translators do not receive an advance fee or where an advance fee is usually paid on signing the translation contract

Category	Name
Countries where translators do not receive an advance fee on signing the contract	Portugal, Spain, Italy, Slovenia, Croatia, Hungary, Romania, Bulgaria, Slovakia, Czechia, Lithuania, Finland and Sweden.
Countries where an advance fee is usually paid on signing the contract	France, Belgium, Germany, the Netherlands, Austria, Iceland and Poland

C. Transparency on remuneration

In general, transparency on remuneration is considered insufficient, with a lack of information on the distribution of the work. An interviewed umbrella organisation representing authors mentioned that remuneration reports often lack information on sales, e-book downloads/streams in flat rates, or audio book slots listened by hour.

Article 19 of Directive 2019/790 lays down that authors and performers should receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up-to-date, relevant and comprehensive information on the exploitation of their works and performances from the parties to which they have licensed or transferred their rights. However, almost all interviewees representing writers and translators indicated that, when reports are provided, they are considered too complex. According to interviewed

[179] Stowarzyszenie Tłumaczy Literatury (STL), Model Contract for Literary Translators, STL, 2018, last accessed on 22/07/2024 and available at: https://stl.org.pl/wp-content/uploads/2019/03/STL_model_contract_EN_092018.pdf

[180] European Council of Literary Translators' Associations (CEATL), *CEATL legal survey: mapping the legal situation of literary translators in Europe,* 2022, last accessed on 22/07/2024 and available at: https://www.ceatl.eu/wp-content/uploads/2022/06/CEATL-Legal-survey-ENG.pdf

organisations representing literary works authors, many writers receive support from organisations to help read and understand reports. The results of the study's survey indicate that only 17% of literary works respondents always receive transparency reports on the revenues generated by the exploitation of rights, while 30% indicated that they never receive such reports.

In this regard, the EWC Writers' Contracts 2024 survey results show how contractual practices continue to broadly persist to the detriment of authors, such as not sending annual reports to authors or providing such reports to authors only on request, contrary to the obligation laid down in Article 19 of the DSM Directive to provide at least an annual reporting. A French interviewee, who is an active writer in the literary works sector, mentioned that in 2024, in France, reports are now submitted twice a year, and are available on a type of platform where authors can more easily access them.

According to an interview with a **translator**, translators do not receive reports on sales or the number of books sold for the five or ten-year block when their rights are transferred. Publishing houses are reluctant to send reports to translators, most likely because of the extra effort and resources required to do so. Also, as revealed by the study's survey, under current Polish law, publishers have only a transparency requirement when the author is entitled to royalties.

iii. Choice of law, jurisdiction and enforceability

According to the interviews conducted with umbrella organisations representing literary works authors and individual writers and translators, in most publishing contracts, EU law is applied. An interviewed umbrella organisation representing literary works authors mentioned that, only on rare occasions, are contracts concerning European literary works authors established outside of Europe, for example where authors are proficient in multiple languages or have several nationalities. For instance, an author who can write in English may choose to publish in jurisdictions outside of the European Union. The study's survey results show that publishers tend to use the jurisdiction where they are based for publishing contracts. An interviewed organisation representing translators provided an example of a case where two international publishing houses tried to impose US conditions (buy-out style contracts) on European translators. However, the latter mobilised and successfully made the case that contracts must be under EU law or national law.

In terms of enforceability of contracts, according to the study's survey results, 87% of respondents said that they had never instituted legal proceedings, mainly because of a lack of resources and the lengthy process. A translator interviewed pointed out that parties usually come to a compromise before the case reaches court. The same interviewee also pointed out that publishing houses are willing to compromise with authors if they have a letter of support from associations pleading the author's case.

According to an interviewed translators' association, the majority of translators in the EU are part of a national translator's association, and these association act like a kind of NGO, which helps with enforceability and protection.

3.6. Videogames sector

This chapter explores the videogames sector, examining the various contractual practices involved in rights transfers for authors (Subchapter 3.6.1.). It also explores the terms and conditions of rights transfer agreements, focusing on the scope, duration, remuneration and enforceability of these rights, and provides a comprehensive overview of how they are managed within the industry (Subchapter 3.6.2.).

3.6.1. In-depth look at contractual practices involving rights transfers

i. Contractual actors in the videogames ecosystem

The videogames sector is an intricate creative sector, where works (i.e. games) are collaboratively produced by many professionals.[181] Indeed, the **videogames value chain** comprises several key actors, each playing a distinct role in the creation, production, distribution and consumption of videogames.[182]

Within the traditional value chain of the videogames sector, the first link is the **hardware manufacturer** which supplies the hardware (i.e. consoles, PCs, mobile phones or tablets) on which games can be played.

The authors, known as **game creators**, encompassing a diverse array of **artists, designers, audio composers**, **writers** and **programmers**, who conceive, oversee, design, write and programme the software and content of the games are at the forefront of the value chain.[183] These professionals usually hold copyright from the creation of their works, but this varies according to their contribution.[184]

Nevertheless, the survey responses revealed a diverse range of videogame professionals beyond the typical game creators. These include **translators, localisers** and **trans-creators**, who adapt games for different languages and cultures, as well as the **artists who focus on the visual design** of games, who differ from designers who develop game rules.

These authors mainly operate with **game studios,** which develop and produce the games with the different creative elements produced by the wide range of authors involved in the creation of the videogame. **Game studios**, responsible for hiring **authors**, serve as the visible face of the industry, categorised into first-party, second-party or third-party entities depending on their affiliation with **console development companies**.

These studios distribute games on the market. **Game Publishers** oversee marketing, manufacturing and investment in game development.

Distribution and retail channels, once dominated by physical copies, have shifted towards digital platforms, such as **app stores** and **online marketplaces**, revolutionising sales operations. Although publishers traditionally act as intermediaries with consumers, retailing hardware and software products, modern value chains resulting from digital disruption involve a more direct connection between the developer and the consumer, for instance bypassing smaller publishers to the benefit of app stores.[185]

Lastly, **gaming platforms** encompass electronic delivery systems, facilitating game launches and interactions, including mobile applications, thereby completing the value chain of videogames.

ii. Types of agreements

[181] European Games Developer Federation (EGDF), Reporting Obligations and Renegotiation Rights, EGDF, 2024, last accessed on 22/07/2024 and available at: https://www.egdf.eu/documentation/5-fair-digital-markets/5-a-digital-ready-copyright-framework/reporting-obligations-and-renegotiation-rights/

[182] European Commission, *European Media Industry Outlook*, European Commission, 2023, last accessed on 20/06/2024 and available at: *The European Media Industry Outlook|Shaping Europe's digital future (europa.eu)*

[183] European Commission, *European Media Industry Outlook*, European Commission, 2023, last accessed on 20/06/2024 and available at: *The European Media Industry Outlook|Shaping Europe's digital future (europa.eu)*

[184] Ramos, A., López, L., Rodríguez, A., Meng, Tim, Abrams, S., *The Legal Status of Videogames: Comparative Analysis in National Approaches,* World Intellectual Property Organization (WIPO), 2013, last accessed on 18/06/2024 and available at: https://www.wipo.int/export/sites/www/copyright/en/docs/creative-industries/video_games.pdf

[185] European Commission, *European Media Industry Outlook*, European Commission, 2023, last accessed on 20/06/2024 and available at: *The European Media Industry Outlook | Shaping Europe's digital future (europa.eu)*

Within the value chain of the videogames sector, the developer of the full game (which is typically the game studio) tends to unify authors' rights. To cluster the rights from the different rightholders involved in the creation of the game, studios either hire authors or agree with them on the assignment of all their intellectual property rights (not just copyright).[186]

According to several organisations representing studios in the videogames sector authors in the games industry are employees, usually hired by studios or publishing companies. Employment relationships are typically very long-term, i.e. 20 to 30 years. Accordingly, the types of contracts commonly established between the authors and studios are **employment contracts** or **subcontracting contracts.** The latter are regarded as '360 contracts', where IP rights are exclusively transferred to the studios.

Nevertheless, while the core contributors to a game (e.g. lead designer, lead level designer and lead sound engineer) are typically in-house, according to an organisation representing studios in the videogames sector, studios may also use freelancers for project-based assignments. This relationship typically takes the form of a fixed-term employment contract with a term of around one to two years.

In addition, **standard contracts** as well as **open-source licensing agreements** between programmers and assets stores[187] are in place for the use of existing coding of games. The findings of a study on 'understanding the value of a European videogames society'[188] reveal that permanent employment contracts are a predominant practice in the sector (for instance in Spain, France and Germany). They are characterised by the inclusion of a range of benefits and proper salaries, thereby favouring talent retention in the companies. To a lesser extent, temporary contracts are also in place in the videogames industry for lower-positioned or non-specialised professionals.

In the videogames industry, some authors use licences to allow for the use of their rights in games, for example in the case of music authors. In the videogames sector, existing musical elements are often licensed rather than game-specific music commissioned.[189] Therefore, music composers or their publishers transfer their exclusive rights to game distributors through **synchronisation licensing agreements**, where collecting societies are often involved.[190]

iii. Negotiations

According to the interviews with organisations representing studios and publishers in the videogames industry, negotiation dynamics are strictly linked to the skills possessed by the authors. The evidence gathered in a study on 'understanding the value of a European videogames society'[191] shows that there is an unfulfilled demand for high-quality talent

[186] European Commission, Study on the Economic Detriment to Authors and Performers Resulting from the Sale of Rights in the EU, Publications Office of the European Union, 2015, last accessed on 22/07/2024 and available at: https://data.europa.eu/doi/10.2759/332575

[187] Assets stores often collect creative resources (i.e. codes, music and visuals) that can be used in the development of videogames.

[188] European Commission, *Study on the Economic Detriment to Authors and Performers Resulting from the Sale of Rights in the EU*, Publications Office of the European Union, 2015, last accessed on 22/07/2024 and available at: https://data.europa.eu/doi/10.2759/332575

[189] European Commission, *Study on the Economic Detriment to Authors and Performers Resulting from the Sale of Rights in the EU*, Publications Office of the European Union, 2015, last accessed on 22/07/2024 and available at: https://data.europa.eu/doi/10.2759/332575

[190] Interactive Software Federation of Europe (ISFE), Response on Creative Content Reflections Paper, ISFE, 2010, last accessed on 22/07/2024 and available at: https://www.videogameseurope.eu/wp-content/uploads/2018/11/isfe_response_on_creative_content_reflections_paper_january_2010.pdf

[191] European Commission, *Study on the Economic Detriment to Authors and Performers Resulting from the Sale of Rights in the EU*, Publications Office of the European Union, 2015, last accessed on 22/07/2024 and available at: https://data.europa.eu/doi/10.2759/332575

within the industry's value chain. The latter factor, together with the author's reputation and their past achievements, enhances their bargaining power when negotiating with the studios that have fewer options when it comes to contracting authors and acquiring their rights for the distribution of games.

These organisations also pointed out that contract negotiations mainly take place on an individual basis (i.e. directly between authors and their counterparties), although experienced and more reputed authors typically involve agents or legal representatives in their negotiations.

In addition, these organisations also highlighted that, unlike other sectors, CMOs are notably absent within the videogames domain, notwithstanding their occasional presence in areas such as music licensing for videogames. Likewise, as the videogames sector is a relatively small sector in terms of employees (i.e. in Europe the sector is mostly composed of small and micro companies employing fewer than ten employees[192]), there are usually no collective agreements in place.

Overall, no major challenges to the bargaining power of authors in negotiations were observed.

3.6.2. Rights transfers: scope, remuneration, duration and enforceability

The contracts within the videogames sector include several provisions related to the scope of the rights transferred, remuneration and choice of law.

i. Scope and duration of rights transfers and uses

Videogames are composed of multiple creations (i.e. artworks, videos, original designs, sound and music creation) as well as a wide range of software developments,[193] so copyright and other IP rights (including trademarks and patents[194]) are an important competitive asset within the industry[195] and their protection has therefore become crucial.[196]

When authors create their works under an employer-employee relationship with studios, their copyrights are contractually retained by their employer. However, when the work is not created within the employment framework, a transfer of authors' rights is usually negotiated with studios in order to produce, publish and market the videogame in a legal and proper way.[197]

According to an interview with an organisation representing studios, there is a full transfer of rights in perpetuity under the employment or subcontracting contracts.

[192] European Commission, *European Media Industry Outlook*, European Commission, 2023, pp. 9-10, last accessed on 20/06/2024 and available at*: The European Media Industry Outlook | Shaping Europe's digital future (europa.eu)*
[193] European Commission, *Study on the Economic Detriment to Authors and Performers Resulting from the Sale of Rights in the EU*, Publications Office of the European Union, 2015, last accessed on 22/07/2024 and available at: https://data.europa.eu/doi/10.2759/332575
[194] European Parliament, Digital Services Act (DSA): The fight against illegal content online, European Parliament, 2023, last accessed on 22/07/2024 and available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749808/EPRS_BRI(2023)749808_EN.pdf
[195] European Commission, *European Media Industry Outlook*, European Commission, 2023, pp. 9-10, last accessed on 20/06/2024 and available at*: The European Media Industry Outlook | Shaping Europe's digital future (europa.eu) ,,*
[196] Interactive Software Federation of Europe (ISFE), *Response on Creative Content Reflections Paper*, ISFE, 2010, last accessed on 22/07/2024 and available at: https://www.videogameseurope.eu/wp-content/uploads/2018/11/isfe_response_on_creative_content_reflections_paper_january_2010.pdfhttps://www.videogameseurope.eu/wp-content/uploads/2018/11/isfe_response_on_creative_content_reflections_paper_january_2010.pdf ISFE, 2010,
[197] Ramos, A., López, L., Rodríguez, A., Meng, Tim, Abrams, S., *The Legal Status of Videogames: Comparative Analysis in National Approaches,* World Intellectual Property Organization (WIPO), 2013, last accessed on 18/06/2024 and available at: https://www.wipo.int/export/sites/www/copyright/en/docs/creative-industries/video_games.pdf

ii. Remuneration for rights transfers

According to interviewed organisations representing studies and publishers, the remuneration for the rights transfer is typically covered by the author's salary. These salaries can be scaled-up over time and typically include social benefits.

Additionally, an interviewed organisation representing videogame companies also highlighted that those authors with greater negotiation power (i.e. experienced and talented authors) are commonly able to negotiate periodic adjustments or additional bonus payments or revenue sharing linked to the achievement of milestones or the success of the game (e.g. number of copies sold, release of new editions).

iii. Choice of law, jurisdiction and enforceability

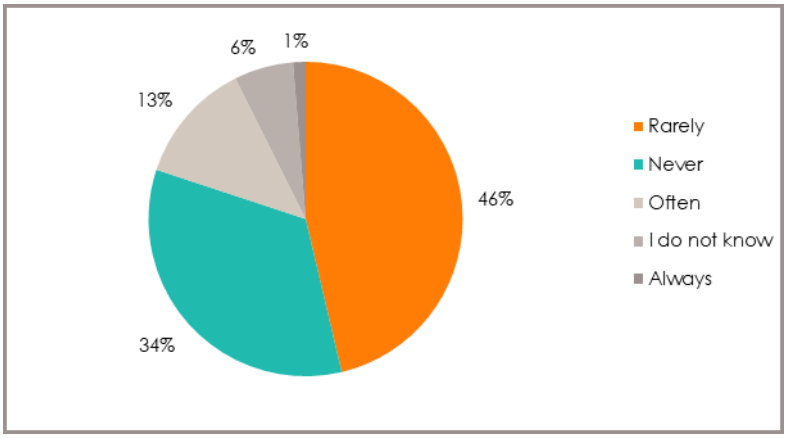
- According to interviewed organisations (one representing studios and the other publishers), the choice of governing laws for contracts can be problematic, mainly when each of the contractual counterparties wants to apply the law of the jurisdiction in which they are acting. However, contracts usually tend to be governed by the legislation where the studio/developer is based. For instance, asset stores, which are mainly based in the US or China, apply their jurisdiction to the contracts.

3.7. Implications of contractual practices for authors and performers

Impact on the remuneration of authors and performers

As regards the fairness of remuneration in the contracts of authors and performers, according to the study's survey result and in line with the insights gained during the interviews with stakeholders, **46**% of respondents said that this is **rarely** the case, and **34**% said that remuneration is **never** fair, as shown in the figure below. When broken down by sector, the results show that respondents representing the literary works sector are the most dissatisfied with their remuneration, with 43% asserting that it is **never** fair.

Figure 24: Fairness of remuneration (n=542)



The **main reasons** why remuneration is not perceived as fair by respondents include: i) disregard for the real or potential economic value of the work (76%), ii) hindering of financial stability (57%) and iii) exclusion of opportunities for future growth or advancement (53%).

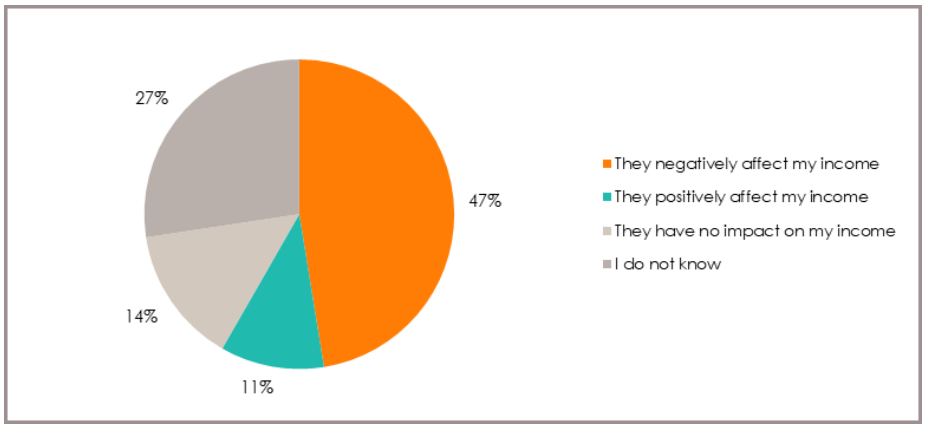
This perceived lack of fairness was confirmed throughout the interviews conducted with authors and performers, as well as with professional organisations across creative sectors. Remuneration was considered by the interviewees to be unsatisfactory and restricting in their respective fields. Many interviewees said that it was difficult to earn a living from their work since the remuneration was rarely proportionate. This financial insecurity forces many

of them to seek supplementary income outside their creative fields, by taking on additional jobs. This potentially diminishes their ability to focus on and invest in their creative endeavours. Consequently, the overall quality and diversity of new content may decline, as they have fewer opportunities to experiment and innovate. Indeed, during the interviews with individual authors and performers, it emerged that buy-out practices tend to stifle creative freedom and homogenise content, decreasing the diversity of works.

As highlighted by the survey respondents, the main obstacle to fair remuneration is the lack of **transparency** in the distribution of works, which prevents authors and performers from accurately calculating whether their remuneration is proportionate and appropriate. This was confirmed during in-depth interviews with authors and performers, as well as with organisations representing them, across all sectors, from which it also emerged that a lack of a standardised system in place for monitoring and granting remuneration makes it challenging to achieve proportionate and appropriate remuneration.

When asked about the impact of lump-sum payments against the transfer of all their rights on their actual income, **47**% of the survey respondents indicated that they have a negative impact, while 27% of respondents consider that they have no impact on their income.

Figure 25: Impact of lump-sum payments on creators' income (n=314)

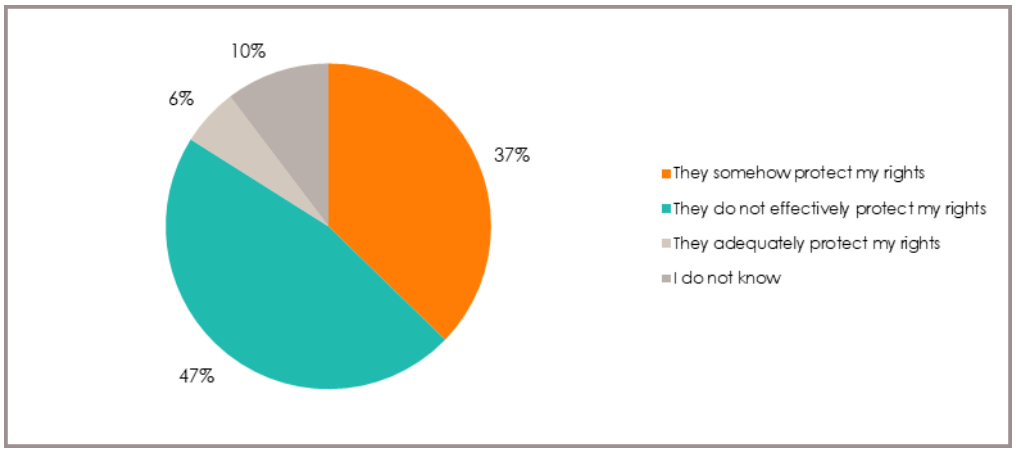


During the interviews with authors, performers and professional organisations representing them, the interviewees stressed that the absence of residual remuneration in the form of royalties can lead to financial instability, as creators are deprived of the revenue that their work continues to generate. Also, the difficulty in accurately gauging the success of a work and thus a lack of awareness of the potential long-term value of their rights makes lump-sum payments rarely proportionate (being made before the success can be measured).

According to the survey results, and as per the interviews conducted with authors and performers, the refusal to accept a lump-sum payment in consideration of the rights transfer exposes authors and performers to the risk of being blacklisted and losing the opportunity to present or publish their works. Artists fear being excluded from future opportunities with long-standing clients if they refuse these contracts.

Finally, when asked about their perception of the impact of current laws and policies in their region/country on these contractual practices, 37% of respondents felt that they somehow protected their rights, while 47% of them said that they did not effectively protect their rights.

Figure 26: Impact of current policies and laws on the protection of creators' rights (n=542)



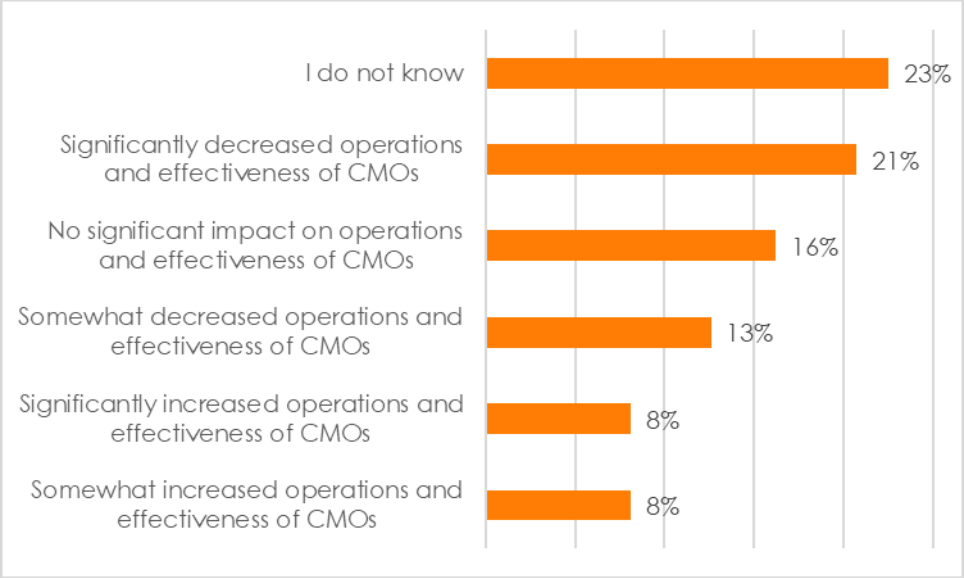
In this regard, both the survey respondents and interviewed stakeholders representing authors and performers consider that the DSM Directive represents a positive step towards protecting rights, but its effectiveness is only known when it is transposed into national laws.[198] While acknowledging that the legal framework has become more robust over time, the survey respondents and stakeholders interviewed pointed out that it was difficult for legislation to keep pace with the new possibilities of reproduction of the work of authors and performers. The need to ensure the legal protection of CMOs, in order to avoid weakening their power and ability to intervene was also highlighted. Finally, while the stakeholders consulted seem to welcome European regulations, they also want further mechanisms to ensure and reinforce these laws at national level.

Impact on the operations and effectiveness of CMOs

When asked to indicate the extent to which contractual practices (e.g. transferring all rights in exchange for a lump-sum payment, contracts governed by non-EU law) affect the operations and effectiveness of CMOs in their sector, **21**% of respondents said that in their opinion such practices **significantly decreased** the operations and effectiveness of CMOs, while **8**% stated that such practices **significantly increased** the operations and effectiveness of CMOs.

Figure 27: Impact of contractual practices on operations and effectiveness of CMO operations (n=98)

[198] Johansson D., AEPO-ARTIS, *Streams & Dreams Part 2, 2024 The Impact of the DSM Directive on EU Artists and Musicians,* last accessed on 25/11/2024 and available at: https://www.aepo-artis.org/wp-content/uploads/2024/06/STREAMS_AND_DREAMS_PART2-1.pdf



When broken down by sector, the results show that **29**% of music sector respondents consider that contractual practices significantly decreased the effectiveness and operations of CMOs, followed by **25%** and **20**% of respondents from the audiovisual and visual arts sectors respectively. 33% of those answering 'I do not know' represent the audiovisual sector. In line with the findings of the interviews conducted with organisations in the music and audiovisual sectors, the evidence shows that CMOs face challenges in ensuring that authors retain certain rights, as these are often transferred in contracts without the full understanding of authors.

One of the key elements of contractual practices affecting the effectiveness and operations of CMOs is the payment of a lump sum for the rights transfer. Some survey respondents mentioned that terms and conditions in contracts might force authors and performers to choose between membership of their CMO or the opportunity to carry out their work. This point was also flagged as a problematic practice in the interviews with professional organisations representing authors and performers in the music sector. These exoneration clauses are inserted in the contracts between authors/performers and their counterparties, and prevent CMOs from managing remuneration rights effectively. CMOs, such as SPEDIDAM in France, are authorised to oversee secondary uses and distribute the corresponding remuneration. However, when global transfer clauses together with exoneration clauses are included in contracts, CMOs might lose the ability to manage these rights, reducing the potential income for performers and authors. As a result of this contractual practice of the global transfer of rights and buy-out contracts, the bargaining power of CMOs is reduced.

3.8. Conclusions

In the following subchapters, a summary of the key results per creative sector is provided, together with some main conclusions.

Key results – AV Sector	
Key contractual relationships	• The main contractual arrangements in the audiovisual sector involve **production contracts** for authors and **commissioning contracts** for performers. These contracts are usually concluded with producers. • According to insights gathered through the interviews, where contracts are directly negotiated and agreed between authors or performers and other exploitation and/or distribution entities acting as producers (especially non-EU streaming platforms) these predominantly take the form of **buy-out contracts**, where all exploitation rights are transferred against a single lump-sum payment.
Contract negotiations	• Negotiations with producers (and, where relevant, with other counterparties) are predominantly conducted either **individually** (71% of authors and 78% of performers responding to the study's survey) or through **agents**. Of those negotiating individually, authors (57%) and performers (71%) seek support from entities, which differ between authors and performers. In the case of authors, professional associations and lawyers are the main source of support when negotiating contracts, while performers mainly rely on professional associations and trade unions • According to the study's survey results, the bargaining power of authors has either remained the same (43%) or decreased (36%) over the last five years, while that of performers has mainly remained the same (52%) or increased (28%). • The benefits of CBAs are perceived differently by authors and performers, with 38% of authors and 65% of performers perceiving that collective agreements have led to improvements in their contracts. • The role of trade unions and CMOs varies significantly across Europe. In this regard, France, the Netherlands, Germany, Spain, Italy and Denmark have stronger trade union and CMO involvement in contract negotiations within the audiovisual sector.

Key results – AV Sector	
Rights-related terms and conditions	• In contracts between authors/performers and producers, broad exploitation rights are often transferred worldwide across all platforms, for both current and future uses. According to the study's survey results, **exploitation rights** are predominantly **always** (53%) or **often transferred** (26%), particularly for primary purposes of exploitation. Although the transfer of rights for secondary purposes of exploitation is common, it is not as widespread. • Directors, screenwriters, actors and voice actors generally transfer most of their rights to producers. However, screenwriters may retain specific rights, such as theatre rights (right to rewrite and adapt the script for the theatre). • Music composers transfer most of their rights to producers/VOD platforms acting as producers, including synchronisation rights and distribution rights.
Remuneration	• The study's survey results suggest that the prevalent payment mechanism is a **single lump-sum payment** (64%), sometimes supplemented by a bonus (14%) or royalties (30%). • Audiovisual authors and performers responding to the study's survey indicated that the use of lump-sum payments has either remained the same (41%) or increased (25%) over time.
Applicable law	• Production, composition or actor contracts are executed **with local or EU-based producers**. 80% of authors and performers responding to the study's survey indicated that the law of an EU country is usually applied in their contracts.
Key conclusions	
The study findings reveal a perceived weak bargaining power in negotiations between individual audiovisual authors and producers. This is reflected in the contractual terms, which typically include full buy-out contracts against a single lump-sum payment or perceived low royalty rates. Additionally, creators frequently face challenges related to understanding complex contracts and how their reputation and experience influence negotiation outcomes. Interestingly, audiovisual authors perceive their bargaining power to be decreasing, while audiovisual performers consider that it is increasing. This is consistent with the observation that the perceived benefits from CBAs are greater for performers than for	

Key results – AV Sector

authors, suggesting more active or effective collective bargaining within the performers' sector.

National legislation and specific contractual agreements primarily determine the rights of audiovisual authors and performers, leading to varying degrees of rights retention and statutory remuneration across Member States. Producers generally acquire broad exploitation rights, while authors and performers retain limited exclusive rights and non-waivable statutory remuneration.

Survey respondents highlighted concerns about the fairness of remuneration for rights transfers, with 51% rarely and 33% never considering this remuneration fair. Several factors contribute to this perception of 'unfair' remuneration, including:

- Timing of negotiations: contracts are often signed in pre-production phases when the value of the work is unknown, as it does not yet exist. The parameters considered typically relate to the author's experience, past credits, successes and the production budget rather than the actual value of the work.

- Standard industry fees: the standard fees for TV productions (documentaries, TV shows, series, films, etc.) are generally perceived as imbalanced and too low. Survey respondents noted that these fees do not take account of inflation and are sometimes calculated on different bases (per minute/per word).

- Lump-sum payment methods are perceived as negatively impacting the income of authors and performers.

It is often not clear to authors what revenue they will receive from rights transfers because contracts usually do not separate this amount from creation/working fees and costs are deducted from the amount due. It is challenging to establish an appropriate lump sum that reflects the time and resources invested in the work. For example, film music composers highlighted that lump sums often fail to cover the costs of producing music in a professional and sustainable manner, including maintaining a production environment, hiring musicians and technicians, and using equipment. Also, authors do not receive additional remuneration for repeated showings, secondary sales or if their work is highly successful.

Key results – Music Sector	
Key contractual relationships	• The main counterparties of music authors are **music publishers** (67%), with which they conclude various types of music publishing deals, involving different levels of transfers of authors' rights. • Authors also assign **mechanical and performing rights to CMOs** to collect royalties when musical works are used. • Regarding musical pieces for audiovisual works, music authors usually engage directly with **audiovisual producers or VOD platforms acting as producers** under commissioning contracts. • The main counterparties of music performers are **record labels**. Contractual arrangements concerning rights transfers differ between types of performers, with featured performers entering into record deals against the payment of royalties and non-featured performers signing commissioning deals against lump-sum payments. • There has been an increase in **self-production and in Do-It-Yourself** (DIY) platforms (21% of individual survey respondents produce their own music).
Contract negotiations	• The perceived **bargaining power** of authors and performers in the music sector has either **remained the same** (41%) or **decreased** (38%) over the last five years. • Contracts with counterparties (mainly record labels and music publishers) are **negotiated directly** by authors and performers (83% of the survey respondents). However, 63% of them seek external support from professional organisations, lawyers and CMOs. • In the case of music authors, CMOs play a prominent role in managing and licensing their rights. Authors assign mechanical and performing rights to CMOs, which negotiate the licences or online uses and collect remuneration/compensation for secondary uses. • Benefits from CBAs **in terms of negotiations** are rather limited (33% of authors and 13% of performers perceive that they benefit from collective agreements).
Rights-related terms and conditions	• Authors partially transfer their publishing rights, while mechanical rights are usually assigned to CMOs. • Performers transfer their exclusive rights to record labels. The **scope of clauses** governing transfers of rights covers all uses and channels of distribution, globally and for 'perpetuity'.

Key results – Music Sector	
Remuneration	• Authors are mostly remunerated **through royalties** (67% of respondents) and **lump-sum payments** (41%). Featured performers transfer their exclusive rights in exchange for royalties, while non-featured performers are typically paid a fixed price (**session fee**). • **The development of the use of lump-sum payments** in the music sector is mixed, but with a perceptible **downward trend** (40% of authors and performers participating in the survey indicated a decrease and 28% reported an increase). • CBAs have had a clearly positive influence on remuneration, with 85% of music respondents believing that collective bargaining agreements are important in order to ensure a fair remuneration for authors and performers in Europe • Progress has been made recently in the inclusion of remuneration adjustment mechanisms for non-featured performers in CBAs (additional lump sums in France or 'best seller' clause in the Netherlands). • Authors and performers remunerated through lump-sum payments rarely receive information on revenues generated.
Applicable law	• Performers and authors usually sign contracts with independent labels or local branches of major labels in their own countries, thus **local jurisdiction** applies in contracts. • The main concern relates to 'buy-out' contracts signed by music composers with US audiovisual platforms that are governed by US law.

Key conclusions

The transfers of rights from authors to audiovisual streaming platforms and royalty-free music companies typically involve transferring all rights in exchange for a one-time payment. In contrast, in their agreements with music publishers, authors maintain mechanical and performing rights, which are usually assigned to CMOs). Organisations representing authors emphasised that, compared with other sectors, songwriters are less pressured by market dynamics to sign publishing contracts for the exploitation of their works, as CMOs play a prominent role in managing and licensing their rights.

Performers engage with record labels to transfer their exclusive rights. The trend towards licensing, instead of transferring these rights, is not clear, except for synchronisation licences to use music in audiovisual works, which usually require the performer's separate consent. Among performers, session musicians in particular are in a weaker position than featured performers, as the latter are remunerated through lump-sum payments. These one-off payments, in exchange for the transfer of all exclusive rights, do not always reflect the long-term value of their work.

Survey respondents and interviewed organisations indicated that both authors and performers often find themselves in 'take it or leave it' situations during negotiations,

Key results – Music Sector

especially with VOD platforms and record labels. The competitive nature of the sector and the fear of being blacklisted discourage them from trying to negotiate better terms. Despite recent advancements in collective bargaining, such as the inclusion of remuneration adjustment mechanisms for non-featured performers in CBAs, the perceived bargaining power of authors and performers does not seem to have improved.

According to the study's survey results, remuneration resulting rights transfers is generally perceived as rarely (49%) or never (23%) fair. The main reason given by interviewees and survey respondents is the difficulty in determining the economic value of a work at the time it is created and payment made. Performers and authors remunerated through lump-sum payments do not benefit from the increased economic value of their rights throughout their exploitation, undermining their financial sustainability and their ability to invest in their careers.

Key results – Visual Arts sector	
Key contractual relationships	• Visual artists enter into contractual arrangements with a variety of counterparties, including corporate entities, media agencies, publishers, galleries, museums and art institutions. • On the basis of the documentary review, it would appear that **commissioning contracts** are the most common form of contract. However, 45% of the survey respondents indicated that **licensing contracts** are the most common practice, followed by commissioning contracts at 19%.
Contract negotiations	• According to 49% of visual artists participating in the study's survey there has been **no change** in their **bargaining power**. • The majority of visual artist survey respondents (76%) said that they engage in ***direct*** negotiations. • 67% of visual artists responding to the study's survey consider that they do **not** benefit from collective agreements. Nevertheless, 58% of visual artists responding to the survey consider that collective bargaining agreements are crucial for ensuring a fair remuneration for visual artists in Europe. • According to the study's survey results, 46% of visual artists who directly negotiate their contracts **seek assistance**. However, only 17% use CMOs for assistance, while 26% rely on trade unions. • In the visual sector, CMOs oversee a broad range of rights through licensing mechanisms, including individual licences for activities such as reproduction, book publications and broadcasting, as well as collective rights for uses such as private copying, reprography and public lending, while ensuring fair revenue distribution and managing the artist's resale right.

Key results – Visual Arts sector	
Rights-related terms and conditions	• Visual artists can either distribute their work through **intermediate suppliers that** then license their work, or they can transfer their rights **directly to visual art exploiters** (e.g. corporate entities, media agencies, publishers, galleries, museums and art institutions, etc.). • 35% of visual artists participating in the study's survey indicated that they **always** transfer exploitation rights. • **The rights transferred include** communication to the public rights, distribution rights, adaptation rights, right of access, right to modification of work and translation rights. • Contracts for visual artists may include clauses that can be interpreted as waiving **moral rights** or demanding extensive rights transfers without fair remuneration.
Remuneration	• 51% of visual artists responding to the study's survey indicated that the most common form of remuneration is a single **lump-sum payment,** followed by **advance payments recouped from future royalties** (36%). • According to the study's survey results, for 38% of participating visual artists the use of **lump-sum payments** has not changed over time, while 14% consider that its use has increased, and 28% consider that it has decreased.
Applicable law	• Contracts specify that the **governing law** is that of a jurisdiction which permits broader assignments of rights than would be allowed under the artist's home country's law. • Visual artists **who work on a crossborder basis**, for example through digital platforms or international exhibitions, might face challenges because of differing legal frameworks across jurisdictions.

Key results – Visual Arts sector
Key conclusions
While 49% of the survey respondents representing visual artists indicated that their individual bargaining power has not changed, 20% of them consider that it has decreased, mainly because of increased competition in the market, the rise of technology, social media and Artificial Intelligence (AI). The complexity of agreements, the pressure to conform to standard practices, fear of potential repercussions, such as missing out on opportunities or being blacklisted, are seen as the main factors affecting the bargaining power of authors. Most of the survey respondents representing visual artists consider that collective bargaining agreements are important for ensuring a fair remuneration, whose benefits include, for instance: additional bargaining power for authors, a minimum remuneration indicator, and support and advice for authors. Many respondents see them as a necessary tool to protect authors' rights, allowing for more stability and homogeneous remuneration. In terms of fairness of remuneration, 51% of visual artists responding to the study's survey consider that remuneration is rarely fair, while for another 26% it is never fair. Specifically, respondents indicated that the main reasons behind 'unfair' remuneration are: i) disregard for the real or potential economic value of the work (76%), ii) impact on financial sustainability (56%), and iii) exclusion of opportunities for future growth or advancement (49%). In this regard, in the visual arts sector, commissioning contracts are perceived as problematic as they provide for the transfer of ownership, with the transfer of all or some exploitation rights in exchange for a lump-sum payment, equivalent to buy-out contracts. This contractual practice impacts the proportionate and appropriate nature of remuneration. Moreover, some survey respondents consider remuneration to be unfair as it disregards the real or potential economic value of the work and excludes opportunities for future growth.

Key results – Literary sector	
Key contractual relationships	• Authors (both writers and translators) in the literary works sector sign **publishing contracts** for their works with **publishers;** the most common are publishing contracts in the form of licensing agreements. • Buy-out contracts are not used for either translators or writers. However, in some translation contracts the terms and conditions used resemble those of buy-out contracts.

Key results – Literary sector	
Contract negotiations	• In terms of **changes in bargaining power,** 44% of individual literary works authors participating in the study's survey consider that it has remained the same over time, while 26% consider that it has increased. Likewise, 53% of **organisations** representing literary work authors participating in the study's survey consider that bargaining power has remained the same over time, while 42% believe that it has decreased. • According to the study's survey results, 87% of participating literary works authors **negotiate** their contracts, ***directly,*** while only 7% rely on an agent. Also, it appears that some authors (38%) rely on organisations, such as associations representing writers or translators, for support in their contract negotiations. • 74% of individual literary works authors participating in the study's survey indicated that they do **not benefit from collective bargaining agreements**. • Overall, in the literary sector, CMOs do not participate in the exploitation of primary rights, but they do participate in the exploitation of **secondary rights**. Associations representing writers and translators can offer support in understanding contracts but do not participate directly in negotiations.
Rights-related terms and conditions	• **Most** rights are fully transferred exclusively by both writers and translators to publishing houses. • According to the study's survey results, 72% of literary works authors **always** transfer their **primary** rights, while another 60% indicated that they either **always** or **often** transfer their **secondary** rights. • Rights are usually transferred through broad and all-encompassing clauses. Examples include transferring rights for all known and unknown media through

Key results – Literary sector	
	known and unknown devices, in all languages and all countries.
Remuneration	• Writers mainly receive **royalties and advances;** typically they do not receive lump-sum payments. The **payment of lump sums** is a practice that mainly applies to **translators**. In some countries, translators receive **royalties** on top of an advance payment. • 50% of translators participating in the study's survey consider that the **use of lump-sum payments** has remained the same over time, while 22% believe it has increased and 15% answered decreased.
Applicable law	• In the literary works sector, **EU law** is usually applied in contractual arrangements involving a rights transfer. • **The applicable jurisdiction** is that of the location where the authors and publishing house counterparty are based. • Contracts concerning European literary works are only established **outside of Europe** on rare occasions (for example when authors are proficient in multiple languages or have several nationalities).
Key conclusions	
In the literary works sector, bargaining power is strictly dependent on the success, experience and reputation of an author. The main reasons for a lack of bargaining power of literary works authors include: i) lack of resources, time and human effort, ii) lack of presence of organisations in the negotiation of contracts, and iii) the nature of the balance of power between a publishing house and an author. According to the study's survey results, a majority of literary works authors (78%) feel that they do not benefit from CBAs. Some respondents indicated that this tool is not effective in their countries and needs to be strengthened. This contrasts with 68% of professional organisations representing literary work authors which consider that they *do* benefit from collective agreements. A majority of the survey respondents mentioned that CBAs are a necessary first step to help assist authors who are often faced with a situation where they have to negotiate on their own and have little bargaining power.	

Key results – Literary sector
43% of the survey respondents in the literary works sector consider that their remuneration is never fair, suggesting a general dissatisfaction among both writers and translators as regards their remuneration, which they perceive as neither appropriate nor proportionate and consider that it often disregards the real or potential economic value of the work. Industry standards are considered relatively low and have not improved over time. Overall, the impact of contractual practices on remuneration undermines the financial stability of authors, forcing many of them to seek additional employment opportunities, for example having a second job as a teacher.

Key results – Videogames sector	
Key contractual relationships	• In the videogames sector, authors are known as **game creators**. Their main counterparties are **game studios**. • Authors in the videogames sector are **employees**, either hired by studios or publishing companies. • Videogame authors typically conclude **employment** or **subcontracting** contracts with game studios or publishing companies. These are considered as '360 contracts', under which IP rights are exclusively transferred to the studio. • Game studios might hire **freelancers** for project-based assignments, resulting in **fixed-term contracts**. • Programmers have **standard contracts or open-source licensing agreements** if they sign with asset stores.
Contract negotiations	• Videogame authors negotiate on an **individual basis**. Overall, authors with **more experience** tend to have **more bargaining and negotiating power**. • There are **no CMOs** in the videogames sector to manage the rights of videogame authors.

Key results – Videogames sector	
Rights-related terms and conditions	• Authors **transfer their rights** over many **different creations**, such as, but not limited to: artworks, videos, original designs, sound and music creation, and software development. The IP, trademarks and patents are transferred to the employer. • When the work is created outside an employment contract, a rights transfer is negotiated with studios. • Authors typically engage in a **full transfer of rights** in **perpetuity** under employment or subcontracting contracts.
Remuneration	• Authors receive a **salary** under an employment contract. Salaries can be scaled-up over time, and typically include social benefits.
Applicable law	• Contracts are governed by the **legislation where the studio/developer is based**. For instance, asset stores, which are mainly based in the US or China, apply their jurisdiction to contracts.

4. Contractual practices affecting audiovisual producers

This chapter analyses the contractual arrangements between audiovisual producers in the EU and broadcasters/streamers, with a focus on challenges related to IP ownership by producers. The chapter begins with an explanation of key financing models in Subchapter 4.1.1., followed by an analysis of market trends in Subchapter 4.1.2. Subchapter 4.1.3. then explores the contractual relationships between producers and streamers/broadcasters in the EU, including issues related to prevalent financing models and the balance of negotiation power in business relationships. Drawing on the interviews carried out, this subchapter also examines the risk balance and challenges associated with the ownership and exploitation of rights. In Subchapter 4.1.4., the analysis of contract terms and conditions is presented, based on empirical insights from the interviews. Subchapter 4.1.5. examines policy instruments in EU Member States and their effects on contractual practices. The following Subchapter 4.2. focuses on analysing impacts resulting from these contractual practices, based on the interviews and desk research, while Subchapter 4.3. presents the conclusions on how these practices affect audiovisual producers.

4.1. Contractual practices in the audiovisual sector with a focus on IP retention by producers

4.1.1. Contractual practices and financing models

Raising financing for audiovisual productions is a complex task for producers, engaging multiple downstream financiers that all require satisfactory arrangements based on the risks they take and the size of their investment. Rights may be acquired before or after the completion of the audiovisual work, covering a specified territory, a defined period and one or more exploitation windows, which may or may not be exclusive. These variables, related to the scope of rights, play a role in shaping the size of the investment. Investments in film and television production in the EU can come from different sources, including public funding (funding from screen agencies, tax credits or rebates), financing from public broadcasters, private broadcasters, pay-tv and local and global streaming platforms and distributors. Investments can be made in different types of audiovisual productions, such as films and TV series, and they can vary in genres. An important distinction to make is that films and series are financed differently. Traditionally, the financing and production of films in Europe have been linked to cinema release. However, broadcasters and streamers also invest in films, employing various financing models that may involve direct-to-VOD release.

Audiovisual producers enter into contractual arrangements with broadcasters or streamers as financiers[199] to secure financing and distribution for audiovisual works. In examining different financing models between producers and financiers, for the purpose of this study, two foundational financing arrangements are considered: 'cost-plus financing' and 'deficit financing',[200] which can be summarised as follows.

- **Cost-plus financing or buy-outs:** the commissioner covers the entire production budget of the film/TV series and additionally pays a one-time fee for the production company. In return, the commissioner typically gets full ownership of rights, thereby obtaining exclusivity and control over the exploitation of the content and any subsequent works. The producer gets 'cash in hand' but foregoes revenue generated by the exploitation of rights. Therefore, the producer foregoes not only back-end revenue from successful projects, but also the opportunity to benefit from exploring ancillary rights.

- **Deficit financing arrangements:** under deficit financing, a broadcaster/streamer purchases limited rights in exchange for a licence fee that covers only a portion of the budget. The producer can retain rights ownership and cover the budget deficit based on pre-sale to other markets. This allows producers to build up a catalogue of rights.

There are variations on these two foundational financing arrangements depending on several factors, such as the number of financiers, the level of financing, the types of rights involved, whether the rights are acquired in perpetuity or for a limited timeframe, and the forms of exclusivity. In the contractual arrangements between audiovisual producers and broadcasters/streamers, four types of financing models for audiovisual productions can be distinguished, depending on the distribution of risk and rights, as well as the financiers involved:

199 In this study, entities that operate global streaming services in Europe and also have pay-TV channels are categorised as 'global streamers'. For further explanation of how we distinguish broadcasters from streamers in this study, please see the methodology chapter.

200 See: Doyle, G., Paterson, R. and Barr, K., 2021. *Television production in transition: Independence, scale, sustainability and the digital challenge*. Springer Nature.
McElroy, R. and Noonan, C., (2019). The Ecology of TV Drama Production. *Producing British Television Drama: Local Production in a Global Era*, pp.45-71.

- **Financing model for commissioned productions:** under this financing model, there is one key commissioner that covers the full production budget and obtains full ownership of all or most of the rights. The producer is typically remunerated by way of a single payment (fee), without being able to own rights and generate future passive income. These types of financing arrangements include buy-outs or cost-plus financing. Typically, the original idea for the production comes from the audiovisual producer that receives it from the author.

- **Financing model for in-house productions:** these financing arrangements come into play when a broadcaster or a streamer conceives the idea for a production and then engages an audiovisual producer to implement the project. In this setup, cost-plus financing typically applies, as broadcasters/streamers obtain full ownership of rights and pay a one-time fee to the producer. An executive producer may be hired, with the broadcaster/streamer taking on a significant editorial role and playing a key part in assembling the creative team for the production.

- **Financing model for licensed productions:** this financing model typically includes deficit financing arrangements, whereby a streamer or a broadcaster pays the audiovisual producers a licence fee for the rights to air the production for a **pre-defined** period. In licensed productions, licensees do not own rights by definition. Depending on the level of investment, the licensor can recoup downstream revenue. The audiovisual producers retain most rights, allowing them to leverage these for future revenue. In licensing deals in Europe, it is common practice for audiovisual producers to rely on public funding to secure part of the financing. In some cases, licensing includes a pre-purchase of rights, with one or several financiers making commitments to the production prior to its completion and delivery also known as **pre-sale arrangements**. If there is a financing shortfall during the production, the arrangement may involve gap financing, with a financier stepping in to cover a budgetary shortfall, usually not exceeding 10-15% of the total budget. Licensing can take the form of a multi-territorial agreement, or the producer can license each territory individually. Opting for a multi-territorial licence offers certain benefits for the producer, such as avoiding the cumbersome task of individually selling the production to local distributors or platforms in different territories without any guaranteed outcomes. However, the financial return from multi-territorial deals often falls short of the total that could have been raised by licensing the title separately in each territory and for different modes of exploitation. Key points in negotiations often include setting exclusivity terms and agreeing on holdback periods. The agreement typically provides for a defined licensing period for licensed rights.

- **Financing model for co-productions:** under this financing model, production resources and creative input are combined to create a project. Co-productions may involve different contractual parties: one or several co-financiers and a production company acting as a co-producer. Also, there could be more than one production company involved in the co-production. The advantage of co-productions is that this type of collaboration typically includes the **sharing of financial risks and/or creative contributions**, and it offers opportunities to ensure wide distribution and access diverse markets. For example, international co-productions offer each co-financier the benefit of creating ambitious multi-territorial productions at a fraction of the cost it would take to produce them independently. In international co-production agreements, it is common for the parties to hold 100% of the exploitation rights and corresponding revenues in their respective countries and in the countries with which

they may be associated, given that each co-producer is familiar with their market.[201] Typically, co-production partners are involved in all stages (development, production and co-production). Based on the level of contribution, the partner can be either a majority or minority co-producer, or partners can make equal contributions. Contributions may be monetary and/or non-monetary. Provided that the co-producers have made the promised contributions, they are usually the co-owners of the IP rights and share future revenues from exploitation. International co-productions incorporate specific clauses for obtaining aids and subsidies available in each co-producer's country, as well as clauses designating the competent legal jurisdiction and the applicable law.[202] Typically, in a co-production, unlike in financing on licenced productions, each party makes their investment in advance and expects to recoup their investment. The European Convention on Cinematographic Co-Production was adopted in 1992 in response to the need to promote European cultural cooperation in the field of cinema.[203] It provides rules to which it is important to adhere in order to receive public funding.

Each of these generic financing models encompasses a wide range of variations as regards the contractual terms and conditions and sources of financing (see below). Policy measures, along with other contextual factors, play a role in determining how these financing arrangements unfold in different Member States.

Typical sources for the financing of audiovisual productions in EU Member States

- **Primary commissioner:** the main commissioner of the audiovisual work. The primary commissioner can be a PSB, a private broadcaster, a pay-TV provider or a streamer. There are commissioners whose business models encompass two or more of these roles, for example a company that operates both pay-TV channels and a streaming service.[204]
- **Co-producer:** co-financier that shares the investment risks and makes monetary and/or non-monetary contributions. In addition to the audiovisual producer that can act as co-producer, another co-financier can also take part in a co-production arrangement.
- **Distributor:** to cover the production deficit, the difference between initial funding and the total production cost, distributors license the finished programme to domestic or international buyers.
- **Public aids:** sources of funding at national, regional or EU level in the form of production incentives, public funding schemes or investment obligations.
- **Other financing to cover the production deficit:** loans from a bank, other third parties or self-financing.

201 See: https://rm.coe.int/iris-plus-2018-3-the-legal-framework-for-international-co-productions/168090369b. Alternatively, it may also be the case that a co-producer has been assigned the revenues of one mode of exploitation to the exclusion of any other: for example, a television channel that participates in the project as a co-producer may benefit from television broadcasting rights. See in particular Subchapter 5.2. on legal disputes on the ownership of rights.

202 Ibid.

203 For more information on the European Convention on Cinematographic Co-Production, see the EAO explanatory report, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5e4 (Article 1, paragraph 2),

204 In this study, entities that operate global streaming services in Europe and also have pay-TV channels are categorised as 'global streamers'. For further explanation of how we distinguish broadcasters from streamers in this study, please see the methodology chapter.

When exploring the challenges linked to IP rights, it is essential to make a clear distinction between **ownership and exploitation of rights of audiovisual works** (also known as granting a licence for a limited period). Streamers and private broadcasters, and in some cases PSBs, typically require ownership of rights in exchange for an equity investment in audiovisual works under the financing arrangements for commissioned productions, in-house productions and co-productions. Producers typically have rights ownership under the financing models for co-productions and licensed productions. The owners of rights to audiovisual works, whether they are producers, broadcasters or streamers, can sell exploitation rights. For example, a producer can sell exploitation rights for a series to a broadcaster or a streamer, but a broadcaster or streamer can also sell exploitation rights to third-party buyers, such as broadcasters/streamers in other territories.

Table 13: Financing agreements and typical (Co)-Owner of rights

Type of financing arrangement	Typical (Co)-Owner of rights
Commissioned productions	Broadcaster/streamer
In-house productions	Broadcaster/streamer
Licensed productions	Producer
Co-productions	Producer and broadcaster and/or streamer

Depending on the financing model, the right to exploit the audiovisual work in each of the distribution channels and release windows (the period in which a work can be distributed) are either owned by the producer, broadcaster/streamer, or co-owned by the partners involved in the contractual arrangements (see table below). The length and exclusivity of the windows is typically negotiated contractually. In some Member States, holdback periods may apply for audiovisual works that have received public funding (see 4.1.5). In these different windows, rights can be exploited across different territories (the domestic market and other markets). Audiovisual works can be exploited on an exclusive or non-exclusive basis.

Table 14: Exploitation windows for audiovisual works

Exploitation windows for audiovisual works
Theatrical exhibition (only for films)
Physical Distribution (DVD/Blu-ray (BD))
Transactional VOD (TVOD)
Free TV
Pay-TV
Subscription video-on-demand (SVOD)

Exploitation windows for audiovisual works
Ad-supported VOD (AVOD)
Free VOD (e.g. 'catch-up')

Digital convergence has led some companies to target more than one exploitation window with audiovisual content they own or license. For example, Paramount offers audiovisual works in Europe through its linear channels streaming service, but also through Pluto TV, which is its free ad-supported streaming television (FAST) service. Some of the FAST channels are made available on FAST TV global platforms, such as Samsung TV Plus, which provides content to users with a Samsung television without the need for subscriptions. As another example, some streamers, such as Amazon Prime, have also started offering a FAST service. The Spanish FAST venture, LoveTVChannels, is focused on providing a FAST offering for the European markets. Other examples of FAST services include MyTF1 stream and INA Ardvision in France. These examples show that it is important to also consider how the existence of different types of services influences contractual practices.

An important element of contractual arrangements concerning ownership and exploitation of rights is the **right to derivative works,** which determines how the original content can be further developed, adapted or transformed into new forms (see the table below). Even if one contractual party holds derivative rights, there can be an agreement to share the revenues generated by these rights. In some cases, the contractual party that does not initially hold the derivative rights may be granted a right of first negotiation and last refusal to produce derivative works, which allows them the first opportunity to pursue these projects before they are offered to another party.

Table 15: Types of derivative rights

Types of derivative rights
Spin-offs: rights to create any content that derives from the original audiovisual work, focusing on characters or other aspects of the universe.
Sequels and prequels: rights to produce content that continues the storyline of the original series (sequels) or explores its backstory (prequels).
Remakes: rights to reproduce the audiovisual work by retaining certain elements of the original work.

Other types of rights which are important for exploitation are **merchandising rights** (the rights to manufacture and distribute merchandise based on characters or events based on the audiovisual work), as well as rights to **develop versions for new platforms and interactive media** (e.g. apps, videogames). The content of popular audiovisual works may be also adapted to live theatrical performances or in a form of literary adaptation.

4.1.2. Market trends influencing contractual practices between audiovisual producers and broadcasters/streamers

Trends in financing European audiovisual works

The dynamics of financing audiovisual works in the EU Member States are shaped by the profile of the dominant financiers and how their investment strategies are evolving.

According to the EAO analysis[205] the configuration of financiers investing in original and acquired content[206] differs across EU Member States, indicating that there is geographical variability in the investments of streamers and broadcasters in European content. Below we summarise some of the key trends in financing European audiovisual works based on recent data. Overall, the total expenditure on European original content (excluding news and sports rights) amounted to EUR 22 billion in 2023, reflecting a moderation in growth after the rebound from the pandemic.

Public and private broadcasters remain the biggest spenders. The EAO analysis shows that investments by broadcasters in the European market have not fallen as a result of the presence of global streaming services. Original content represents 38% of the total expenditure by broadcasters According to the analysis by the EAO, both private and public broadcasters increased their investments in original content.[207] Global streamers' share of investment in European original content stood at 26% in 2023, which is lower than the 74% share from broadcasters.

The largest portion of spending by broadcasters is directed towards original content. Original content comprises the lion's share of broadcaster spending in **2023**. Spending on acquired films and TV was 28% of the overall spending. Public broadcasters allocated 62% of their spending to original content and 27% to acquired films and TV. Private broadcasters directed 28% of their spending to original content and an equal share to acquired films and TV. The total spending of broadcasters on original content and acquired film and TV in 2023 was EUR 28.2 billion.

The growth of global streamer investments slowed down in 2023. In 2023, there was a rise in investments by global streaming services in European original content, jumping by 34% from 2023 to a total of EUR 5.7 billion, constituting 26% of the overall financing of European original content.[208] Still, the growth of global streamer investments slowed down (+34% vs. +104% in 2022). According to EAO's analysis, Netflix accounted for around 35% of streamer investments in European original content (EUR 2 billion), down from 58% in 2021, amidst increased spending by other SVOD services, particularly Amazon Prime Video (EUR 1.5 billion). Despite this upturn, future growth is uncertain, with announcements from some services that they intend to reduce investments in non-US content. One of the biggest commissioners of Nordic series and films, the Sweden-based streamer Viaplay has scaled back on content investments as part of a cost-saving plan.[209]

Also, HBO and the Walt Disney Company announced in 2022/23 that they would scale back investments in non-US content.[210] Nonetheless, in a recent announcement, Disney disclosed its intention to invest around €4.58 billion in European films and series. Viaplay has scaled back on content investments as part of a cost-savings plan.[211]

205 Fontaine. G. (2024). Audiovisual services spending on original European content. 2024 edition A 2012-2022 analysis. European Audiovisual Observatory. Available at: https://rm.coe.int/investments-in-original-european-content-2024-edition-september-2024-g/1680b17ccf

206 According to the methodology in the report, original content refers to any programme commissioned, pre-purchased or co-produced by an audiovisual service. Acquired film & TV programmes refer to any programme acquired without participation in the financing. For broadcasters, "acquired film & TV" content refers to content from any origin, European or not; for streamers, it refers to European content. For further information on the methodology see: https://rm.coe.int/investments-in-original-european-content-2024-edition-september-2024-g/1680b17ccf 2

207 Spending on European original content by audiovisual services in Europe includes only original content spending and excludes acquired film & TV content. The data also includes the UK. For further information on methodology see the EAO report.

208 Idem.

209 Nordic decision-makers react to crisis-hit Viaplay and look at new paradigm. See: https://nordiskfilmogtvfond.com/news/stories/nordic-decision-makers-react-to-crisis-hit-viaplay-and-look-at-new-paradigm

210 HBO Max Halts Originals in Parts of Europe in Major Restructure. See: https://variety.com/2022/tv/global/hbo-max-europe-originals-development-1235308730/

211 Nordic decision-makers react to crisis-hit Viaplay and look at new paradigm. See: https://nordiskfilmogtvfond.com/news/stories/nordic-decision-makers-react-to-crisis-hit-viaplay-and-look-at-new-paradigm

Global streamers' spending on original content overtook acquisitions. According to the report by the EAO, scripted programming accounted for approximately 80% of streamers' original content spending as of 2023.[212] Within scripted content, approximately 90% of global streamer investments are directed towards series, with only 10% allocated to films. Original content became the top category for global streamers' spending in 2023, 53% of total amount, overtaking acquisitions, which had held the majority share until 2022.

Decline in investments in some Member States. The production sectors in some Member States have already reported a decline in investments in audiovisual content by financiers. For example, the German Producers Alliance has reported a significant decline in orders placed with their members. In fact, 80% of the fiction-producing companies surveyed between October 2023 and November 2024 stated that the volume of orders by international streamers had fallen sharply or very sharply since 2022. [213] The companies surveyed said that the biggest challenges were rising costs and falling budgets for clients. According to the survey results, this problem exists equally in small and large companies and regardless of whether they produce fiction or non-fiction programs.

Public vs private broadcaster dominance varies between Member States. Investment patterns in original content vary significantly between Member States, influenced by industry norms. In countries such as Denmark, Germany, and Belgium, public broadcasters are key financiers in original content. In contrast, the primary financiers in Poland, Italy and France are private broadcasters, according to the EAO analysis.

Streamers have become important financiers in some Member States. According to the EAO analysis**,** the share of investments by global streamers in original content is higher than that of broadcasters in Spain (53%). The share of global streamers' investments is also high in Italy (43%), and Sweden (25%).

Direct public funding and tax incentives–key financing sources for fiction film financing. The most important source of financing for fiction films is direct public funding, which accounted for 26% of the total financing volume, tracked in the EAO sample analysis of fiction films financing in Europe. Direct public funding was followed by production incentives, which accounted for 21% of the total financing. Producer investments (excluding broadcasters) made up 18% of the total, just ahead of broadcaster investments, which accounted for 17%. Pre-sales (excluding broadcasting rights) accounted for 13% of the total financing (Kanzler, 2024).[214]

The pandemic and release windows. The economic disruption caused by the Covid-19 pandemic affected the release windows for films across the EU. According to the EAO analysis (Cabrera Blázquez et al., 2023),[215] despite the lifting of all restrictions and the sector's return to normal functioning, release windows have not reverted to their pre-2020 levels. However, the length of the SVOD window did not change significantly in most

212 According to the methodology in the report, original content refers to any programme commissioned, pre-purchased or co-produced by an audiovisual service. Acquired film & TV programmes refer to any programme acquired without participation in the financing. For broadcasters, "acquired film & TV" content refers to content from any origin, European or not; for streamers, it refers to European content. For further information on the methodology see: https://rm.coe.int/investments-in-original-european-content-2024-edition-september-2024-g/1680b17ccf 2

213 Producers Alliance's 2024 autumn survey: The situation in the film and television industry is deteriorating dramatically. Available at: https://produktionsallianz.de/wp-content/uploads/2024/11/2024-11-29-Herbstumfrage-2024.pdf

214 Kanzler, M. (2024). Fiction film financing in Europe: A sample analysis of films released in 2021. Available at: https://rm.coe.int/fiction-film-financing-in-europe-2023-edition-m-kanzler/1680af8262. The data sample covers a cumulative financing volume of EUR 1.33 billion - EUR 852 million for 100% national films and EUR 488 million for international co-productions.

215 EAO (2023). Territoriality and release windows in the European audiovisual sector. Available at: https://www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/wy5m8bRgOygg/content/when-how-and-where-can-we-access-european-films-and-series-

countries between 2019-2023. The duration was reduced in France from 36 to 15-17 months, and became less flexible in Belgium, shifting from 7-36 months to 26-30 months.

Development of audiovisual market segments

Regarding the dynamics of financing audiovisual works and the capacity of audiovisual players to expand and build scale, an analysis of the revenue fluctuations between traditional players and streamers, as well as between European and US players by the EAO[216] reveals which audiovisual production financiers possess the more robust assets and experience stronger revenue growth.

Streamers drive the growth of the top 100 audiovisual companies in Europe. The cumulative operating revenues of Europe's top 100 audiovisual companies grew at a much faster rate in 2022 (+23% over 2016) than the total audiovisual services market, achieving double the market's growth rate and exceeding the pace of average inflation. Growth among the top 100 players was predominantly driven by pure SVOD (Subscription Video-On-Demand) entities which contributed over 40% to the revenue growth recorded by the top 100 players.

European-backed players dominated the top 100 revenues in 2022, securing 63% of the total. Broadcasters represented 78% of this percentage, while telco-driven groups accounted for the rest. Deutsche Telekom, Vodafone, Telia, RTL, Telefónica, PPF, Bouygues, the BBC, ITV, and Canal+ collectively accounted for over 55% of the incremental revenues generated between 2016 and 2022.

SVOD is the most concentrated segment in Europe's audiovisual market, with 90% of subscriptions cumulatively being signed off to top ten OTT platforms at the end of 2022. The concentration level among the top three players declined in 2022 versus 2021, as Netflix and Amazon experienced a slowdown in new additions, while smaller players expanded their presence. This shift reduced the market share of pure SVOD platforms to 57% in 2022 (a decrease of 8% from 2021), while broadcasters increased their share by 9%, reaching 40%. A total of 64% of SVOD subscriptions were collectively signed off to the top three OTT platforms, namely Netflix, Prime Video and Disney+. Overall, concentration levels across the top three SVOD players went down year-on-year. In 2022, US companies captured the majority share (54%) of new subscriptions, with European-backed broadcasters contributing 19%, nearly matching the 21% share of pure SVOD players. As a result, broadcasters collectively drove 80% of the SVOD market's growth compared with 2021. SVOD remained predominantly influenced by US entities (84%) and private interests (99%), holding steady from the previous year.

US powerhouses drove the pay-AV services market. US powerhouses led the growth in the pay-AV services market in 2022, contributing to over half of the additional subscriptions in the expanding 'editor' categories. This growth was driven by Disney+'s expansion into Poland and Turkey, along with significant growth in established markets such as the UK, Germany, Italy, France and Spain. The launch of HBO Max and the expanded availability of Discovery+ in Germany and Austria also played a key role, as did the entry of Paramount+ into Germany, Italy and the UK.

216 Ene Iancu, L. (2024). Top players in the European AV industry Ownership and concentration. EAO. Available at: https://www.obs.coe.int/en/web/observatoire/-/svod-us-powerhouses-and-european-broadcasters-fight-back indicators analysed are operating revenues, pay-TV subscriptions, over-the-top SVOD subscriptions, number of TV channels, number of on-demand services (ODAS), audience share and number of TV fiction titles. For jointly owned assets, the values registered for each analysed indicator were equally distributed between all parties and cumulated at the level of each unique European group identified in the report.

Increased weight of US interests in top 100 revenues. US companies have increasingly focused on expanding through direct investments by launching SVOD platforms, acquiring European assets and producing content locally, rather than relying on traditional indirect investment methods. The share of US interests in the top 100 revenues increased to 36% in 2022, i.e. 5% up on 2016. In 2022, the top four US-backed audiovisual players accounted for 80% of the US market share: Comcast (39%), Netflix (16%), The Walt Disney Company (15%) and Warner Bros. Discovery (10%). Sky alone contributed one-third of the revenues generated by US-backed players. The US-backed market saw revenues bolstered and concentration heightened as a result of consolidation among US players, notably Discovery acquiring Scripps Networks Interactive, Comcast purchasing Sky, Disney acquiring Fox International Channels and NGC Europe from 21st Century Fox, and the merger between WarnerMedia and Discovery Inc.

Audiovisual services by number are predominantly European. Regarding the number of services, the operations of both broadcasting and on-demand services remain predominantly European driven, with European groups owning 86% of TV channels and 74% of ODAS. TV production continues to be a predominantly European-driven industry, not only in cumulative terms but also in terms of leadership, with European groups dominating the rankings.

The TV production market is moderately concentrated. Compared with other sectors, the TV production market has relatively low levels of concentration. The top 20 executive production companies accounted for 35% of titles released in 2022. PSBs are relatively better represented in the TV production business when compared with the audiovisual services market. PSBs produced 12% of the total number of TV fiction titles released in Europe in 2022.

Fiction production in the EU

Financing audiovisual fiction production is a key competitive field among broadcasters and streamers that operate on EU markets. In its analysis of audiovisual fiction production in Europe[217] the EAO has identified the key commissioners, primary producers and top fiction producing countries (Schneeberger, 2024).[218]

PSBs commissioned the highest number of fiction titles in 2023 In 2023, a significant majority of fiction titles produced in Europe were commissioned by PSBs: 55%, versus 31% for private broadcasters and 14% for global streamers.[219] Since 2015, there has been a decline in the proportion of series with 13 or fewer episodes per season that are commissioned by public broadcasters. Global streamers released 199 original European fiction titles across all formats in 2023, compared with 196 in 2022 Netflix and Amazon continue to be the most important commissioners among global streamers.

Majority of fiction films and series are produced by groups not affiliated to broadcasters. Over 2000 production companies/groups produced at least one fiction title between 2015 and 2023. 81% of all fiction titles were produced by groups not affiliated to broadcasters. The top producer by number of titles was the Banijay Group (51fiction films and series).

Large markets are the top fiction producing countries. The top fiction-production countries by number of TV films/seasons are the large markets - Germany, France, UK, PL

217 In this analysis, as explained by EAO, 'Europe' refers to the 27 Member States of the European Union, the United Kingdom, Norway, Switzerland and Iceland.
218 Schneeberger, A.-(2024). Audiovisual fiction production in Europe 2023 figures. EAO.
219 In the EAO report, a 'title' refers to either a TV film or a TV season. Each different TV season of a TV series is counted as one title.

Spain and Italy. Among EU countries, Germany, France, Italy and Spain stand out as the top countries producing TV series with 13 or fewer episodes per season. Four Nordic countries rank among the top 15 for producing series with 13 or fewer episodes per season.

Some countries are the production hubs for global streamers. Among EU Member States, Spain was the leading country for fiction titles commissioned by global streamers in 2023, with 38 titles produced. The UK and France also emerged as significant production centres for streamer-commissioned content over the same year.

Gradual increase in non-linguistic co-productions. International co-productions made up **10**% of all fiction titles produced in Europe in 202**3,** predominantly focusing on TV films and series limited to 13 episodes or fewer per season. Historically, most of these co-productions involved neighbouring countries sharing a common language, such as France and Belgium or Germany and Austria. However, non-linguistic co-productions have recorded a gradual increase. The UK, Germany, the US (as minority co-producer), France and Sweden are the leading EU countries according to the number of participations in co-productions, excluding linguistic co-productions.

IP ownership by broadcasters and streamers

The European Media Industry Outlook, conducted by the European Commission in 2023, revealed a worrying trend with notable imbalances in the control and ownership of IP rights in the contractual relationships between producers and broadcasters/streamers.[220] According to the European Media Industry Outlook (2023), around 19% of producers surveyed stated that streamers typically maintain exclusive control of all IP, whereas this figure decreases to 12% for broadcasters.[221]

According to the European Media Industry Outlook, a significant 80% of the surveyed producers expressed concerns over the practice of broadcasters and streamers of retaining IP rights to the works they commission from audiovisual producers.[222] Over half of respondents fear that such practices could lead to a dependency on commissioners and drain resources from their productions. Additionally, a substantial number of producers are troubled by what they perceive as insufficient remuneration. Loss of creative control is also a major concern for many producers.

According to the study, streamers and broadcasters have full ownership of IP in 25% of their contracts.[223] About 19% of surveyed producers reported that streamers retain exclusive control over all IP in most of their contracts, a figure that is slightly lower for broadcasters (12%). When weighting the volume of overall EU audiovisual works produced by respondents, the data reveals that streamers maintained full IP rights in approximately 38-62% of contracts, whereas broadcasters held onto all IP rights in about 11-35% of the contracts.[224]

Streamers are more likely to hold onto the IP rights. Producers tend to view streamers as more likely than broadcasters to hold onto the IP rights of audiovisual works, a sentiment

220 European Commission (2023). The European Media Industry Outlook. Available at: https://digital-strategy.ec.europa.eu/en/library/european-media-industry-outlook
221 Carre, S. et al. (2023). Buy-out contracts imposed by platforms in the cultural and creative sector. Available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)754184
222 The European Media Industry Outlook's questionnaire covered scripted EU content for which a contract was concluded over a three-year period (July 2019-July 2022). The analysis relies on responses from 76 producers from 18 different countries. As outlined in the European Media Industry Outlook Report, the sample of producer respondents is large and diverse to provide an initial overview of the main trends (although, strictly speaking, not statistically representative).
223 60% for streamers and 70% for broadcasters. For further information, see the European Media Industry Outlook.
224 N in this question = 60. Respondents were invited to reply and provide intervals (e.g. 0-25; 26- 50; 51-75; 76-100%) instead of absolute figures. For further information, see the European Media Industry Outlook.

echoed by 46% of respondents. About 13% believe that broadcasters are more inclined than streamers to retain IP rights, according to the European Media Industry Outlook. Meanwhile, 20% of those surveyed see no substantial difference in the IP retention approaches of either entity. Producers consider that non-EU entities, encompassing both streamers and broadcasters, are more inclined than their EU counterparties to retain IP rights, with 34% of responses sharing this view. Nevertheless, 33% of producers do not consider that there is a significant difference in IP retention practices between EU and non-EU buyers.

Impact of IP retention on producers

The European Media Industry Outlook (2023) outlined the challenges perceived by the surveyed EU producers on the question of IP retention.

- **Challenges with long-term licensing agreements.** Alongside full ownership of IP, other contractual arrangements can also have a similar impact. For instance, long-term licensing agreements (exceeding seven years) involving all IP, and situations where streamers or broadcasters acquire full ownership of crucial, though not necessarily all, IP rights, are examples. Producers suggest that such practices may occur nearly as frequently as complete IP ownership transfers (around 80% of the scale of full IP transfer). These arrangements are more commonly found in contracts with streaming services than with broadcasters.

- **Securing rights for ancillary exploitation is difficult.** Regarding ancillary exploitations, producers of TV series are commonly granted the option to create a second season, although securing rights for remakes tends to be more challenging. According to the European Media Industry Outlook (2023) a significant proportion of those surveyed that had produced series had received offers from the acquiring streamers (70%) and broadcasters (74%) to produce additional seasons. In the case of remakes, 64% of these producers were given this opportunity by broadcasters, compared with 45% in the case of streamers. It is important to note that producers generally do not receive any remuneration from either subsequent seasons or remakes unless they are directly involved in their production.

- **Absence of performance-based remuneration**. According to the majority of producers performance-based remuneration is rarely included in their contracts. This applies to both streaming platforms and broadcasters. Specifically, 79% of producers said that such remuneration covers less than 25% of their projects with streamers and 70% of their projects with broadcasters.

The European Media Industry Outlook (2023) also analysed obstacles that limit the ability of producers to capitalise on potentially profitable IP exploitation opportunities and examined which rights are deemed the most valuable.

- **Primary exploitation on TV on national markets is considered the most valuable right by producers.** According to the European Media Industry Outlook, the most valuable right, as indicated by producer respondents, is the primary exploitation on TV on national markets, followed by the primary exploitation of streaming rights on the main national market or similar markets, and by primary exploitation on streaming and TV at international level. In contrast, respondents view sequels, remakes and exploitations outside traditional exhibition channels, such as games or merchandise, as the least valuable forms of exploitation.

- **Factors hindering the ability of producers to take advantage of potentially lucrative forms of IP exploitation.** According to the European Media Industry Outlook, about 35% of producer respondents identify 'streaming' as a potentially more lucrative form of exploitation, yet they face challenges in fully capitalising on it. Additionally, producers highlight sequels/spin-offs and non-traditional forms of exploitation, such as gaming and merchandise, as other significant categories that hold potential value but are difficult to leverage. Over 40% of the survey respondents mentioned the terms of their contracts as the primary obstacle to capitalising on these types of exploitation. Furthermore, 24% of respondents pointed to a lack of business capabilities and know-how as factors hindering their ability to leverage certain potentially lucrative forms of IP exploitation.

Certain challenges were also recognised by organisations representing producers. The European Producers Club, an organisation representing independent producers, has published a Code of Fair Practices, with the aim of establishing basic parameters to be applied to streamers when they commission 'originals' from independent production companies.[225] Several organisations representing global screen producers have issued a joint statement calling on governments to recognise the importance of regulating streaming platforms to ensure that independent screen businesses can own and control their IP.[226]

4.1.3. Choice of financing model and risk balance

Given the fierce international competition, the capacity of the European audiovisual industry and audiovisual producers to own and exploit IP rights is crucial for revenue growth, investment and maintaining independence.[227] Building on the European Media Industry Outlook Report, this chapter of the study explores the contractual relationships between producers and streamers/broadcasters in the EU, including questions related to prevalent financing models and the negotiation power balance in business relationships. It examines how the bargaining power of global streamers, broadcasters and audiovisual producers is linked to the risk balance. It also looks at the prevailing financing models and analyses whether there has been a shift in the choice of financing models by broadcasters/streamers. The insights in this chapter are derived from the interviews and desk research.

Choice of financing models and risk balance

Factors that influence the choice of financing model

The choice of the financing model of broadcasters/streamers and audiovisual producers is influenced by a mix of factors such as macroeconomic conditions, market structure and level of competition, market demand and the regulatory environment.

Differences in business models. While clear differences exist between broadcasters and streamers, it is also important to make a distinction between PSBs, which have a public service remit, and private broadcasters, which are commercially driven. The business models of streamers are also diverse and changing, as seen by the introduction of advertising-supported models and the rise of FAST services (free advertising-supported streaming TV) which are competing with linear TV for advertising revenues. It is evident from the EAO analysis that Warner Bros. Discovery (Europe), the Walt Disney Company, Paramount (Europe) and Groupe Canal Plus, among others, have strong offerings as

225 EPC Code of Fair Practices. Available at: https://www.europeanproducersclub.org/our-code-of-fair-practices
226 Joint Statement: Global Screen Industry Unites for Streaming Platform Regulation and Intellectual Property Protections. Available at: https://www.cepi-producers.eu/post/joint-statement-global-screen-industry-unites-for-streaming-platform-regulation-and-intellectual-pr
227 As outlined in the European Media Industry Outlook Report

regards both VOD services and pay-TV channels, making their categorisation as broadcasters or streamers challenging.[228] As regards producers, there are differences according to size, whether the company is independent, and whether it specialises in producing films, series or both. Independent producers have historically been central to the requirements of broadcasters and video-on-demand service providers to promote European works under the AVMSD.[229]

National, regional or global focus. There are differences between players, depending on whether they are targeting national, regional or global markets. For example, some public broadcasters, such as DR in Denmark, operate their own international sales departments, demonstrating their interest in pursuing opportunities to distribute the audiovisual works they finance on international markets. Some US streaming services, such as SkyShowtime (owned by Comcast and Paramount) are available in some but not all EU Member States. In some markets, there are also local streaming services, such as Streamz in Flanders, Belgium.[230] Similarly, producers may focus primarily on serving domestic audiences or aim to create audiovisual works that also appeal to international markets.

Size of markets. Local PSBs and private broadcasters in smaller Member States face even more difficulties to compete with global streamers because of limited budgets for audiovisual works.[231]

Different composition of commissioners and financiers in local markets. Member States have varied numbers and a diverse range of financiers, and this composition impacts the bargaining power of broadcasters and streamers. In Member States where audiovisual producers have few financing alternatives, broadcasters and streamers have more leverage to choose the business model that is most favourable to them.

Regulatory context. As discussed in Subchapter 4.1.5., the policy context also plays a key role in shaping the financing models. In Member States where audiovisual producers rely more on public support for financing, and funding criteria mandate that producers retain rights, there is likely to be a greater prevalence of licensed and co-production business models.[232]

Differences in production mixes. Some Member States have a dominant production mix of long-running soaps (e.g., Portugal, Hungary, Poland and Greece). Series with 13 episodes or fewer per season are important in Italy and France. Germany, France and Belgium participated in the highest number of co-productions in 2022.[233] Neighbouring Member States that share a common language, as discussed in the report, tend to have an affinity for co-productions.

Variety in share of European works. According to the European Audiovisual Observatory, the share of European works in VOD catalogues shows notable differences across Spain, Italy, and Poland, where audiences favour European content, while Sweden and Denmark

228 The methodology chapter contains further details on the distinctions between companies classified as broadcasters and those classified as streamers in this study. In general, entities that operate global streaming services in the EU and also have pay-TV channels are categorised as 'global streamers'.
229 EAO (2023). Independent production and retention of intellectual property rights. Available at: https://www.obs.coe.int/en/web/observatoire/-/independent-production-and-retention-of-intellectual-property-rights
230 Domazetovikj, N., Raats, T. and Donders, K., (2024). Global SVoD services in small audio-visual market contexts: Commissioning patterns in Flanders, Ireland and Norway. *Journal of Digital Media & Policy*, *15*(2), pp.213-235.
231 Raats, T. and Jensen, P.M., (2021). The role of public service media in sustaining TV drama in small markets. *Television & New Media*, *22*(7), pp.835-855.
232 EAO (2019). Mapping of film and audiovisual public funding criteria in the EU, European Audiovisual Observatory. Available at: https://rm.coe.int/mapping-of-film-and-audiovisual-public-funding-criteria-in-the-eu/1680947b6c
233 Schneeberger, A. and Fontaine, G. (2023). Audiovisual fiction production in Europe 2022 figures. Available at: https://rm.coe.int/audiovisual-fiction-production-in-europe-2022-figures-october-2023-a-s/1680ad1ede

exhibit a stronger preference for US productions. Overall, the analysis of data based on catalogues of works in 9 EU countries by region of origin over 1 year (September 2022 - September 2023), European works account for respectively 43% and 33% of film and TV season catalogues. By comparison, 41% of film catalogs and 51% of TV season catalogs are produced in the US, while 16% originate from other regions worldwide.[234]

Linguistic and cultural targeting. The catalogues of global streamers have varying degrees of territorial diversity. Disney+ content is generally uniform because it serves as a platform for distributing global franchises, while Amazon Prime and Netflix feature more localised content.[235] The composition of catalogues demonstrates significant regional variations in their content, reflecting linguistic and cultural targeting that forms distinct content regions.[236] Member States which are part of distinct content regions (e.g. the Nordics) may be more attractive because of the potential for achieving scale.

Demand for original TV series on streaming services. In the SVOD market, the significant production of original TV series by major SVOD platforms such as Netflix and Amazon, coupled with their substantial view time shares, underpins the preference for originals. In particular, TV content commissioned by streamers has a substantially higher viewing share, i.e. 60% versus less than 25% for films.[237] Overall, the data analysis shows that investment by streamers in local originals seems to be the main driver behind the high share of national content in SVOD catalogues.

Structural advantages and scale

The contractual relationships between audiovisual producers in the EU and broadcasters/streamers are also influenced by their structural advantages.

The bargaining power of private broadcasters or streamers operating on a global scale is typically different from that of those operating at a national or regional level. Data from the EAO (Ene Iancu, 2024) shows that at the end of 2020 SVOD was the most concentrated audiovisual market segment in Europe with 90% of subscriptions cumulatively held by the top ten players.

Private broadcasters in Member States may also be internationally focused, depending on ownership structures.[238] Some private broadcasters are integrated into larger global audiovisual groups, owning production companies and/or international linear and nonlinear services. Examples of such European audiovisual groups include RTL Group (Luxemburg) and Groupe Canal Plus/Vivendi (France).

While making up only 8% of TV channels, PSBs account for nearly one-third of all viewing consumption in Europe, thanks largely to their popular generalist channels that attract a wide viewership and their own on-demand offer. While PSBs are focused on serving domestic audiences, in response to digital distribution and competition from platforms, some organisations have also tried to scale up their distribution. For example, the German public broadcasters ARD and ZDF want to put their streaming services on a joint operating

234 The report provides overview of the view time on SVOD services of works (films and TV seasons) by origin, genre and age (only for films) by analysing SVOD viewing time data in 9 EU countries (Denmark, Finland, France, Germany, Italy, Netherlands, Poland, Spain, Sweden. See: Grece, C., and Tran, J., (2023). SVOD usage in European Union. https://rm.coe.int/svod-usage-report-in-the-eu-2023-december-2023-c-grece-and-j-a-tran/1680af0850

235 Chalaby, J.K., (2024). The streaming industry and the platform economy: An analysis. *Media, Culture & Society*, *46*(3), pp.552-571.

236 Eklund, O., (2023). Streaming Platforms and the Frontiers of Digital Distribution: 'Unique Content Regions' on Netflix, Amazon Prime Video, and Disney. *The SAGE Handbook of the Digital Media Economy*, pp.197-222.

237 Grece, C. and Tran, J.A. (2023). SVOD Usage in the European Union. EAO. Available at: https://rm.coe.int/svod-usage-report-in-the-eu-2023-december-2023-c-grece-and-j-a-tran/1680af0850

238 Doyle, G., (2018). Television production: configuring for sustainability in the digital era. *Media, Culture & Society*, *40*(2), pp.285-295.

system.[239] Also, Eight European public broadcasters - ZDF from Germany, NPO from the Netherlands, VRT from Belgium, SVT from Sweden, DR from Denmark, YLE from Finland, RÚV from Iceland and NRK from Norway - have formed a partnership called the New8 to jointly commission TV drama.[240] Another form of collaboration is the EBU's Drama Initiative, which provides PSBs early access to high-quality drama content. This initiative allows executives to preview projects in development, offering them the opportunity to co-produce and/or pre-buy the content.[241] Overall, private broadcasters and PSBs are challenged by the digital disruption,[242] which has effects on their bargaining power.

The size and scale of business operations also play a defining role in the bargaining power of audiovisual producers in the EU. Banijay Group (Europe), for example, is the top audiovisual group in Europe in terms of the number of fiction titles produced. Besides the increased consolidation and conglomeration in the sector, most of the audiovisual production companies in the EU are small and medium-sized enterprises (SMEs) that operate on national markets. In total, there are about 96,400 enterprises registered as film and TV content producers and another 19,218 registered as active in post-production.

Financial investment risks under different financing models

Each financing model presents risks for both audiovisual producers and broadcasters/streamers. The balance of risk and the ability to own or exploit rights are matters of negotiation and depend on various factors influencing the choice of one of the financing models discussed before (see Subchapter 4.1.1.). In this chapter, the financial investment risks are examined on the basis of the results of the stakeholder interviews and desk research. Figure 24 presents the financial investment risks under different financing models, along with the typical levels of risk assumed by producers, broadcasters and streamers.

Financing model for licensed productions. The financial investment risks for producers are highest in **licensed productions** because they may need to secure financing from various sources and might be unable to sell the rights to be exploited across different windows and territories. Typically, the financial investment risks for broadcasters and streamers are lower because they only pay for a licence. However, the level of risk also depends on the type of arrangement. For example, in licensing deals where there is a key financier, such as a PSB, the investment risks can either be more heavily weighted on the financier's side or shared between the financier and the producer.

Financing model for co-productions. In arrangements regarding **co-productions**, the financial investment risks are more evenly balanced between producers and broadcasters/streamers because they share financial risks, as shown in the figure below. In co-productions, multiple financiers may be involved and share the financial risks.

Financing model for commissioned productions. As presented in the figure below, broadcasters or streamers face the highest level of financial investment risks under the financial arrangements for **commissioned productions** because they typically cover upfront all the costs and the production fees. Under these arrangements, producers usually face a low level of financial risk.

239 https://www.broadbandtvnews.com/2024/05/06/ard-zdf-plan-joint-open-source-streaming-os/
240 https://cineuropa.org/en/newsdetail/451135/#cm
241 https://www.ebu.ch/news/2020/06/the-drama-initiative--a-small-revolution-in-psm-drama
242 McElroy, R., Noonan, C., McElroy, R. and Noonan, C., (2019). The Ecology of TV Drama Production. *Producing British Television Drama: Local Production in a Global Era*, pp.45-71.

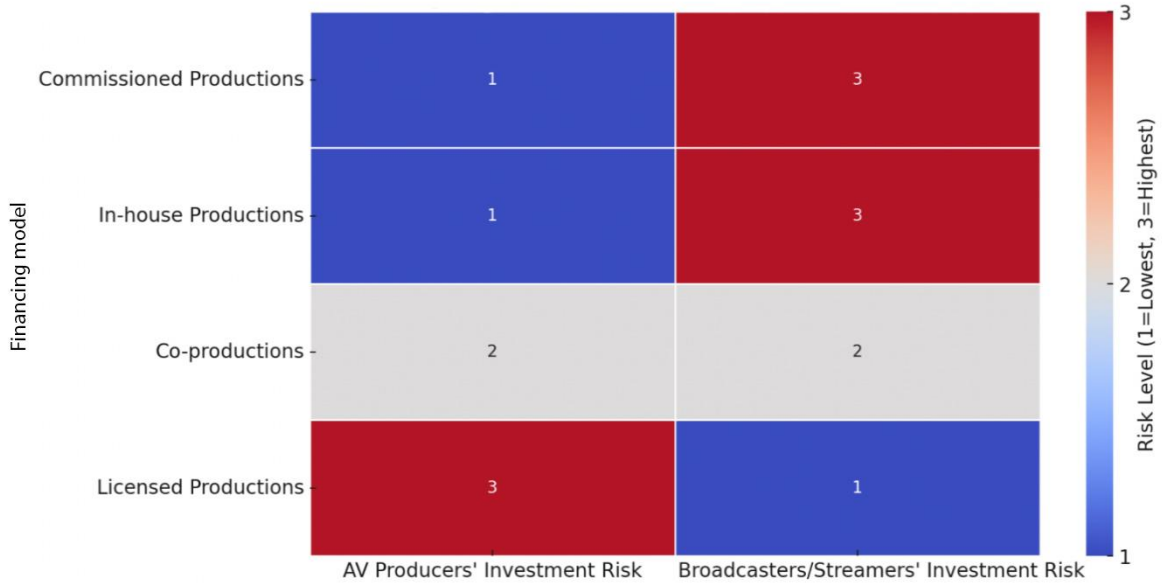
Financing model for in-house productions. As with commissioned productions, broadcasters and streamers take on the highest level of financial investment risks under the financial arrangements for in-house productions. This also implies that producers typically do not participate in the financing and therefore have a low level of financial risk.

This overview generally applies, although co-productions or licensing agreements for costly, internationally appealing genres, such as high-end fiction, can at times result in higher financial investment risks for broadcasters/streamers than less expensive commissioned genres. Some producers explained that covering a budget shortfall from their own financing is risky. PSBs and private broadcasters that operate on national territories with tighter budgets, have a lower financial cushion than global streamers to absorb the risks in investments in co-productions and licensing.

When considering financial investment risks, other factors also influence the recovery formula. For example, a producer assumes higher investment risks when financing development costs (based on their own investment or public funding). Therefore, under the financing model for commissioned productions, if such development costs are not considered, this results in an imbalance between the rights and risks for the producer. A broadcaster or streamer assumes higher investment risks when they finance the development costs.

In the interviews, some producers outlined that a risk they also face is if the project goes over budget.

Figure 28: Financial investment risks under different financing models



Source: Authors, based on the desk research and interviews

Risk balance and challenges in producers' rights ownership and exploitation

Besides the financial risk, another factor influencing the choice of financing arrangements and risk balance is **whether the rights sharing and exploitation agreements are proportionate to the investment**.

It is important to recognise that the level of financing varies significantly among different types of financiers. For example, an interviewed producer from a small Member State

outlined that the price offered by global streamers for an hour of fiction financing is six to eight times higher than that provided by the PSB. Some producers noted that this level of financing increases the ability to expand audiovisual productions to international territories.

Impact of rules on exclusivity and exploitation periods on the commercial value. Some legal experts and producers interviewed explained that some global streamers practice **long exploitation periods of 25-30 years**, which, in addition to SVOD rights, include the exploitation of pay-TV rights. As explained by the producers and legal experts interviewed, although the audiovisual producer can sell the free TV rights after a holdback period of 12 months when the streamer has exclusive rights, these often have a lower commercial value because the audiovisual work remains available on the global streamer's service. Even though producers in this arrangement retain ownership of the rights, the value of the rights is reduced because of the **long licensing period,**[243] **the broad scope of rights exploited by the global streamer and the holdback period.** Producers keep the derivative rights because they bring in tax incentive funding, but the streamer has the right to first negotiation last matching.[244] In the same Member State, two other global streamers typically work under a co-production arrangement where they co-own all rights with the audiovisual producer in a 70-30% split. The producer has ownership of rights proportional to the share of the tax incentive. In this arrangement, as explained by interviewees, the exploitation is entrusted to the global streamer, except for the free TV rights which the producer retains. The derivative rights, as explained by one of the interviewed experts, are shared in a 70-30% split, and there is a difference between domestic and international derivative rights.[245]

Determining the scope of rights under underestimated budgets. Some interviewed producers noted that PSBs in the negotiations often push for low production budgets owing to their financing restrictions. When producers cannot cover the actual costs, they risk earning less or needing to secure additional financing from other sources. As explained, this is problematic because the scope of rights is negotiated based on an unrealistic financial plan. Ultimately, producers say they find themselves securing a project rather than making a profitable deal.

Lack of data transparency. Data transparency in audience analytics enables producers to evaluate the success of their content and discern audience tastes, leading to informed decisions on fair remuneration and enhanced bargaining power in negotiations. Most of the interviewed producers and the umbrella organisations representing them identified the reluctance of global streamers to share comprehensive audience data with producers as a significant challenge. Some producers and streamers that were interviewed said that data is sometimes shared informally. Better access to data could ensure that arrangements on rights ownership and exploitation agreements are proportionate to the investment.

Trends in the choice of financing models by broadcasters and streamers

In the interviews conducted for this study, some global streamers[246] reported a shift in the past two-three years towards financing arrangements where they share more risks and rights with audiovisual producers in the EU. Particularly, some global streamers reported a transition from commissioned and in-house productions, where they typically covered the

243 See 4.1.1.

244 The right of first negotiation is a contractual right that grants the broadcaster or streamer the option to decide whether they want to enter into negotiations for a deal on any derivative work before the producer is allowed to enter into an agreement with a third party (another financier). 'Last matching' (also known as 'last refusal') is a contractual right that allows a broadcaster/streamer to match any offer that a producer receives from a third party for a particular project or derivative work.

245 As explained by the expert, derivative rights are subject to case-by-case negotiations. Global streamers often seek to retain the rights to produce spinoffs in the US without the involvement of the audiovisual producer, offering royalties to the producers instead.

246 For an explanation of which players are considered global streamers, please refer to the methodology chapter.

full production costs and retained all or most of the rights, to licensed deals and co-productions.

There is no conclusive evidence that one financing model is prevalent. Overall, the data from the desk research and interviews provide evidence of the coexistence of different financing models when global streamers are involved in an audiovisual production**.**

Several key points from the interviews related to trends in the choice of financing models by broadcasters and streamers are highlighted below.

Global streamers

- The reduced availability of financing and tighter investment strategies was a common theme raised in the interviews with global streamers as an explanation for shifts in financing models.

- Some global streamers, when discussing their shift in choice of financing models, explained that this change was partly due to their **willingness to respond to the needs of audiovisual producers and demonstrate greater flexibility during contractual negotiations with audiovisual producers** in the EU and to co-design the contractual arrangements based on the latter's needs. According to some producers interviewed, unlike in the past, some global streamers are not upfront cash-flowing productions. Several producers noted that global streamers may decide more often to back away from an audiovisual work. Most of the audiovisual producers and broadcasters noted a **downsizing of the investments of global streamers** and, in some cases, a complete cessation of investments in their domestic markets.

- Some producers noted that since 2023, one global streamer has begun introducing **step development contracts**. This approach builds the development process in stages, with significant time taken to move from one step to the next, and as it can sometimes take years before a project proceeds to production this has an impact on producers.

- Some global streamers said that after the development phase, they may decide to **opt for buying a licence and not acquire all rights**.

The key reasons mentioned by global streamers for the shift towards sharing risks and rights are summarised below:

- rise of production costs on the global market;

- shifting investment strategies;

- narrowing the risk profile to avoid paying a premium for originals;

- adapting to the needs of audiovisual producers to share risks and rights.

Broadcasters

Most of the PSBs interviewed explained that their dominant financing models are licensing and co-productions, often shaped by policy measures (see Subchapter 4.1.5.). Private broadcasters reported using a variety of financing models. The interviews with broadcasters

(private broadcasters and PSBs) revealed that **financing models have changed in recent years, but in a different way from those of streamers.** The following results emerged from the interviews:

- Some private broadcasters that offer VOD services reported that the market is not as big as it was a few years ago, so it is becoming more difficult to find co-financiers for audiovisual projects.

- Some broadcasters interviewed said that their contractual arrangements are unchanged from pre-streaming days, except for **including the question of catch-up rights** in the contractual arrangements.

- Some producers noted that broadcasters have maintained the same level of investment but **have increased their demand for rights**.

- Some private broadcasters and PSBs also noted that, compared with the pre-streaming era, they now need to **sell content across as many windows as possible** in international territories. Whereas broadcasting on linear TV was sufficient in the past to cover expenses, it is **no longer sufficient to cover the costs and close the financing**.

- Several PSBs noted that it has become increasingly difficult for them to fully finance TV drama productions because of the rising costs of this genre. Therefore, they have to work under financing models that involve **co-financing** (licensing and/or co-production). However, this is not a recent trend, as it is associated with the arrival of streamers.

- Some PSBs noted that collaboration in co-productions with global streamers has become more difficult owing to their rapidly changing strategies.

Several global streamers and private broadcasters indicated in the interviews that their choice of financing model was also **shaped by the types of production companies** in the Member States, as producers in some markets have a greater capacity and willingness to share risks than others.

The **nature of exclusivity** changes based on the type of player (broadcaster/streamer) and reflects diverse strategies. Global streamers that have noted a shift towards co-production and licensing financing models also adjust exclusivity terms. These terms vary by windows and territories, depending on the partners involved. Some PSBs and private broadcasters appear more prepared to collaborate and co-finance with global streamers, sometimes accepting a second window when contributing less financing. Others outlined in the interviews that exclusivity is important to them because they monetise the audiovisual works through advertising.

Rights ownership and exploitation under different financing models

This chapter, informed by the interviews, discusses the rights arrangements for the financing models detailed in Subchapter 4.1.1.

Financing model based on commissioned productions and impact on rights. With few exceptions, both the private broadcasters and global streamers interviewed stated that they typically retain all rights in perpetuity under the commissioning financing model. The rationale is that exploitation and ownership of rights are determined by the level of investment. This finding was also confirmed by some producers interviewed. The PSBs interviewed rarely use the commissioning financing model.

Some producers noted that, under the commissioning model, some private broadcasters may offer only a small share of exploitation rights in certain windows on international markets. According to the interview results, only an exceptionally small number of global streamers under the commissioning model allow **producers to make recoupments** (in territories not covered by the streamer, for example). Some private broadcasters and global streamers indicated in the interviews that the commissioning model is more prevalent for series.

Some producers have noted differences among global streamers regarding how they handle rights, mainly depending on who developed the work. Certain interviewees claimed that some global streamers are inclined to impose commissioning contracts under which producers **cannot own rights or future revenue, even when producers have developed the work themselves.** According to some of the global streamers interviewed, some audiovisual producers prefer to work under the commissioning model when they have developed the project, but they can negotiate to get a share of future revenue or a portion of merchandising rights in return. A small number of global streamers and producers pointed out that if the first season is successful, the production company may sometimes receive a financial bonus for a second season. All interviewees (both producers and global streamers) reported that financiers have creative control under the commissioning model.

Financing model based on in-house productions and impact on rights. Global streamers typically distinguish between audiovisual works where they have purchased an underlying IP (e.g. book or videogame), thereby playing a stronger creative and financial role, and projects where a producer pitches an idea. The former may be considered an in-house production, which, in terms of rights arrangements, is similar to the commissioning model. Some private broadcasters interviewed also have audiovisual productions where the original concept originates from them, and they then hire a production company to implement the concept. Most of the public broadcasters interviewed develop in-house productions only for soap series. Some producers reported that it has become **challenging to acquire IP rights (such as those for a book) because of strong competition from global streamers** which are willing to pay high prices.

Financing model based on co-productions and impact on rights. Some PSBs reported that the co-production financing model is the dominant model they use to co-finance with producers, other PSBs, broadcasters, distributors or streamers. Some private broadcasters and global streamers also reported that they use co-productions, among other financing models. Broadcasters reported that the ownership share of all rights in co-productions typically corresponds to the investment made. Most PSBs and private broadcasters noted that projects are often developed jointly with audiovisual producers, both financially and creatively.

The interviewees reported a range of exploitation periods for co-productions, determined in some Member States by policy (see 4.1.5.). Some PSBs noted that large producers are more inclined to negotiate and finance the ownership of VOD rights in co-production deals, acknowledging their commercial potential. Some PSBs reported that under co-production arrangements with streamers, there could be non-exclusive arrangements, whereby broadcasters and streamers distribute the audiovisual work on their own service.

Licensed productions financing model and impact on rights. Whether an audiovisual work is licensed for an exclusive first window plays a critical role in determining the licence price and its terms. Some global streamers interviewed reported that the majority of the titles in their libraries are licensed. One global streamer noted that 75% of its European catalogue over the last three years has been composed of licensed titles, from which only a small portion is for primary rights for an exclusive first window. As explained by one global streamer, films dominate among licensed titles. Another global streamer reported a strategy

whereby it licences an audiovisual production for a limited number of territories, and then, depending on its success, it may decide to buy additional territories and extend the licensing period. Some PSBs and private broadcasters reported that they typically license more films based on a MG (minimum guarantee). In some Member States, there are policy instruments that encourage contractual parties to work under the licensing model (see Subchapter 4.1.5. on Terms of Trade). Typically, producers own the IP rights and have stronger creative control under the licensing model. The producers interviewed explained that the licensing model allows them to build a catalogue of rights and generate back-end revenue.

Licensed productions, as explained by the interviewees, can vary depending on whether the financier(s) purchased the exploitation rights in advance or after the production (see the table below). For example, in a licensed production where a PSB is the primary financier, there might also be an international distributor that contributes financing to close the financing gap. The distributor is then expected to recoup the investment along with a distribution fee. As explained in the table below, when a financier pre-buys exploitation rights for the first exclusive window, it can also recoup the cost through further sales of exploitation rights involving other territories or windows. As discussed before, some producers reported **challenges with long licensing periods,** with both broadcasters and streamers.

Table 16: Examples of different combinations of financiers under the licensing financing models

Primary financier that pre-buys exploitation rights for first exclusive window	Other financiers that pre-buy exploitation rights for other windows	Other financiers that buy exploitation rights for other windows after production	Producer's investment	Recouped through further sales of exploitation rights
PSB	Foreign VOD	Foreign PSB Global streamer	Producer's investment in development funding based on public support	PSB Producer
Global streamer (multi-territory licence)	Private broadcasters in different territories where the streamer is not providing a service	/	Producer's investment based on tax incentive	Global streamer Producer
Private broadcaster Global streamer	/	Private broadcasters	Producer's investment based on investment obligations as a policy measure	Producer

Source: Authors, based on data collected from interviews

Strategies of audiovisual producers to strengthen their bargaining power

Audiovisual producers sometimes have sufficient bargaining power to challenge the preference of broadcasters or streamers for the commissioning model. During the interviews, some producers that work predominantly with the co-production and licensing models said they can use the revenue generated downstream from their productions to grow their libraries and hold onto rights. Some larger production companies in large Member States reported that they had **raised capital on the stock market, to enable them to invest in development and gap financing, thereby engaging with co-production and licensing financing models**. By financing development and gap financing, they can create a cycle of investment and grow their catalogue of rights. However, raising capital through the stock market is challenging for most independent producers.

Many producers interviewed acknowledged that **large independent producers and established companies have greater bargaining power** than smaller 'indies'. Some producers interviewed in small markets explained that they strategically chose to sell their companies to international players with strong global distribution and networks to strengthen their bargaining power. These TV drama-focused 'indies' reported that, despite becoming part of 'super-indies', they can maintain their identity and benefit from improved distribution and greater access to financiers. Examples of acquisitions identified through desk research include the powerhouse Banijay, a major player with ownership in more than 60 production outlets in nine EU countries. However, other large and established audiovisual producers that have produced successful high-end series for global streamers have noted that they find it challenging to negotiate IP rights if they wish to strategically continue long-term collaboration with them. Producers indicated that if they were to walk away from the contractual negotiations, this might make it difficult to maintain the level of audiovisual production and threaten their company's viability.

Producers in some Member States reported that they can secure ownership of rights when public financing guarantees them certain rights, or when other policies are in place to protect their position in the recoupment waterfall (see 4.1.5.).

4.1.4. Terms and conditions of contracts

This chapter focuses on analysing the terms and conditions of contracts based on insights from the interviews. The key points covered include clauses in contracts under financing models for commissioned production, terms of trade related to the choice of law and jurisdiction, and rights of first negotiation and last refusal.

Clauses in contracts in financing models for commissioned productions. According to producers and legal experts, the terms and conditions of contracts vary in comprehensiveness. Generally, in financing models where the commissioner - global streamer - retains all or most of the rights, a standard clause stipulates that they keep all rights in perpetuity.

The key elements of the contractual clauses are the following:

- All rights in the **work,** including material commissioned or previously created by or on behalf of the producer for the work, will be owned by the company exclusively throughout the universe in perpetuity (or for maximum legal term of protection).
- The materials constitute works made for hire/commissioned works and all rights will vest in the company.

Terms related to the choice of law and jurisdiction. Most producers and streamers interviewed confirmed that contracts with global streamers are subject to US law**,** which in practice makes it extremely difficult for producers to exercise their fundamental right of defence in the event of litigation for any reason. The right to defence is a sine qua non condition for the exercise of the other fundamental rights. The global streamers explained that having contracts under US law is a preferred choice for practical reasons, as they operate globally, and can use the same contract template. Some streamers explained that their lawyers ensure that the contracts do not conflict with the law in the Member State where the production company is based. However, most audiovisual producers and legal experts interviewed stated that the choice of law and jurisdiction presents a legal challenge, particularly when potential conflicts arise. According to a legal expert from an EU Member State, agreements subject to US law are often drafted by lawyers in the EU who are not members of any US bar and, therefore, should not negotiate these agreements.

An organisation representing some of the global streamers explained that they see the question of choice of law and jurisdiction as mainly relevant to the authors/performers as there are rules in the Copyright Directive (Directive - 2019/790) that are intended to improve their negotiating power. They explained that local producers in the EU typically conclude talent contracts under EU law, thereby with no evidence of contract choices aimed at circumventing European rules.

Rights of first negotiation and last refusal. Both the audiovisual producers and commissioners interviewed confirmed that typically the financier providing most of the funding has the right of first negotiation and, in some cases, also the right of last refusal regarding subsequent seasons and derivatives. This ensures that the financier has the first opportunity to negotiate their involvement in any follow-up projects related to the original audiovisual work, which can include additional seasons of a TV series, sequels or spin-offs. The right of first negotiation gives the financier a privileged position to continue their investment and association with a successful audiovisual project, often before other potential investors or partners are approached. The right of last refusal allows the financier to match any offer that the producer might receive from a third party.

In addition, some producers' associations reported that most of the commissioners do not sign contracts on time, making it difficult for producers to secure bank loans in a timely manner.

4.1.5. Role of policy instruments and their effects on the contractual arrangements between audiovisual producers and broadcasters/streamers

IP retention as criterion for producers/productions to qualify as independent

<u>Criteria used for defining independent producers and independent productions</u>

Understanding whether IP retention is considered a criterion to qualify producers and productions as independent is crucial for identifying variations in the contractual practices of Member States. In most Member States, definitions of independent production and/or independent producers are included in either primary or secondary legislation. Many Member States allocate State aid either directly to independent producers and productions or establish specific eligibility criteria, making the definition important.

Although the AVMSD does not explicitly define independent producers or works, it provides, within its recitals, elements to consider regarding the relationship between independent producers and providers of audiovisual media services. According to Recital 71 of the AVMSD (2010), when defining 'producers independent from broadcasters,' the independence could be assessed in relation to operational criteria (such as 'the ownership

of the production company' and 'the amount of programmes supplied to the same broadcaster') and the criterion of the retention of IP rights by the producers ('the ownership of secondary rights'). In most Member States that define an 'independent producer', both financial and operational criteria are applied (17 out of 23 countries), according to a study published by EAO (2023) on independent production and the retention of IP rights.[247]

- Overall, there is a definition of independence in 24 Member States out of 28 countries (including EU Member States and the UK). The definitions of independent productions and independent producers rely on three criteria: financial, operational and ownership of IP rights.

- Operational criteria are used to define independent productions and/or independent producers in all of the 24 Member States in question.

- In 20 out of the 24 Member States with a definition of independence, financial criteria are used to define independent productions and/or independent producers. Financial criteria refer to three key elements: the capital participation (% of shares and/or voting rights in the production company held by a broadcaster), the financial contribution (% of the broadcaster/producer contribution to the co-financing of the audiovisual work) and financial control (the degree of the producer's economic risk and control over the production process.

According to the analysis by EAO, seven Member States, namely Austria, Croatia, Cyprus, Estonia, Ireland, Italy and Portugal, use the ownership of the IP rights as a criterion for defining independent producers. As outlined in the study, the IP retention criterion is used in a broader sense than in Recital 71 of the AVMSD (Directive 2013/13/EU), since the notion of 'IP rights retention' refers to both 'primary' and 'secondary' rights. However, none of the Member States provide a clear definition of primary and secondary rights.

Ownership of IP rights and the definition of independent productions

In France and Portugal, the definition of independent productions relates to the ownership of IP rights by the producer. In Portugal, the 'ownership of IP rights' is used for assessing the independence of both the production and the producer.

The EAO analysis of national rules shows that four Member States, namely Austria, Estonia, Italy and Portugal, refer to the general term 'ownership of IP rights.' In Estonia, 'ownership of rights' encompasses 'copyright or related rights' in audiovisual works, which can be transferred to the production company either by legal presumption or by contract. Therefore, in Estonia, 'ownership of IP rights' is effectively understood as 'ownership of the exploitation rights in audiovisual works produced by an independent producer'. Other Member States such as Croatia, Cyprus, France and Italy use the term 'secondary rights'. This term is not explicitly defined in either a positive or negative way. In Croatia, Cyprus and Italy, there is a more specific reference to 'secondary rights', while in France both terms are used.

In seven out of eight Member States, namely Austria, Croatia, Cyprus, Estonia, Ireland, Italy and Portugal (the exception being France), the criterion of the ownership of IP rights is not extended to VOD services. In Croatia, Cyprus, Estonia, Ireland and Italy the ownership of

247 EAO (2023). Independent production and retention of IP rights. Available at: https://www.obs.coe.int/en/web/observatoire/-/independent-production-and-retention-of-intellectual-property-rights Kostovska, I. (2024). Boosting global sales and transnational circulation: Public financing of film and TV fiction and animation in Flanders and Denmark. Journal of Digital Media & Policy. https://doi.org/10.1386/jdmp_00157_1

IP rights as a criterion of independence relates to audiovisual works, while in Austria, France and Portugal it relates to both audiovisual and cinematographic works.

However, the notion of primary and secondary rights assigned to the AVMS provider is not defined in a clear and harmonised way. Such a definition is provided in only two countries, namely Croatia and Italy. More specifically, 'primary rights' assigned by contract to the AVMS provider, which finances the production or the co-production of an audiovisual work, according to EAO, should be understood as the exclusive rights to broadcast or communicate the work to the public by all means, including on-demand services, on the national territory and for a limited period. As outlined in the study, secondary rights are broadly understood in the industry as the rights to use audiovisual works through distribution channels and territories which are not covered by primary rights in the licensing agreement.

In three Member States, namely Croatia, France and Portugal, primary rights assigned to the broadcaster are to be understood as broadcasting rights (of an exclusive or non-exclusive nature) licensed for the exploitation of the work by all available means on the national territory and for a limited period. In France, this also refers to VOD providers. In Italy, primary rights assigned to the AVMS provider may be unlimited in time, but they cover specific media services as agreed in the contract.

Broadcasters may also acquire secondary rights not included in the primary rights package by contract. In Croatia, France, Italy and Portugal secondary rights assigned to the broadcaster are to be understood as rights licensed for the exploitation of the work by all means (broadcasting, communication to the public, etc.) through other distribution channels and on markets outside the national territory, unless agreed otherwise by contract.

These rules are not supplemented by a set of rules related to the possible retention of primary and/or secondary rights by the producer. Thus, the definition of primary and/or secondary rights retained by the producer may be deduced by a negative (*a contrario*) approach. Therefore, the primary and secondary rights retained by the producer encompass the transmission or retransmission rights of the work through specific distribution channels and markets, which are excluded from the AVMS provider's package agreement.

Portugal is the only Member State where the rules on 'retention rights' focus on the producer and offer significant protection. According to these provisions, 'independent producers cannot transmit their rights in their entirety for at least five years from the date of the first dissemination of the work'. In this sense, all broadcasting rights which remain from the AVMS provider's exploitation package covering the five-year period after the first dissemination of the work could be understood as IP rights of a primary and secondary nature retained by the independent producer.

In France, the protection of IP rights for producers of cinematographic works may be secured through professional agreements approved by a ministerial decree (Chronologie des médias). This agreement sets out guidelines for safeguarding the cinema window, allowing TV channels and VOD providers to make works available only after a designated period has elapsed since their first release.

Summary of measures in France[248]

(A) VOD services (non-linear) Independent production

(i) Audiovisual European works (Article 22, II of Decree No. 2021-793)

- The duration of the exploitation rights stipulated in the contract does not exceed 72 months in each territory in which those rights were acquired, including 36 months when acquired on an exclusive basis.
- The service provider does not hold, directly or indirectly, any marketing mandates or secondary rights in the work in question.

(ii) Cinematographic European works (Article 21, II of Decree No. 2021-793)

- When the exploitation rights are transferred to the service provider by contract on an exclusive basis, their duration does not exceed 12 months in each territory in which those rights were acquired.
- The service provider may not hold, directly or indirectly, more than one mandate or secondary right in order to market the work in French territory or abroad except in certain ways agreed by contract (cinemas, television services, on-demand services other than the one it broadcasts, video recordings for private use by the public).

(iii) Adjustments to the conditions under which a work is deemed to be an independent production, for both audiovisual and cinematographic works (Article 26, 7° of Decree No. 2021-793)

248 Based on the EAO study, as stipulated in Article 21-22 of Decree No. 2021-793 of June 2021 relating to on-demand audiovisual media services (Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande (décret SMAD)).
Article 13 of Decree No. 2021-1926 of 30 December 2021 on the contribution to the production of cinematographic and audiovisual works by terrestrial television services (Décret n° 2021-1926 du 30 décembre 2021 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne Terrestre). Note that France also has other rules relating to the definition of independent producers/productions. For further information see the EAO study: https://www.obs.coe.int/en/web/observatoire/-/independent-production-and-retention-of-intellectual-property-rights

B) TV broadcasting services (linear) Independent production

(i) Audiovisual European works (Article 21, II of Decree No. 2021-1926) - The duration of the rights stipulated in the contract for TV services does not exceed 36 months.

- When the broadcaster has financed less than 50% of the cost of the work, these rights include broadcasting on a television service and, for a period specified by the agreement or the specifications, exploitation on a catch-up television service.

- When the broadcaster has financed at least 50% of the cost of the work and its contribution is defined globally by application of Article 8, these rights include broadcasting on all television services and exploitation on all on-demand audiovisual media services of the broadcaster, its subsidiaries and the subsidiaries of the company controlling it within the meaning of 2° of Article 41-3 of the aforementioned law of 30 September 1986.

The broadcaster does not hold, directly or indirectly, marketing mandates when the producer has, directly or through one of its subsidiaries, an internal distribution capacity for the work in question or when the broadcaster has a framework agreement with a distribution company.

(ii) Cinematographic European works (Article 13, II of Decree No. 2021-1926) - When the exploitation rights are transferred to the service provider by contract on an exclusive basis, their duration does not exceed 18 months. - The service provider may not hold, directly or indirectly, more than one mandate or secondary right in order to market the work in French territory or abroad except in certain ways agreed by contract (cinemas, television services other than the one it broadcasts, on-demand services, video recordings for private use by the public).

(iii) Adjustments to the conditions under which a work is deemed to be an independent production, for both audiovisual and cinematographic works (Article 26 and 43 of Decree No. 2021-1926)

(C) Broadcasting services via networks Independent production

(i) Audiovisual works (Article 25, II of Decree No. 2021-1924) - The duration of the rights stipulated in the contract does not exceed 36 months.

- The service provider does not hold, directly or indirectly, marketing mandates when the producer has, directly or through one of its subsidiaries, an internal distribution capacity for the work in question or when the broadcaster has a framework agreement with a distribution company.

(ii) Cinematographic works (Article 19, II of Decree No. 2021-1924) - When the exploitation rights are transferred to the service provider by contract on an exclusive basis, their duration does not exceed 18 months. - The service provider may not hold, directly or indirectly, more than one mandate or secondary right in order to market the work in French territory or abroad except in certain ways agreed by contract (cinemas, television services other than the one it broadcasts, on-demand services, video recordings for private use by the public).

(iii) Adjustments to the conditions under which a work is deemed to be an independent production, for both audiovisual and cinematographic works (Article 30 and 47 of Decree No. 2021-1924)

Summary of measures in France[248]

(D) Cinematographic works released in French cinemas

According to a professional agreement validated by a ministerial decree (chronologie des médias), broadcasting services via a network (for instance payTV cinema channels) may transmit a film released in French cinemas six months after its first distribution. VOD providers can also benefit from this position if a 'premium' agreement is concluded with one or more professional organisations of the film industry, or 15 months in the case of a 'non-premium' agreement, or 17 months after its first distribution. In the case of VOD subscription providers, the transmission of a film released in French cinemas may be ceased after a period of 22 months in order to allow free-to-air TV channels to distribute the film in question.

Summary of measures in Portugal[249]

In the case of funding or co-production between broadcasters or VOD and independent producers, the legislation provides for several measures related to the retention of IP rights by independent producers, as follows: a) Independent producers have ownership of works co-produced with providers of any kind; b) Independent producers cannot transmit their IP rights in their entirety for at least five years from the date of the first dissemination of the work in question; c) In the case of audiovisual or multimedia works co-produced with a television provider, the independent producer may not assign exclusive broadcasting rights for the national territory for a period exceeding seven years. Such a limitation does not apply to broadcasting to foreign territories; d) In any case the financing or co-production of audiovisual or multimedia works cannot deprive independent producers of their IP rights, where their contractual transfer is possible within the limits provided by law.

National rules on the promotion of European works and IP rights retention

The analysis of national implementation of AVMSD rules on the promotion of European works shows that in some countries, regulations may allow independent producers to retain IP rights, based on criteria linked to the definition of independent producers or productions.[250]

With the 2018 revision of the AVMSD,[251] Member States were given the opportunity to request media service providers, including VOD providers targeting their territories but established in another Member State, to make financial contributions to the production of European audiovisual works (Article 13(2)). Some Member States already had investment

249 Based on the EAO study, as stipulated in: Article 2 (1) (p) of the Television Law Article 9(2) and 33(4) of Decree-Law No. 25/2018 Regulation on the Cinema Law related to the measures on supporting the development and protection of cinematographic and audiovisual activities (Regulamenta a Lei do Cinema no que respeita às medidas de apoio ao desenvolvimento e proteção das atividades cinematográficas e audiovisuais) 139 Article 7(3) and Article 24 (3), (8) of Decree-Law No. 74/2021. Portugal also has rules on definition of independent producer/production. For further information please see: https://www.obs.coe.int/en/web/observatoire/-/independent-production-and-retention-of-intellectual-property-rights

250 Kostovska, I., Komorowski, M., Raats, T. and Tintel, S., (2023). 'Netflix taxes' as tools for supporting European audiovisual ecosystems: Policy interventions for rights retention by independent producers. In *European audiovisual policy in transition* (pp. 157-176). Routledge.

251 Directive 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. Available at: https://digital-strategy.ec.europa.eu/en/policies/revision-avmsd

obligations in place before the AVMSD revision, but many introduced such rules with the transposition of the directive. While less than half of the Member States have introduced investment obligations for domestic and targeting VOD services, some have introduced similar obligations for domestic and targeting broadcasters as well (e.g. Poland, Portugal and Spain).[252]

A study carried out by SMIT-VUB emphasised the importance of structuring investment obligations as an integral part of a coherent audiovisual policy framework, with an emphasis on the question of rights retention by independent producers.[253]

National rules on investment obligations for VOD providers. According to Article 13(2) of the AVMSD, financial contributions may take the form of direct investment in content or contributions to a national fund. Based on an analysis of the underlying features of the investment obligation models developed in the Member State, investment obligations can take the form of a levy payable to a fund, a direct contribution in the production of European works, a choice to invest either through a levy or direct contribution, or a combination of a levy and direct contribution. In Croatia, Greece and Portugal, for example, VOD providers are required to direct their entire financial contributions to audiovisual works by independent producers. Other jurisdictions, such as Spain, France, the Netherlands and Flanders in Belgium, have independent production quotas. For example, under the recently introduced investment obligation in the Netherlands, large streamers[254] are required to invest 5% of their turnover in Dutch productions. At least 60% of these productions must be audiovisual works by an independent producer. According to the State Secretary, this approach 'ensures greater variation in supply and strengthens the Dutch production sector'.[255] In Italy, with the latest amendments to Legislative Decree No. 208 of 8 November 2021 (AVMS Code), the investment quota for European works produced by independent producers as part of the investment obligation has been decreased.[256]

Obligations for broadcasters. According to Article 17 of the AVMSD, broadcasters are required to reserve at least 10% of their transmission time or at least 10% of their programming budget for European works created by producers that are independent of broadcasters. They must also ensure an adequate proportion of recent works. Italy and France, for example, require broadcasters to reserve at least 10% of their programming budget for independent productions.

Quota rules on European works in VOD catalogues. According to Article 13(1), Member States must ensure that providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure the prominence of those works. In implementing the quota obligation to promote European works in VOD catalogues, some Member States also enforce sub-quotas that specifically support audiovisual works created by independent producers. For instance, in Italy, one fifth of the 15% sub-quota (3%) must be dedicated to original Italian-language cinematographic works by independent producers. In Portugal the sub-quota rules on independent

252 EAO (2023). AVMSDigest The promotion of European works. Available at: https://www.obs.coe.int/en/web/observatoire/-/observatory-s-conference-the-promotion-of-european-works-according-to-the-avmsd-where-do-we-stand-

253 Kostovska, I. et al. (2022) Investment obligations for VOD providers to contribute to the production of European works: A 2022 update. SMIT-VUB. Available at: https://smit.vub.ac.be/wp-content/uploads/2022/09/Kostovska-et-al-2022-Investment-Obligations-VOD-Providers-Study-1.pdf

254 With a turnover of €10 million or higher.

255 Staatssecretaris Cultuur en Media, Streamingdiensten gaan 5% omzet investeren in Nederlandse producties, 6 juni 2023 https://www.rijksoverheid.nl/regering/bewindspersonen/gunay-uslu/nieuws/2023/06/06/streamingdiensten-gaan-5-omzet-investeren-in-nederlandse-producties
See also: https://zoek.officielebekendmakingen.nl/stb-2023-382.html

256 Legislative Decree No. 50 of 25 March 2024 laying down the supplementary and corrective provisions to Legislative Decree No. 208 of 8 November 2021. https://www.gazzettaufficiale.it/eli/id/2024/04/17/24G00067/sg

production stipulate that at least 15% of independently produced European creative works originally in Portuguese and produced in the last five years must be included as a share of VOD catalogues.

Other public support measures and the question of IP rights

Funding schemes from screen agencies

At both national and regional levels, some national film funds offer targeted support, either on a selective basis or automatically, aimed specifically at independent producers. In certain instances, eligibility for grants from various film fund programmes is contingent upon the recipient being an independent producer, as is the case for example in Denmark and Portugal. Nevertheless, most film funds stipulate that the producer must be independent only under the funding criteria for specific support schemes. This is often accompanied by the additional requirement that the independent producer must be established (or has an operating establishment) in the country.

For example, the Austrian Television Fund[257] offers financial support to independent producers and production companies. To qualify for funding, productions must involve broadcasters contributing at least 30% of the total production costs. Where the participation consists of presales, at least 50% of the financing must be available when shooting begins. Broadcasters contributing to the total production costs are restricted to acquiring rights for a maximum of five years, or up to seven years for series or multi-part productions. For pay-TV and subscription video-on-demand (SVOD) rights, these can be held jointly with the producer for only the first half of the licensing period. Afterward, producers gain full rights to exploit SVOD services independently within the broadcaster's licence region.

The SOFICAs (Sociétés de financement de l'industrie cinématographique et de l'audiovisuel or Film and Audiovisual Industry Financing Companies), established in France by Act No. 85-695 of 11 July 1985, offer another form of support for independent productions. Established with the aim of mobilising private funds specifically for financing film and audiovisual productions, SOFICAs can be initiated by professionals in the film and audiovisual sector or by entities in the banking and finance industry. From 2005, SOFICAs have agreed to a professional charter with the CNC (National Centre for Cinema and the Moving Image) before each annual fundraising effort, outlining investment rules in independent productions.[258] For instance, the charter lays down that a minimum of 50% of investments should go to non-leveraged productions. These are works produced by companies without financial ties to SOFICAs or any related entities, and for which no buy-back price is predetermined (see EAO, 2019).[259]

Production incentives

With the globalisation of film production and distribution, production incentives have gained in importance as a financing source, for both European films and series.[260] Our analysis shows that production incentives in some Member States include criteria for funding that provide opportunities for independent producers to enjoy a better negotiating position with private financiers and to exploit rights. We outline some best cases examples of production

257 https://www.rtr.at/medien/was_wir_tun/foerderungen/fernsehfonds_austria/startseite.de.html
258 https://www.cnc.fr/professionnels/aides-et-financements/multisectoriel/production/les-sofica_759536
259 EAO (2019). The promotion of independent audiovisual production in Europe. Available at: https://rm.coe.int/iris-plus-2019-the-promotion-of-independent-audiovisual-production-in-/1680947bc8
260 EAO (2024). Fiction Fil Financing In Europe: Overview and Trends (2016-2020). https://www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/wy5m8bRgOygg/content/fiction-film-financing-in-europe-production-incentives-are-rising-amid-shrinking-direct-public-funding-and-broadcaster-investments; Kostovska, I. (2024). Boosting global sales and transnational circulation: Public financing of film and TV fiction and animation in Flanders and Denmark. Journal of Digital Media & Policy. https://doi.org/10.1386/jdmp_00157_1

incentive funding criteria that allow producers to exploit their rights. However, as discussed in this chapter, these rules are sometimes circumvented in practice, with producers securing funding through production incentives, but still not obtaining ownership of the production rights.

The Austrian production incentive FISA+

The Austrian production incentive FISA+ supports international films and series (service productions) in the field of cinema, TV & streaming (including professional services in production) and Austrian TV and streaming productions. Production companies and production service companies based in Austria that are independent of media service providers or such companies that have a permanent establishment in Austria can apply for funding. This applies regardless of their company seat, as long as it is within the European Economic Area or Switzerland.[261]

Under the production incentive scheme that supports Austrian films and series for the streaming and TV sector, media service providers contributing a share to financing the overall production costs of Austrian films and series may acquire rights for a **maximum of seven years and, in the case of multi-part productions, a maximum of ten years**. The acquisition of other periods of use following initial release is permitted. Contracts with media service providers contributing a share to the financing must indicate a licence share of at least 50% of the overall amount to be paid by the media service provider(s). All profit-sharing claims of media service providers must adhere to the ratio between the co-production share and the approved overall production costs. Profitable productions (applicants) must receive an adequate share from media service providers, at least to the extent required by law. Said share must be stipulated in the contract between applicants and media service providers.

Italian tax incentive

The criteria for funding under the Italian tax credit scheme for cinematographic and audiovisual works on TV and web provide incentives for independent production companies to retain rights. The tax incentive is intended for independent production companies that are subject to taxation in Italy or EEA countries and have a registered office in the European Economic Area.[262] The basic rate of the tax incentive is 30%, but can be increased to 40% in the following cases:

- the producer retains 100% ownership of one of the three main usage and exploitation rights (free TV, pay-TV, VOD) or the rights are transferred to the audiovisual media service provider for no more than five years;

- resources from countries outside Italy contribute at least 30% to cover the production cost of the work;

- in the case of works in collaboration between partners, the participation of the independent producer is equal to or greater than 30%;

261 https://fisaplus.com/en/funding/faqs/internationale-filme-serien-folgen-und-produktionsteile/ https://fisaplus.com/en/funding/guidelines/ and *Consolidated text of the DI MiC and MEF 2 April 2021 rep. 152* https://cinema.cultura.gov.it/wp-content/uploads/2023/02/TESTO-VIGENTE-CONSOLIDATO-D.I-2-APRILE-2021-REP-152.pdf

262 https://cinema.cultura.gov.it/cosa-facciamo/sostegni-economici/linee-di-sostegno/tax-credit/produzione-tv-e-web/ Note that the tax incentive rules were under revision at the time of writing.

- only for contracts stipulated by 31 January 2021, the original producer retains the right to produce **derivative works** from the one for which the benefit is requested and/or subsequent seasons in the case of serial works.

Starting from 1 January 2022, the rate is calculated on 85% of the eligible costs (except for animation works). Funding is available for fiction, animation and documentaries.

Similarly, the tax credit for the production of Italian films provides for a higher rate of credit for independent companies than for non-independent companies.[263] According to the tax credit for the production of Italian films (including international co-productions), independent producers are entitled to a tax credit of 40% of the eligible costs of producing cinematographic works recognised as being Italian. For non-independent producers, however, the rate is set at 25%.

Terms of trade and professional agreements

Terms of Trade are codes of practice adopted by PSBs in Ireland and the UK which govern how PSBs commission programmes from independent producers. These statutory frameworks set out the primary rights available to PSBs and the revenue sharing arrangements relating to the subsequent use of commissioned works. Fundamentally, Terms of Trade give independent producers control over the 'secondary rights' to their audiovisual works, enabling them to monetise these works on international markets. According to the interviewed producers and their associations in some of the Member States where terms of trade and framework agreements have been introduced, many productions still fall outside of the scope of the defined rules, presenting a challenge from the producers' perspective.

Terms of trade between PSBs and producers in the UK and Ireland

In the UK, the terms of trade were established in response to the Communications Act 2003 to address the uneven negotiating power that existed between PSBs and independent television producers.[264] Historically, the BBC and ITV were considered as a duopoly with substantial leverage over production companies, which had limited options for selling their content. The argument was that PSBs demonstrated minimal interest in leveraging the value of audiovisual content, while production companies were restricted from exploiting it. The UK's Communications Act 2003[265] was designed to enable independent producers to maintain control over the secondary IP rights of their productions, instead of the commissioning PSBs, thus allowing them to market their content internationally. While the revenue from such exploitation must be shared with the broadcasters, production companies have the autonomy to initiate such deals. According to the Communications Act 2003, PSBs are required to formulate codes of practice setting out their principles for commissioning content from independent producers. These codes have to be drafted in accordance with the regulator Ofcom's guidance.

While the Terms of Trade have positively influenced the UK independent production industry[266] they have not been without their drawbacks. Following the establishment of the Terms of Trade, independent production companies became more attractive to larger

263 https://www.anica.it/tipologie-di-investimento-tax-credit/tax-credit-alla-produzione-di-opere-cinematografiche-televisive-e-web
264 Doyle, G. and Paterson, R., (2008). Public policy and independent television production in the UK. *Journal of Media Business Studies*, *5*(3), pp.17-33. Lee, D., (2018). *Independent television production in the UK: From cottage industry to big business*. Springer.
265 https://www.legislation.gov.uk/ukpga/2003/21/contents
266 O&O (2018). The impact of Terms of Trade on the UK's television content production sector. A report for the Canadian Media Producers Association (CMPA) by Oliver & Ohlbaum. Available at: https://ised-isde.canada.ca/site/broadcasting-telecommunications-legislative-review/sites/default/files/attachments/968_CMPAAppendixC1.pdf

companies, leading to their acquisition by global media conglomerates.[267] This resulted in a trend in the UK production industry towards concentrated ownership, with 'super-indies' and global media corporations acquiring independent producers and gaining control of their rights catalogues.

In Ireland, under the Broadcasting Act 2009, the PSBs, RTÉ and TG4, are required to prepare and publish a code of fair-trading practice, setting out the principles that they must apply when agreeing terms for the commissioning of programming material from independent producers. The Act requires a PSB to include in its code a reference to its approach to: (i) the acquisition of rights, (ii) multi-annual commissioning, and (iii) a timetable for contractual negotiations.

Terms of Trade in the UK

The **Terms of Trade in the UK** have been constantly updated in negotiations between PACT, the UK screen sector trade body representing and supporting independent production and distribution companies and PSBs. In 2020, the BBC and PACT agreed on new Terms of Trade, allowing the BBC to host independent commissions on its on-demand service iPlayer for a year, with an option to extend this period for a fee.[268] Consequently, the BBC's international sales revenue was reduced from 15% to 10% and its UK sales share was reduced from 25% to 20%. In light of increased competition from international streaming services, the Terms of Trade are undergoing a review.

According to the key principles applicable to all BBC independent commissions under the Terms of Trade, '*copyright in content commissioned in accordance with the BBC's Code of Practice shall remain vested in the producer who created it*.'

According to the BBC's Code of Practice,[269] the BBC will acquire a licence including the following primary rights and associated provisions under its deal with the independent producer:

a. An exclusive licence in the UK programme market, and the right to exercise the primary rights in the programme on its licence fee funded services, for a period of five years.

b. The primary rights will cover the following:

- The right to use the programming on the BBC's linear television broadcast services, including simultaneous streaming of such services over other distribution platforms such as the internet or mobile devices.

- The right to use the programming in connection with the BBC's public service multiplatform services.

- The right to use the programming (including extracts and previews) for the BBC's promotional purposes in any media.

Under the Terms of Trade, the revenue from international sales is split. The BBC expects to share in the net revenue arising from this exploitation on an agreed basis through

267 Doyle, G., Paterson, R. and Barr, K., (2021). Television Production in Transition. Independence, Scale, Sustainability and the Digital Challenge. Available at: https://link.springer.com/book/10.1007/978-3-030-63215-1
268 https://www.bbc.co.uk/delivery/business-contractual
269 http://downloads.bbc.co.uk/commissioning/site/code_of_practice.pdf

individual negotiations to deliver value back to the licence fee payer and as an acknowledgement of the added value that the BBC contributes to the programme.

Global streamers are not covered under the Terms of Trade. While PSBs and global streamers face a regulatory imbalance, directly translating and applying PSB trade terms to streamers could prove unwise because of their different business models.[270] Instead, a comprehensive review and appraisal of the existing system is required.

Terms of Trade in Ireland

According to the Code of Fair Trading Practice: Guidance for Public Service Broadcasters (2017),[271] a PSB is deemed to commission the production of an audiovisual work from an independent producer when the PSB finances at least 25% of the total production costs before work starts on making the programme. When agreeing terms for the commissioning of programming material from independent producers, a PSB may negotiate on the exploitation of rights. For primary rights (all platform rights), the BAI/CnaM Code specifies that the parties should work on the basis of the acquisition by a PSB of all platform rights for Ireland for five years, unless agreed otherwise by the parties. Additional time-limited primary rights may be acquired by the PSB for broadcasting to the Irish diaspora for the fulfilment of the PSB's objective. The BAI/CnaM Code includes the possibility of a time extension. For 'other rights' (other than those covered under 'all platform rights'), the BAI/CnaM Code specifies that parties should negotiate these rights separately if the independent producer wishes to make them available. The BAI/CnaM Code forbids the insertion in the PSB code of the automatic bundling of rights as between primary and other rights (unless so agreed by the parties).

According to **RTÉ's Code of Fair Trading Practice,**[272] in situations where RTÉ is the primary owner of the commissioned programme, meaning that RTÉ provides at least 51% of the funding, RTÉ will expect the producer to deliver programme materials in accordance with RTÉ's delivery requirements and to grant RTÉ primary rights.

- The RTÉ **primary rights** are defined as both linear and nonlinear rights for a duration of five years. In terms of exploitation of the programme, two years after RTÉ's initial airing of the programme (or the final episode of a series), the producer can propose to RTÉ the exploitation of the programme within the island of Ireland on other third-party services/platforms, but excluding any television platforms in or outside Ireland that compete directly with RTÉ or that have a negative material impact on RTÉ audience figures. RTÉ retains the right to approve such proposed exploitation to safeguard its commercial, editorial and reputational interests.

- In accordance with the Code, t**he producer retains worldwide ownership of the programme's copyright,** and all rights not guaranteed to RTÉ as primary rights. Where an original programme format is exclusively created by the independent producer then the format rights will remain with the producer and may be exploited by the producer.

- RTÉ is entitled to 50% of the net revenue from **secondary rights exploitation** globally, or a proportionate share if the programme is co-funded, According to the Code**,** secondary rights include rights such as international television sales rights to

270 Public service broadcasting, streaming services and the future for 'Terms of Trade' https://www.create.ac.uk/blog/2020/06/19/public-service-broadcasting-streaming-services-and-the-future-for-terms-of-trade-2/ See also: https://committees.parliament.uk/writtenevidence/7077/pdf/

271 https://www.bai.ie/en/media/sites/2/dlm_uploads/2019/11/20171115_BAIGuidance_COFTP_vfinal_AR.pdf

272 Code Of Fair Trading - About RTÉ - RTE

> the programme, merchandising rights and interactive rights (other than to the extent that such rights are granted to RTÉ as part of the primary rights) and any other rights (including ancillary rights of all kinds and the reversionary interest in all primary rights granted to RTÉ) now known or hereafter invented (other than to the extent that such rights are granted to RTÉ as part of the primary rights) (unless otherwise agreed by the producer) and those secondary rights may be exploited by the producer subject to meeting additional provisions of the Code. Neither the producer nor any third party may broadcast or exploit the programme and the secondary rights outside of the island of Ireland prior to 28 days after the first broadcast of the programme by RTÉ unless RTÉ provides written consent to the contrary.

The Terms of Trade are not applicable to co-productions on TV fiction, except when the programme is fully commissioned by RTÉ.

Framework agreements between PSBs and producers in Germany

In Germany, public broadcasting organisations (ARD and ZDF) have established framework agreements (ARD - Framework agreement on contractual cooperation on film/television joint productions and comparable cinema co-productions;[273] ZDF and television producers - Framework conditions for fair cooperation[274] that guide contractual practices with producers. These are negotiated between broadcasters and producers' representative organisations and are revised over time. In general, the contractual practice depends on whether the production is fully financed by the broadcaster. If a production is partially financed by a producer, the production company will keep rights proportionally.

Both ZDF and ARD distinguish between four production categories depending on the level of involvement of broadcasters in the financing. ZDF and ARD classify financed productions into **four types** ('clusters') based on the level of financing provided. This classification determines the allocation of rights associated with productions. Rights are segmented **across exploitation phases** (first, second and additional), type of rights (broadcasting/free TV, free-VOD, pay-TV, pay-VOD, EST/DTO and standalone placement on third-party platforms rights), territoriality and exclusivity of use. The distribution of these rights depends on the production type ('cluster'), i.e. the level of financial involvement of the broadcaster in the net total production costs.

In co-productions of cinema films, ARD and ZDF typically hold exclusive free TV and free-VOD rights in the first exploitation phase, i.e. for five years, which can be extended to seven years, depending on the level of financing. Across all co-production types, the initial exclusive exploitation phase generally lasts five years, allowing broadcasters to use the titles across all programmes they organise. A second exclusive exploitation phase of three years is possible, with terms renegotiated on the basis of current market conditions.

When public aid is part of the financing, there are strict legal rules that pay-platforms are allowed to exploit their rights before free TV broadcasters, regardless of their financial contribution (German FFG, § 53). During the first exploitation phase the following principles determine the exploitation of rights on pay-TV, pay-VOD and VOD-EST/VOD-DTO. Under certain conditions relating to holdback periods and the timing of pay-TV broadcasts, pay-TV exploitation is possible if a commercial or pay-TV operator provided financing for the work. Pay-TV exploitation by producers after the end of the broadcaster usage phases does

273 Framework agreement on contractual cooperation on film/television joint productions and comparable cinema co-productions https://www.ard.de/die-ard/Eckpunktevereinbarung-zu-Film-Fernseh-Gemeinschaftsproduktionen-100.pdf

274 ZDF and television producers - Framework conditions for fair cooperation. https://presseportal.zdf.de/pressemitteilung/zdf-verbessert-rahmenbedingungen-fuer-auftragsproduktionen

not require coordination with broadcasters. Within the broadcaster usage phases, pay-TV exploitation by producers is possible in coordination with and subject to prior approval by the broadcaster.

Depending on the production type, i.e. the level of financial involvement of the broadcasters, the pay-VOD rights can vary from being exclusive to the producer within and outside the broadcaster's areas of use (productions with lower broadcaster participation in financing) to defining the usage of pay-VOD rights in the production contract on a case-by-case basis (productions with higher broadcaster participation in financing). Regardless of the case, if pay-VOD rights are exploited by the producers their window may be limited depending on the timing of the first broadcast by the broadcaster (embargo periods preceding and following the first broadcast).

As regards fiction series, ARD's contractual relationship with producers is outlined in the 'Key points for balanced contract conditions and fair distribution of exploitation rights in productions in the genres of fiction, entertainment and documentary'.[275] These rules stipulate that ARD must invest a minimum of 55% of the production budget to secure exclusive German free TV rights, including online offers, for seven years. In general, the minimum participation by the broadcaster is 65%. The document outlines the minimum financing participation required from ARD for acquiring pay-TV rights before the TV premiere, secondary rights (including merchandising) as well as for extending German exclusive free TV rights.

For ZDF's TV productions, the allocation of rights varies according to the financial contributions. If ZDF fully finances a commissioned production, it retains all rights. However, if the production is only partially financed by ZDF, the producer retains certain rights proportionate to its share of the production costs. These rights are specified in individual contracts based on the producer's financial contribution and the projected value of the production. When producers exploit rights, ZDF is entitled to a share of the proceeds, but only after the producer has recouped its investment. If ZDF Studios co-finances a production, it gains rights to revenue sharing. In cases when the producer identifies exploitation opportunities, ZDF is generally open to renegotiating rights transfers, having regard to the interests of both parties.

Professional agreements in France

The French public service broadcaster **France Télévisions** signed a professional agreement which frames its investments in audiovisual production with the five trades unions representing French producers SATEV, SPECT, SPFA, SPI and USPA in 2024.[276] In return for its investment of €440 million per year in creation, France Télévisions will be able to have "360° rights" for periods ranging from 30 to 42 months, determined for each work according to the level of funding from France Télévisions.

Effects of broader audiovisual policy measures on IP retention by audiovisual producers in the EU

The analysis in this chapter shows that policy instruments in some Member States establish rules that shape the contractual relationships between audiovisual producers and broadcasters and/or streamers.

275 https://www.ard.de/die-ard/ARD-Eckpunkte-2021-2024-100.pdf

276 Agreement with producers- France Télévisions. https://lespi.org/2024/06/communique-france-televisions-animfrance-le-satev-le-sedpa-le-spect-le-spi-et-luspa-signent-un-accord-sur-lengagement-financier-et-lexposition-des-oeuvres-patrimonial/

Direct public funding and production incentives continue to be an important financing source in the composition of financing for films and series in EU Member States. Given the growing risk aversion of commissioners and increased uncertainty in the global audiovisual market, production incentives increasingly serve to attract private investment in film and TV productions in EU Member States. They serve as an important source of funding for genres that appeal to global audiences. In this context, some Member States have established criteria under production incentive schemes that introduce more attractive funding rates if independent producers have the possibility to exploit rights. In some of the examples analysed, independent producers can secure a stronger position for future revenue, as the funding criteria for production incentives specify the duration of licensing periods and stipulate that rules for profit sharing should align with the co-production share. Some Member States define rules that support the role of independent producers through investment obligations or other policy instruments.

As outlined in the table below, each of the policy instruments covered in this chapter has its own advantages and disadvantages, identified through desk research. It is important to recognise that the degree to which any of the policy instruments listed in the table supports rights ownership and/or exploitation depends on the specific funding conditions and how effectively the instrument is applied in practice.

Table 17: **Overview of policy instruments influencing contractual practices**

Type of policy instrument	Examples of Member State implementing such policy measures	Advantages	Disadvantages
National rules on investment obligations for VOD providers/broadcasters	Croatia, Greece and Portugal	Possibility for audiovisual producers to exploit and/or keep certain IP rights	Limited use to audiovisual works covered under the specific policy measure
Funding schemes of screen agencies	France and Austria	Independent producers can have an equity investment in productions to be able to own and exploit IP rights	Mostly applicable only for films and not for TV works

Type of policy instrument	Examples of Member State implementing such policy measures	Advantages	Disadvantages
Production incentives	Austria and Italy	Independent producers can have an equity investment in productions to be able to own and exploit IP rights	Less competitive incentive, risk of discouraging investors; Possibility for regulations to be circumvented, resulting in producers not getting IP rights equivalent to the value of the production incentives they bring to the project.
Terms of trade and professional agreements	Ireland, Germany and France	Greater transparency Tailored rules for different PSBs Possibility to own IP rights	Terms of trade may pose risks of consolidation in the production sector Typically, applicable only to PSBs

4.2. Impacts resulting from contractual practices involving transfers of rights from audiovisual producers to streamers/broadcasters

This chapter summarises the effects of financing models where streamers and, to a lesser degree, broadcasters retain all or most of the rights. It focuses on analysing the impact of these contractual practices on producers and the sustainability of the audiovisual industry.

The analysis based on the interviews conducted shows that global streamers, as well as private broadcasters and, in some cases, PSBs employ the commissioning model for financing in which they own all or most of the rights for TV fiction productions. This puts audiovisual producers in a weak bargaining position, and they are typically unable to negotiate more favourable contractual arrangements. The interviews with producers supported the European Media Industry Outlook's findings, indicating a tendency to include the transfer of all IP rights in their contracts, particularly towards non-EU streamers.

As presented in Subchapter 4.1.3., some global streamers interviewed for this study reported that there has been a shift in the past two to three years towards financing models where they share more risks and rights with audiovisual producers or other co-financiers in the EU. This shift, as explained by the interviewees, is predominantly driven by challenging global market conditions. However, most of the audiovisual producers interviewed highlighted that the most common financing model used when working with global

streamers is still the commissioning model, in which the commissioner holds all or most of the rights.

Some of the private broadcasters interviewed also use the commissioning model for audiovisual works, with the key difference being their attempt to sell exploitation rights to foreign territories to recoup their investment. Most global streamers and private broadcasters confirm that the commissioning model, where they retain all or most of the rights, is predominantly used for TV fiction series.

Impacts of contractual practices on producers

This study has identified a high level of diversity in the contractual practices employed by commissioners (global streamers and broadcasters) across different Member States. The landscape is characterised not only by diverse contractual practices but also by changes regarding the financing models preferred by broadcasters/streamers.

Based on the analysis, it is apparent that producers face challenges in maximising the value of IP rights through ownership and exploitation. In some Member States, audiovisual producers are in a more vulnerable position must operate under financing models that deprive them of owning rights, particularly in the absence of protective policy mechanisms. Almost all interviewed producers said that they would be interested in owning IP rights to the audiovisual works they produce to secure the meaningful and continuing value of the asset. There are various factors that influence a producer's choice of working under models where rights ownership is held by the streamer or broadcaster. These factors range from the small number of commissioners to the limited investment power of those commissioners that prefer financing through the purchase of exploitation rights.

Other factors, such as restricted access to policy mechanisms and bank loans in some Member States, also contribute to making audiovisual producers more vulnerable in negotiations with powerful financiers such as global streamers. Based on the interviews, we have summarised a number of key challenges related to contractual practices that have an impact on audiovisual producers.

Challenges arising from not owning rights for future exploitation. During periods of heightened uncertainty, audiovisual producers face a critical challenge when they cannot own and exploit rights, even in contractual arrangements where they are applicants and bring funding from production incentives. This situation is challenging because, under the financing model for commissioned productions, in some cases, the commissioners hold all rights, even though they do not cover the entire budget because of contributions from tax incentives. Consequently, producers with limited bargaining power, aiming merely to secure commissions, often have no choice but to accept these terms. Producers claim that the long-term impact of working under the commissioning model hinders their ability to build strong asset bases and makes their company more vulnerable and dependent on production fees as their only source of income. Without having a catalogue of rights, audiovisual producers have limited ability to invest in the development of new audiovisual works.

Challenges related to long licensing periods, share of rights and revenues. The challenge with long term licensing agreements, recognised in the European Media Industry Outlook Report (2023), is also confirmed by our findings. As discussed in Subchapter 4.1.3. in some Member States, global streamers work with long licensing periods for VOD rights, which undermines the ability of producers to capitalise on assets based on the ownership of free TV rights. Secondly, some global streamers practice shorter exclusive licensing periods as trials. Based on the success of the audiovisual work, they may decide to extend the licence for additional periods or to other territories. Renegotiating broader rights can be

complex and may not always result in favourable terms for the producers because typically global streamers have leverage in negotiations. This practice can create uncertainty for producers regarding the long-term revenue potential.

Challenges associated with owning derivative and merchandise rights. Under the commissioning model, audiovisual producers often do not own derivative and merchandise rights, even when they financed the development. A global streamer pointed out that this was a choice made by some producers that are unwilling to take on risk. In cases where the broadcaster/streamer financed the development, they would own these rights. Some producers noted that in contracts with some streamers the possibility of a second season is not guaranteed, but included as an option. In some cases, the deal might include a right of first look or right of last refusal for additional seasons. Global streamers and broadcasters, however, stated that it makes sense if the first season is successful to produce a second season with the same audiovisual producer. In two cases, interviewed audiovisual producers stated that, in a deal with a global streamer, they initially owned derivative rights for the first season. However, they lost those rights when the deal transitioned into a commissioning model for the second season. The uncertainty regarding derivative works directly impacts audiovisual producers because it deprives them of the possibility of future revenue in the case of successful audiovisual works. Some producers acknowledged that these deals have negative consequences for authors and performers that are deprived of future revenues.

Challenges related to the turnaround of audiovisual projects. A relevant question raised by an umbrella organisation representing independent producers and some producers interviewed concerns the ability of producers to generate revenue by moving their audiovisual work to another commissioner if the original commissioner does not greenlight the project after the development or subsequent production of series. Some producers reported in the interviews that they had successfully negotiated project turnarounds with some commissioners. However, other producers said that they faced challenges related to the question of the turnaround of audiovisual project. In some cases, there are long waiting periods, which impacts the producer's ability to try and maximise the value of rights.

Table 18: **Impact on producers of challenges arising from contractual practices**

Challenges for producers arising from contractual practices	Type of production business model	Specific challenges	Impact on producers
Challenges arising from producers not owning rights for future exploitation	Commissioning business model	Rights owned by the commissioner, even though the commissioner does not cover the entire budget, and the producer contributes funding from tax incentives. The development funding of producers is not considered as part of their investment in production. Broadcasters/streamers can sell audiovisual work to third parties.	Limited ability to build catalogue of rights. Inability to have revenue and invest upfront in the development of new projects. Producers struggling with long-term profitability. Vulnerability to market downturns and economic pressures.
Challenges related to long licensing periods, share of rights and revenues	Co-production and licensing business model	Long licensing periods for VOD rights that deprive producers of the value of other rights (free TV rights). Long licensing periods with streamers leaving linear rights to producers without the catch-up rights. Buying of VOD rights for limited time and territories as a trial and later broadening the scope of rights.	Limited long-term revenue potential because the rights are locked-in with long licensing periods. Limited ability to sell exploitation rights to broadcasters as they are interested in exploiting both linear and catch-up rights. Missing out on upfront revenues and limited earnings.
Challenges associated with owning derivative and merchandise rights	Commissioning business model	Buying derivative and merchandise rights after a successful first season under a co-production or licensing business model.	Limited possibilities to have future revenues based on derivative and format rights.

Challenges for producers arising from contractual practices	Type of production business model	Specific challenges	Impact on producers
Challenges related to the turnaround of audiovisual projects	Commissioning business model	Producers lack bargaining power to negotiate the turnaround of projects and long waiting periods.	Limited ability of producers to develop the audiovisual work and try and maximise the value of the rights.

Impacts of contractual practices on industry sustainability

The overall health of audiovisual industries in the EU could be affected if producers are not adequately remunerated or cannot sustainably manage their companies because of unfavourable rights agreements with streamers/broadcasters. This could lead to fewer independent audiovisual productions and reduce diversity in content creation. Most producers interviewed indicated that contractual arrangements preventing them from owning and exploiting IP rights directly impact not only their company's sustainability but also that of the overall industry. Most of the PSBs and private broadcasters indicated that market volatility, with increased production costs for TV fiction, has impacted their investment capacity.

The IP of European works no longer being owned by European entities. Some producers and European broadcasters expressed concerns that adopting the commissioning model by US-owned global companies has resulted in the IP of European works no longer being owned by European entities. Some producers explained that they had been forced to sell their businesses and could no longer operate independently. Overall, the lack of a sufficient and comprehensive analysis regarding the extent of the impact of IP ownership by US and other non-European companies is a challenge. Greater data transparency from global streamers and broadcasters regarding audiovisual productions would help build a stronger evidence base concerning the impact level.

Impact on audiovisual content diversity. The dominance of global streamers and broadcasters in holding rights could lead to a reduction in market diversity and reduce the variety of audiovisual content available to EU consumers. Ownership or co-ownership of IP rights encourages producers to sell and distribute the audiovisual work commercially across various windows and territories, thereby reaching a larger audience in the EU.

Impact on availability and full exploitation of European audiovisual works. Some challenges in the contractual practices identified in the interviews have an impact on the availability and full exploitation of European audiovisual works. For example, some challenges associated with turnaround provisions and long licensing periods have an impact on the potential for full exploitation of audiovisual works.

Impact on the diversity of production companies. New and small independent production companies find it challenging to secure deals in genres such as high-end fiction, which typically see increased competition between large established production companies and major independent producers. Most of the producers interviewed recognised that small independent production companies have a weaker bargaining position vis-à-vis financiers.

4.3. Conclusions

The majority of producers interviewed explained that the commissioning model, where commissioners retain all or most of the rights, is still widely used by global streamers and private broadcasters in contractual arrangements for TV fiction. The producers interviewed reported that they are sometimes deprived of rights ownership even when they have partially or totally developed the work themselves. All interviewed audiovisual producers and the organisations representing them emphasised that building a catalogue of rights is crucial for the future revenue and sustainability of their businesses. Therefore, the commissioning model, as discussed in previous chapters, **directly impacts the growth prospects and sustainability of audiovisual producers**. Small independent producers are in a particularly vulnerable position.

Nevertheless, some global streamers interviewed for this study indicated they have **shifted towards financing models that allow EU audiovisual producers to share risks and rights.** In times of increased uncertainty in the global audiovisual landscape, licensing and co-productions as financing models are more capital-efficient approaches. These models allow global streamers to invest less upfront capital than when purchasing all rights.

Overall, the findings indicate that various financing models coexist, with no conclusive evidence pointing to the predominance of one model. The interviews with PSBs revealed that they primarily rely on licensing and co-production models, sometimes shaped by regulatory requirements.

As discussed in Subchapter 4.1.2., the market trends in Member States impact contractual practices between producers and broadcasters/streamers differently, depending on the context. Policy-related challenges, such as the **lack of protective mechanisms,** place producers in some Member States in a weaker bargaining position, particularly when negotiating with powerful financiers that have the capital and resources to influence contractual terms. **The lack of commissioners in certain markets,** as reported by some producers interviewed**,** leaves producers in a weaker position during negotiations with global streamers, as they often have no other options. Producers in some Member States explained that they faced cashflow challenges related to the difficulty in obtaining financing from banks and delays in collecting tax incentives, further reducing their bargaining power.

As discussed in Subchapter 4.2.2., the fair exploitation of rights by producers can be limited under different financing models. The empirical research based on the interviews also identified challenges arising from the contractual practices related to choice of law and jurisdiction, the lack of bargaining power of producers to negotiate turnaround clauses, as well as limited possibilities to receive future revenues based on derivative and format rights (see Subchapters 4.1.4. and 4.2.1.). Under the co-production and licensing model, long licensing periods present a challenge. Overall, producers reported a lack of transparency regarding data on the exploitation of audiovisual works by global streamers.

A significant challenge identified in the interviews with audiovisual producers and broadcasters/streamers is that production incentives or development funding are sometimes not recognised as the producer's investment in the production. Instead, in contractual deals under the commissioning model, the production incentives where producers are applicants are sometimes included in the overall budget.

Improving the ability of producers to develop assets with long-term value and fully exploit audiovisual works is crucial for the sustainability and profitability of their companies. It is also important for the overall sustainability of audiovisual industries in the EU.

This part of the study has identified best industry practices that may be considered as ways of supporting these objectives.

Table 19: Best industry practices

Mechanism	Impact
Policy instruments that support independent audiovisual producers to enable them to exploit and own rights (criteria to define independent producers, criteria under funding schemes for screen agencies, tax incentives, windowing rules, investment obligations for streamers/broadcasters, terms of trade and professional agreements).	Ensure contracts enable producers, especially those that are independent, to have rights ownership and ensure long-term rights exploitation and effective implementation of policy instruments in practice.
Conditions for audiovisual producers to be able to raise bank loans to manage cashflow during the production cycle.	Improve the bargaining power of producers in contractual negotiations and reduce funding shortfalls for gap financing.
Facilitate international co-productions (through public funding mechanisms and co-production agreements, as well as film festivals and industry conferences, and as part of the strategy for improving the international circulation of audiovisual works).	Improve opportunities for producers to have access to financiers and maximise the value of rights.
Cultivate market environment where audiovisual producers can rely on different types of commissioners.	Increase the variety of commissioners to reduce the dependence of producers on certain financiers.
Capacity building and legal support for audiovisual producers through training and public support mechanisms.	Create market conditions that foster a diversity of production companies, where the valuable role of small independent companies is recognised, allowing them to co-exist with large ‘indies’ and consolidated production companies.
Ensure that audiovisual producers have guaranteed access to timely and comprehensive data on the results of the exploitation of audiovisual works under all financing models.	Improve the bargaining power of audiovisual producers in negotiations with broadcasters/streamers and give them the possibility to make informed decisions.

Based on the interviews and desk research, a key difference in the contractual practices in different EU Member States, confirmed by both interviewed audiovisual producers and broadcasters/streamers, is that producers can secure more rights when public financing is involved, thereby guaranteeing them certain rights, or when other policies are in place to protect their position in the recoupment waterfall. The analysis presented in the previous chapters shows that provisions that enable audiovisual producers, especially independent producers, to enjoy a stronger negotiating position and maximise the benefits of IP and

future revenues may be included in public support measures by screen agencies, production incentives, investment obligations and terms of trade with the PSBs. However, in some cases, as discussed earlier, producers do not obtain any rights as a result of applying for production incentives. Instead, financiers obtain all the rights, even when they do not cover all the costs. This points to the need for policy measures to set rules to ensure effective implementation.

Given that production incentives are widely used by audiovisual producers across the EU, especially for financing ambitious productions with global appeal, Member States could consider ways to support independent producers via the funding criteria for such incentives. The examples of conditions in the tax incentive schemes in Italy and Austria, which were discussed in 4.1.5., contain elements that could be considered by Member States. **There may be a need to strengthen the sustainability and IP assets of production companies** when the audiovisual works are publicly funded**.** However, given the current context where most global streamers and powerful financiers are becoming increasingly risk-averse, it can be expected that Member States will seek to maintain or introduce tax incentive policies that offer flexibility to financiers and attract investment in runaway and domestic productions. Therefore, alongside pursuing policy solutions, it is essential to enhance awareness among national-level policymakers and industry stakeholders about the importance of IP rights for the sustainability of audiovisual producers, the diversity of European works and the overall health of the audiovisual industry in Europe.

As illustrated above, other mechanisms, such as creating conditions for audiovisual producers to be able to raise bank loans to manage cashflow during the production cycle and facilitating international co-productions for both films and series, could be used to improve the bargaining power of producers. In some Member States, capacity building and legal support for audiovisual producers are essential to support the coexistence of small independent production companies with large independents and consolidated producers that operate on a global scale. Finally, it is important to ensure that streamers and broadcasters provide audiovisual producers with guaranteed access to timely and comprehensive data on the results of the exploitation of audiovisual works under all production business models. Data transparency helps producers understand the success of their content and audience tastes. It also helps them make informed decisions about fair remuneration and strengthens their bargaining position in future negotiations.

5. Rules applicable to buy-outs and similar practices

First, this chapter identifies and analyses the rules applicable to rights transfers agreements, including buy-out practices, at international, EU and national levels (Subchapter 5.1.), distinguishing between rules that regulate the position of authors and performers (Subchapter 5.1.1.) and rules that regulate the position of audiovisual producers (Subchapter 5.1.2.). Secondly, analysis of choice of law and jurisdiction clauses in rights transfer agreements is discussed in Subchapter 5.2.

5.1. Rules applicable to contractual practices, involving rights transfers, including buy-out practices

5.1.1. Rules applicable to authors and performers in different sectors

This chapter presents and discusses the results of the desk research on the rules at EU, international and national levels (in all 27 Member States) concerning normative mechanisms that address rights transfers (Subchapter 5.1.1.1.), mechanisms that address remuneration (Subchapter 5.1.1.2.), mechanisms that address the imbalances in bargaining

power (Subchapter 5.1.1.3.) and mechanisms that facilitate the implementation and enforcement of rules through collective management (Subchapter 5.1.1.4.).

All chapters follow a uniform structure, first discussing rules at EU and international levels, followed by national rules, highlighting potential challenges and legal gaps, and a short concluding chapter.

5.1.1.1. Mechanisms addressing rights transfers

The analysis of contractual practices in Chapter 3 shows that authors/performers transfer their rights to producers or streamers/broadcasters either through presumptions of the rights transfer (such as rights transfers in commissioning or employment contracts or the transfer of certain exploitation rights from authors/performers to audiovisual producers) or through contractual negotiation. As explained in Subchapter 3.2.1., the transfers where authors/performers individually negotiate the rights transfer often take the form of buy-out contracts. Such contracts typically require a transfer of all exploitation rights, both present and future, from authors/performers to producers or streamers/broadcasters.

Notwithstanding the **principle of contractual freedom**, which allows individuals or entities to freely negotiate and agree the terms of their contracts, including rights transfer agreements, international, EU and national copyright laws provide a legal framework that seeks to balance the interests of creators, users and society at large.

Copyright law provides authors with a set of distinctive **rights** to safeguard their protected works or other subject matter. **Related rights** are also granted to certain categories of rightholders that play an important role in the creation of the protected works or other subject matter (e.g. performers, phonogram and audiovisual producers). Copyright and related rights have both an **economic** and a **moral** dimension.

Economic rights (also called **exploitation rights**) grant authors and performers the authority to control how their works are used, including reproduction, distribution and communication to the public. They are also entitled to receive a financial remuneration for such use. International and EU law provide that economic rights may take the form of **exclusive rights** which allow their rightholders to authorise or prohibit a particular use or uses of the protected subject matter. On the other hand, **moral rights** encompass the entitlement of authors and performers to claim the right to attribution and protect their integrity.

Economic or exploitation rights can however be transferred in several ways through:

- **A transfer of the ownership of rights**, where all or some of the rights are transferred to a beneficiary who becomes the new owner;

- **Licensing**, which allows rightholders to grant to a third party the right to use their protected subject matter. The rightholder retains the ownership but authorises a third party to use and exploit the protected works or other subject matter in a particular way or in an exclusive or non-exclusive way; or

- **Assignment**, where the rightholders retain ownership of the rights but grant a counterparty third party (for example, a CMO) the right to manage the rights on their behalf. While the assignor remains the rightholder, the third party to which the rights have been assigned (i.e. the assignee) is exclusively entitled to manage and also to grant further licences of those rights on behalf of the assignor.

While economic rights can be transferred, allowing the new holder to exploit the work, moral rights generally remain with the original creator, ensuring that they retain a degree of control and protection over the personal and reputational aspects of their work. Although the research on contractual practices presented in Chapter 3 shows that authors and performers are often asked to waive their moral rights (e.g. in the case of the audiovisual sector, visual rights sector), from a legal perspective such a transfer is invalid, since in most EU Member States moral rights cannot be waived.[277]

Rules at international and/or EU level

The rights transfer takes place within a complex framework of international conventions, EU directives and national laws.

At **supranational level**, conventions are agreements between contracting States that set minimum standards for the protection of copyright and related rights. Their provisions cannot be directly enforced unless they have been incorporated into the national legal systems of the Member States. A review of the main international conventions did not reveal many mechanisms which, if implemented at national level, could help authors/performers resist buy-out contracts requiring a full transfer of their rights.

Provisions on moral rights are an example of protective mechanisms. For example, the World Intellectual Property Organization (WIPO) **Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),**[278] which was ratified by EU Member States, introduces the concept of moral rights, which protects the authors' right to claim authorship and to object to any derogatory treatment of their work that would harm their honour or reputation[279]. The **World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (the WPPT)**[280] regulates the protection of moral rights for performers, while the **Beijing Treaty on Audiovisual Performances (the Beijing Treaty)**[281] grants moral rights to audiovisual performers, i.e. the right to claim, to be identified as the performer, and to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation[282]. These provisions make clear that moral rights are inalienable and remain with the author even if economic rights are transferred. Contractual practices that also require the transfer of moral rights are therefore contrary to these international standards.

Several international conventions contain **provisions on the term of protection**. For example, Article 7(1) of the Berne Convention limits the term of protection to 50 years after the death of the author; Article 14 of the **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)**[283] provides for the term of protection of 20 years for performers; Article 14 of the Beijing Convention provides that the term of protection will last, at least, until the end of a period of 50 years calculated from the end of the year in which the performance was fixed. However, the provisions limiting the duration of protection of copyright and related rights do

[277] Carre S., Le Cam S., Macrez F., 'Buy-out contracts imposed by platforms in the cultural and creative sector', European Parliament, 2023, pp. 51-52.
[278] Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) of 9 September 1886, as last amended on 28 September 1979, available at: https://www.wipo.int/wipolex/en/treaties/textdetails/12214.
[279] Article 6bis of the Berne Convention.
[280] The WIPO Performances and Phonograms Treaty (WPPT), 20 December 1996, entered into force on 20 May 2002, available at: https://www.wipo.int/wipolex/en/treaties/textdetails/12743.
[281] The Beijing Treaty on Audiovisual Performances (the Beijing Treaty), 24 June 2012, entered into force on 28 April 2020, available at: https://www.wipo.int/wipolex/en/treaties/textdetails/12213.
[282] Article 5 of the Beijing Treaty.
[283] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention), signed on 26 October 1961, entered into force on 18 May 1964, available at: https://www.wipo.int/wipolex/en/treaties/textdetails/12656.

not deal directly with buy-out clauses, but refer only to the specific period during which copyright protection exists.

Apart from the measures mentioned above, international conventions **do not regulate the contractual transfer of exploitation rights**, for example, by providing rules such as contractual formalities or mechanisms that impede the transferability of certain rights. This is left to national laws. For example, the Berne Convention only regulates the rights of authors of contributions (e.g. screenwriters, composers) when their work is incorporated in a cinematographic or audiovisual production[284]. The WIPO Copyright Treaty (the WCT)[285] supplements the Berne Convention by establishing additional exclusive rights and by requiring Contracting States to adopt measures for authors and performers with respect to digital rights management, but it does not provide for rules on the transfer of such rights. The Rome Convention and the WPPT focus specifically on the rights and protection of performers, again without specifying rights transfer rules, which are left to national law. Finally, the World Trade Organization (WTO)'s Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement),[286] which addresses the mechanisms for the protection of IP rights without derogating from the rules of the Berne and Rome conventions[287], also does not provide any relevant mechanisms to fight buy-out clauses.

At EU level, **several exploitation rights are harmonised**: for example, **Directive 2001/29/EC (InfoSoc Directive)**[288] harmonises the rights of authors and performers, including the right of reproduction, communication to the public and distribution of their protected works and subject matter[289]. Recital 30 clarifies that these rights can be further transferred, i.e. that authors/performers can transfer the ownership of their rights, assign these rights to CMOs or grant licences. **Directive 2006/115/EC (Rental and Lending Directive)**[290] harmonises the legal situation regarding rental right, lending right and certain related rights, in order to provide a higher level of protection for authors and performers. Rental and lending rights are in principle exclusive rights, which may be transferred either by transfer of ownership, assignment to a CMO or by granting a licence[291]. Moral rights are not the object of harmonisation at EU level.

As is the case at international level, EU law contains rules on the duration of copyright protection. While the rule of no formalities means that rights are acquired automatically upon the creation of a protected work or other subject matter, the term of protection is limited. **Directive 2006/116/EC (Copyright Term Directive)**[292] as amended by **Directive 2011/77/EU (Copyright Term Extension Directive)**[293] harmonises the duration of protection for copyright in EU at 70 years after the death of the author or 70 years after the

[284] Article 14bis of the Berne Convention.
[285] The WCT, 20 December 1996, entered into force on 6 March 2002, available at: https://www.wipo.int/wipolex/en/treaties/textdetails/12740.
[286] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), as amended on 23 January 2017, available at: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.
[287] Articles 9 and 14(6) of the TRIPS Agreement.
[288] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029.
[289] Articles 2 – 4 of the InfoSoc Directive.
[290] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28–35, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32006L0115.
[291] Article 3 of the Rental and Lending Directive.
[292] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12–18, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116.
[293] 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, 11.10.2011, p. 1–5, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0077.

work is lawfully made available to the public, and for related rights at 50 years after the event triggering the term, such as the date of the performance[294]. However, a longer term of protection is granted for fixation on a phonogram, namely 70 years after its publication. This means that the protective mechanisms available to authors/performers to combat buy-out practices, most of which are discussed in the national chapter below, apply only during the term of copyright protection.

Overall, EU and/or international instruments concerning copyright and related rights do not prohibit the transfer of ownership of rights (except for some international conventions which provide that moral rights are inalienable) or the granting of a licence.

Details of the rules on rights transfers at international and EU levels are provided in the table in Annex III.

Going beyond copyright law, the **general rules and principles of contract law**, including the rules on unfair contractual terms and practices can also provide a certain level of protection in the case of the transfer of copyright and related rights.

One of the overarching principles of contract law, mentioned above, is the principle of contractual freedom,[295] which includes not only the freedom to enter into a contractual relationship, but also the freedom to determine the content of such a relationship.[296] This freedom is limited by other general rules and principles of contract law (see also Subchapter 5.1.2. below) and, in relationships where one party is considered to be in a weaker bargaining position, such as in the case of the exploitation contracts of authors and performers, also by **unfair contractual terms** applicable to both Business-to-Business (B2B) and Business-to-Consumer (B2C) contracts. So far, harmonisation at EU level covers only B2C situations,[297] which means that national legal frameworks remain the main source of law for B2B situations.

Rules at national level

Within the framework of the international conventions and subject to compliance with EU law, Member States may introduce further measures with regard to rights transfers. The **analysis of the legal frameworks in the 27 Member States** shows that this is the case in some Member States, which provide for additional measures that could help authors/performers to exploit their protected work or subject matter in the case of buy-out contracts with producers or streamers/broadcasters. The report first discusses national copyright provisions intended to help authors and performers across sectors. Both formal requirements for rights transfers and rules on the material scope of the rights transfer are discussed. It then discusses the sectoral rules in copyright laws and concludes with an analysis of general contract law rules and the rules applicable to the commissioning relationship.[298]

Provisions in national copyright laws, similar to the DSM provisions concerning remuneration, are based on the recognition that authors and performers tend to be the **weaker contracting parties** when they grant a licence or transfer their rights and should

[294] Articles 1 and 3 of the Copyright Term Directive.
[295] See for example Article 18(2) of the DSM Directive, Recital 30 of the InfoSoc Directive as well as national civil law codes.
[296] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), pp. 188-189, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.
[297] The protection against unfair terms is however limited to the assessment of the unfairness and does not extend to the question on the adequacy of the price. See Article 4(2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[298] For a similar discussion, see Professor Vanherpe's recent book, where she also proposes several options for further harmonising the ownership of rights and the mechanisms for limiting rights transfers.

therefore benefit from protective measures, notwithstanding the general principle of contractual freedom.

Formal requirements in national copyright laws

Several Member States have introduced **formal requirements** for rights transfers. Scholars argue that the requirement of a written form for contracts, especially as a condition for the validity of a contract and not a mere condition of proof that a contract has been concluded, leads to increased transparency and legal certainty regarding the scope of rights transferred and the exploitation and remuneration modalities.[299] They can also facilitate easier enforcement of the contract.[300]

The fact that a written contract is a **requirement** for the rights transfer to be **valid** means that in the absence of such a contract, buy-out contracts can be deemed non-binding.[301] For instance, the transfer of IP rights, including copyright, can only be valid if done **in writing,** in **Cyprus,**[302] **Greece,**[303] **Croatia,**[304] **Hungary,**[305] **Ireland,**[306] **Luxembourg,**[307] **Malta,**[308] the **Netherlands,**[309] and **Poland.**[310] In **Spain**, the rights transfer must also be formalised in writing, but the contract will not be declared void outright, only if the transferee fails to comply with the written request after being formally requested to do so.[311] **Portuguese** law sets even more stringent formal rules, stating that contracts for the partial transfer of copyright must be set out in a written document with notarised signatures, under penalty of nullity, whereas the total and definitive transfer of the copyright can only be implemented by public deed, identifying the work and indicating the respective price, under penalty of nullity.

Countries where the exploitation contracts can be concluded orally and where a written instrument is only proof that a contract has been concluded offer less protection in the case of buy-out contracts. In **Belgium**, even if the rights transfer can be concluded orally, the transferee needs to prove that a written agreement has been concluded with the author/performer.[312] In **Lithuania**, rights transfer agreements must be concluded in writing

[299] Strowel, A. Vanbrabant, B., 'Copyright Licensing: A European View' in Jacques de Werra (ed), Research Handbook on Intellectual Property Licensing (Research Handbooks in Intellectual Property, Edward Elgar Publishing 2013), p. 38.
[300] Dusollier, S., 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' [2018] Colum J L & Arts, p. 438.
[301] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), pp. 236-237, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.
[302] Article 12(5) of the Intellectual Property Right and Related Rights Law of 1976 (59/1976) (Copyright Law), available at: https://www.cylaw.org/nomoi/indexes/1976_1_59.html Law 59/1976.
[303] Article 14 of the Law 2121/1993 on Intellectual Property, Related Rights and Cultural Issues (Copyright Law).
[304] An exception to this rule exists, as contracts can also be concluded orally under special circumstances, as based on general contract law. See Articles 65 and 66 of the Copyright and Related Rights Act (CRRA), OG 111/2021, available at: https://www.dziv.hr/files/file/zastita/zakon_autor_2021_ENG.pdf.
[305] See Article 45 Copyright Act (Act LXVVI/1999), available at: https://net.jogtar.hu/jogszabaly?docid=99900076.tv. However, this rule applies with some exceptions for works made available by the author through electronic means, as well as for works published in a daily newspaper or periodicals as per case BH1992.525; Legf. Bír. Pf. IV. 20 062/1992. In Hungary, the written form requirement has an *ad validitatem* effect as confirmed by various court decisions (e.g. Decision no. 4.P.20.188/2010/7 of the County Court of Győr-Moson-Sopron).
[306] Section 120(3) Copyright and Related Rights Act 2000.
[307] Articles 12 and 49 of the Law of 18 April 2001 on copyright, neighbouring rights and databases, Mémorial A n° 158/2022, available at: http://data.legilux.public.lu/eli/etat/leg/loi/2001/04/18/n2.
[308] Article 24(4) Copyright Act (Chapter 415 of the Laws of Malta), available at: https://legislation.mt/eli/cap/415/eng.
[309] Article 2(3) of the Copyright Act and Article 9(2) of the Neighbouring Rights Act.
[310] Article 53 Copyright Law.
[311] Article 45 Intellectual Property Law. See Royal Legislative Decree 1/1996, of 12 April 1996, approving the revised text of the Intellectual Property Law, regularising, clarifying and harmonising the legal provisions in force on the matter, available at: https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930.
[312] Article XI. 167(1) of the Economic Law Code of 28 February 2013 (*Code de droit économique*), available at: https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013022819.

(except in the case of those covering the publication of works in periodical publications).[313] Non-compliance with the requirement for an agreement in written form does not invalidate a transaction but deprives the parties of the right to rely on the testimony of witnesses to prove the fact that the transaction has been concluded or that it has been performed in case of a court dispute.[314] In **Slovenia**, if contractual relationships involving a rights transfer are not concluded in writing,[315] any controversial or unclear stipulations is interpreted in favour of the author and performer.[316]

Material requirements in copyright laws

In addition to formal requirements, some Member States impose **limitations or restrictions** with respect to the material scope of rights transferred. These limitations may take the form of: (i) prohibition of a rights transfer; (ii) temporal and territorial limitations; (iii) limitations with respect to the creation of future works and regarding additional methods of exploitation unknown at the moment of conclusion of the rights transfer; and (iv) other mechanisms that limit the scope of the rights transferred in the case of buy-out contracts (e.g. requirement to specify the rights transferred and the principle of purpose limitation).

i. Prohibition of rights transfers

Although the analysis of contractual practices in Chapter 3 shows that authors and performers are in practice often forced to waive **moral rights,** moral rights are independent of the author's economic rights, and, even after the transfer of the economic rights, the author retains them according the Berne Convention. However, the study has found some exceptions to this principle in national laws. One exception is **Finland**, where Section 3 of the Copyright Act provides that moral rights may be waived in respect of a use which is limited in nature and in scope. Another exception is **Ireland**, where moral rights may be waived by performers, but only where the waiver is made in writing and signed by the performer.[317] In **the Netherlands**, authors can waive certain moral rights, such as the right to oppose disclosure of the work without mentioning their name as authors, the right to oppose the disclosure of the work under another name or the change in the name, and the right to oppose the change in the name of the work, if certain conditions are fulfilled.[318]

With regard to **exploitation rights**, the stakeholder consultation shows that contracts within the scope of the study often require the transfer of ownership of rights. While most countries allow all types of rights transfers under the principle of freedom of contract, **a few of them provide for prohibitions on the transfer of the ownership of rights** (e.g. Austria, Germany and Hungary). Such **narrower regimes** allow authors to object to certain transfers of their rights, such as in the case of buy-outs.

[313] Article 42(1) of the Law on Copyright and Related Rights (*Lietuvos Respublikos autorių teisių ir gretutinių teisių apsaugos įstatymas. Valstybės žinios),* 2003, available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.81676/asr.
[314] Article 1.93(1) and 1.93(2) of the Civil Code (*Lietuvos Respublikos civilinis kodeksas. Valstybės žinios*), 2000, available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.107687/asr.
[315] Article 80(1) Copyright and Related Rights Act (*Zakon o avtorski in sorodnih pravicah - ZASP*), available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO403.
[316] Article 80(2) ZASP.
[317] Section 316 of the Copyright and Related Rights Act 2000, available at: https://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/html.
[318] Article 25(3) Copyright Act.

In **Austria**, according to Section 23 of the Austrian Copyright Act (*UrhG*)[319] the ownership of rights can only be fully transferred by inheritance or testament. Thus, for commercial matters, such as in the case of exploitation contracts, the original rightholder must rely on exclusive (*Werknutzungsrecht*) or non-exclusive licences (*Werknutzungsbewilligung*) to allow others to exploit the protected work or performance.[320] It should be noted that in Austria the duration of a licensing contract can also be unlimited in time, which has a similar de facto effect to the transfer of ownership of the rights. Similarly, in **Hungary**, exploitation rights cannot be transferred or waived, except by inheritance and by licensing contracts, which can be either exclusive or non-exclusive.[321] However, these restrictions do not apply to performers, whose exploitation rights are freely transferable. It should be noted that national laws might use different names to describe contracts on the transfer of the ownership of rights and/or licensing contracts, making the comparison difficult.

Prohibition of the transfer of the ownership of rights – German example

A general prohibition on the outright transfer of copyright ownership as a whole also exists under **German** law (Section 29 UrhG[322]), in accordance with the long tradition of German copyright law as a 'monist' system that considers exploitation rights and moral rights to be inextricably intertwined. The provision states that copyright ownership is not transferable as such, unless it is transferred in the execution of a testamentary disposition or to co-heirs as part of the distribution of an estate. The prohibition of the transfer of the ownership of rights only applies to the rights of authors in their works, not to the exploitation rights of performers.[323] Section 29(2) UrhG provides that '*the granting of rights of use,*[324] *contractual authorisations and agreements based on exploitation rights, as well as contracts on the moral rights of authors as regulated under Section 39 are permitted'.*[325] Section 31(1) UrhG provides that the '*author may grant to another the right to use the work in a particular manner or in any manner (right of use). A right of use may be granted as a non-exclusive right or as an exclusive right, and may be limited in respect of place, time or content'.* Courts consider the granting of authors' rights (i.e. licensing) as a partial transfer of copyright and not a mere obligation.[326]

ii. Temporal and territorial limitations

Provisions on the **temporal and territorial scope** of rights transfers are in principle subject to the agreement of the parties. A review of national copyright rules has however identified certain measures that prevent the transfer of authors/performers' rights globally and in perpetuity.

[319] *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz* or *UrhG*), StF: BGBl. N°. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.) as last amended by BGBl. I N°. 182/2023, available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001848.

[320] Section 24 UrhG.

[321] Article 9 Copyright Act in connection with Articles 16 and 17. Section 17 specifies the types of uses that can be included in a licence contract and include: reproduction, distribution, public performance, communication to the public by broadcasting or in any other manner, retransmission of the broadcast work to the public with the involvement of an organisation other than the original one, adaptation and exhibition.

[322] *Gesetz über Urheberrecht und verwandte Schutzrechte – UrhG* (Copyright Act), available at: https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.

[323] Section 79(1) and 79(2) UrhG.

[324] Section 31 UrhG.

[325] Section 39 UrhG provides that the holder of a right of use is not permitted to alter the work, its title or designation of authorship, unless otherwise agreed. Alterations to the work and its title to which the author cannot refuse consent based on the principles of good faith are permitted.

[326] BGH ZUM 2012, 782 – M2Trade; Peukert, Urheberrecht, 19th ed. 2023, Section 36(11) et seq.

In principle, **licensing contracts should determine the duration**, which **in some countries cannot be unlimited** (e.g. Lithuania). However, the approaches adopted at Member State level across the EU are diverse. Some jurisdictions provide for statutory limitations, and some establish a presumption in the absence of a choice by the contracting parties. With respect to the latter, in **Greece** the presumption is that, unless otherwise agreed, the exploitation period is five years[327] and that the country in which the exploitation takes place is the country in which the rights transfer agreement was concluded.[328] A similar rule regarding both the territorial and the temporal scope is in place in **Spain,**[329] **Poland**[330] and **Bulgaria.**[331] In **Czechia** and **Slovakia**, the licence is limited to the period of time customary for the given type of work and the type of use, but cannot exceed one year from the granting of the licence. Furthermore, a rebuttable presumption exists that that the territorial scope of the licence is limited to the territory of Czechia or Slovakia.[332] There is a similar presumption regarding national territory in **Lithuania**[333] and **Slovenia,**[334] while in **Latvia** the rules of the country in which the licence agreement was signed, or the licence was granted apply, unless agreed otherwise by the parties.[335]

iii. Limitations with respect to the creation of future works or unknown methods of exploitation

The stakeholder consultation in Chapter 3 revealed that certain buy-out contracts cover all future works and unknown methods of exploitation. Under the legislation of some Member States, such practices are however not permitted.

Several Member States (e.g. Croatia,[336] France,[337] Hungary,[338] Lithuania[339] and Spain[340]) prohibit a global transfer of rights in **future works or subject matter**, and therefore any such transfer is deemed **null and void**. Moreover, even in Member States where the transfer of future works and subject matter is allowed (e.g. Austria, Germany, Belgium and the Netherlands), there are rules to protect overly broad and unspecified rights transfers. For example, in **Germany**, the licence for the use of future works, which are not specified or are only referred to by type needs to be in writing.[341] Under **Belgian** law, rights transfers have to be limited, whether in time or with reference to a specific number of works.[342] In **the Netherlands**, the future work must be described in a sufficiently determinable manner[343] for the transfer to be valid.

In view of the risk that the exploitation of protected works or subject matter will increase in the future, leading to unfair contractual imbalances, several national laws **limit or completely prohibit contracts for unknown or unforeseeable exploitation activities**. **Belgium** prohibits any future methods of exploitation and requires all modes of exploitation

[327] Article 14(2) Copyright Law.
[328] Article 14(3) Copyright Law.
[329] Article 43 IPL.
[330] Article 66(1) Copyright Law.
[331] Bulgarian law contains a presumption that the transfer is valid for a period of three years (five for architectural works) and on the territory of the State of the user.
[332] Section 2376(3)(a) Czech Civil Code and Sections 67(3)(a) and 68 of the Slovak Civil Code.
[333] Article 40(2) and (3) Copyright Law.
[334] Article 75(1) ZASP.
[335] Article 45 Copyright Law (*Autortiesību likums*), available at: https://likumi.lv/ta/id/5138-autortiesibu-likums.
[336] Article 66 CRRA.
[337] Article L. 131-1 of the Intellectual Property Code (*Code de la propriété intellectuelle - IPC*), available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069414/.
[338] Article 44 Copyright Act.
[339] Article 38(3) Copyright Law.
[340] Article 43 IPL.
[341] Article 40(1) UrhG.
[342] Article XI.167(2) Economic Law Code.
[343] Book 3 Section 84(2) Dutch Civil Code.

to be expressly specified.[344] Such a prohibition also exists in some other countries such as **Lithuania**[345] and **Spain.**[346] In **Germany**, the rule that unknown types of uses are always invalid was repealed as of 1 January 2008 and replaced by a mandatory right to equitable remuneration for unknown types of uses.[347] Finally, in **France**, future methods of exploitation should be expressly stipulated and subject to proportional remuneration.[348]

iv. Other protective mechanisms

This chapter presents some further **protective mechanisms** beyond those mentioned above, that apply when authors/performers enter into exploitation contracts, including in the case of buy-outs.

For example, some national laws require that **copyright exploitation contracts must specify the rights transferred** to the entities involved in their exploitation or distribution, including the type of exclusive right(s) and the methods of exploitation that are covered by the contract. These provisions aim to increase transparency when rights transfer agreements are concluded. For example, in **Croatia**, the rights exploitation contract must at least specify the work it concerns, the manner of use, the remuneration for the use of the work or an explicit provision that the right of use will be exercised without remuneration, and the person authorised to use the copyright work.[349] In **Belgium**[350] and **France**,[351] the determination of the geographical scope and duration of the rights transfer must be specified. In **Estonia**, the information must include a description of the work (its format, volume and name of the work, etc.), type of licence agreement (non-exclusive or exclusive) and the right to grant a sub-licence, manner of use of the work and the territory where the work is to be used, the term of the author's contract and the term of commencement of the use of the work.[352] In **Lithuania**, exploitation contracts also need to contain several mandatory conditions, including methods of use of the work, type of licence, territory and term of use, remuneration, etc.[353]

Another protective measure, identified under **Austrian**, **Czech,**[354] **Greek**, **Hungarian,**[355] **German**, **Lithuanian**[356] and **Polish** law, is the **principle of purpose-limitation**. This principle limits the scope of rights transferred to what is necessary to fulfil the contract's purpose. In **Austria**, for example, if the respective agreement does not provide details on the types of uses of rights, the law foresees that only those rights which are necessary to facilitate the agreed purpose should be transferred (*Zweckübertragungsgrundsatz*).[357] However, since the purpose can be subject to interpretation, authors and performers can clarify in detail what exact rights should be transferred. A similar rule exists in **Germany**, where, in case of doubt, a copyright exploitation contract is to be interpreted to the effect that the author grants rights only to the extent required by the other party in light of the purpose of the contract as a whole.[358] In **Greece**, the general rule is that the rights transfer is limited to the extent and the means necessary to fulfil the purpose of the contract or

[344] Article XI.167(1) Economic Law Code.
[345] Article 38(3) Copyright Law.
[346] Article 43 IPL.
[347] Section 31a UrhG. The reasoning behind this was that this rule made comprehensive exploitation in new technical ways, in particular via the Internet, often practically impossible.
[348] Article L. 131-6 IPC.
[349] Articles 65 and 66 CRRA.
[350] Art. XI. 167(1) Economic Law Code.
[351] Article L. 212-11 IPC.
[352] Article 57 Copyright Act.
[353] Article 40(1) Copyright Law.
[354] Section 2376(1) and (2) Civil Code.
[355] Article 43 Copyright Act.
[356] Article 40(2) and (3) Copyright Law.
[357] Section 24c UrhG.
[358] Section 31(5) UrhG.

licence.[359] A specific provision, applicable only to the audiovisual sector, further provides that if an agreement between the author/performer and the producer does not cover certain rights, only the economic rights necessary for the exploitation of the audiovisual work in accordance with the purpose of the contract are transferred.[360] **Polish** law provides that if an agreement does not specify the form of use of a work, the work must be used in accordance with its nature and its intended use as well as customary practice.[361]

Lastly, **Dutch** law subjects the transfer of exclusive exploitation rights to an unwaivable **reasonableness test.**[362] This test provides that all clauses included in a transfer of ownership contract or in an exclusive licence contract that are unreasonably burdensome to the artist are to be sanctioned by relative nullity.

Sectoral rules in national copyright laws

While some Member States have chosen to apply horizontal copyright rules to all sectors - music, audiovisual, visual arts and publishing/literary works (examples include Belgium, Denmark, Finland, Ireland, Lithuania, Latvia, Malta, the Netherlands, Poland, Spain and Sweden), with only minor modifications for some of the creative industries, other analysed EU Member States have introduced sector-specific rules **for certain types of contracts** in addition to the general rules.

By virtue of **publishing contracts,** authors transfer to publishers the right to reproduce and distribute their works. In some countries **rules differ based on the type of publication** (e.g. press publications, periodicals, collective works). In **Italy**, two main types of publishing contracts exist[363] (i) a per edition contract, which gives the publisher the right to produce one or more editions within 20 years of receiving the work. Such a contract must specify the number of editions and copies, failing which it defaults to a single edition; and (ii) a term contract, which grants the publisher the right to produce as many editions as deemed necessary within a maximum of 20 years, for a minimum number of copies which must be specified in the contract to avoid nullity.

For **public performance contracts**, **Bulgarian** legislation provides for several presumptions if an author of a stage performance work grants to a user a right to perform the work, and outlines default remuneration guidelines in the absence of an agreement,[364] whereas the law in **Luxembourg** states that such contracts need to be concluded for a limited period or for a specific number of public performances. In this way, the author is guaranteed not to make a lump-sum transfer of rights for a performance that may become a great success.

In particular in the **audiovisual sector**, because of the specific nature of the audiovisual production, which requires considerable financial investment, national rules are intended to simplify the exploitation of audiovisual works. One of those is the **presumption of a transfer of rights** from authors and performers to audiovisual producers. Such rules have been identified in most Member States, including Austria, Belgium, Croatia, Czechia,

[359] Article 14(4) Copyright Law.
[360] Article 34(1) and (2) Copyright Law.
[361] Article 49(1) Copyright Law.
[362] Article 25f(1) Copyright Act.
[363] Article 122 of the Copyright Law, Law No. 633 of 22 April 1941 Protection of copyright and other rights related to its exercise (*LEGGE 22 aprile 1941, n. 633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*), available at: https://www.gazzettaufficiale.it/eli/id/1941/07/16/041U0633/sg.
[364] Pursuant to Article 56 of the Copyright and Neighbouring Rights Act (CNRA), last amended SG No: 100/2023 (*Закон за авторското право и сродните му права*), available at: https://lex.bg/bg/laws/ldoc/2133094401, the user is obliged to perform such a work and to pay remuneration to the author. If not otherwise expressly agreed, the author's remuneration is 15% of the real income of each performance after deduction of taxes.

Cyprus, Greece, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Poland, Romania, Slovenia, Slovakia, Spain, etc. In particular, in **Austria**, the presumption of a rights transfer applies only to pre-existing subject matter and can be rebutted by an agreement to the contrary.[365] In **Slovakia**, however, the producer has to obtain the written consent of the authors and agree on the remuneration for the creation of the audiovisual work as well as on the remuneration or the method of its determination separately for each individual use of the audiovisual work.[366]

In **Bulgaria**, however, authors need to sign a written contract with the entities involved in the exploitation/distribution of their protected subject matter by which they grant them exclusive rights, both on the national territory and beyond, to reproduce, publicly exhibit, broadcast, transmit or retransmit, reproduce and distribute videogames, offer online access to the work or to a part of it, as well as the right to authorise translation, dubbing and subtitling of the work.[367] On the other hand, under **Estonian** law the exploitation rights of the author of the musical work used in the audiovisual work are not transferred to the producer regardless of whether or not the work was specifically created for use in the audiovisual work.

General contract law rules

For all issues that are not governed by specific copyright laws, **rules and principles of general contract law**, such as the prohibition to derogate from imperative provisions of law, the prohibition to enter into contracts contrary to public policy[368] and good morals, as well as **rules on unfair contractual practices**, which in some countries are not limited to consumer contracts, may also apply in the context of the rights transfer, including buy-outs.

Authors and performers could for example claim an injunction and/or damages owing to unreasonable contractual terms. In case of unfair terms, certain contractual provisions or a contract as a whole could also be set aside.[369]

There are numerous examples of unfair contractual terms and practices. These vary from one national jurisdiction to another. Accordingly, the Hungarian Civil Code provides that a general contract term, which unilaterally and unjustifiably determines the rights and obligations arising from the contract, in violation of the requirement of good faith and fairness, to the disadvantage of the contracting party applying the contract term, is unfair. An unfair contract term that has become part of the contract as a general contract term may be contested by the aggrieved party.[370] In **Germany**, provisions in standard business terms '*are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the party contracting with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible*'. An '*unreasonable disadvantage is to be assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates'*.[371]

[365] Section 38 UrhG.
[366] Section 86(1) Copyright Act.
[367] Article 63(1) CNRA.
[368] The public policy limit to party autonomy sometimes becomes relevant in copyright contracts where producers exploit the weakness of authors or performers in order to secure for themselves advantages which are clearly disproportionate to the performance they promise. See Federal Court of Justice, Judgment of 21 April 2022, Dr. Stefan Frank, I ZR 214/20, ECLI:DE:BGH:2022:210422UIZR214.20.0.
[369] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), p. 253, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.
[370] Article 6:102 Civil Code.
[371] Section 307 BGB.

Rules applicable to works and subject matter created in an employment or commission relationship

The analysis of contractual practices in Chapter 3 shows that authors/performers not only transfer their rights to producers by contractually negotiating such a rights transfer, but also by presumptions of a rights transfer, as in the case of a rights transfer in commissioning relationships or in employment contracts. Many Member States have established specific rules - either in national **copyright or labour laws** - for the **commissioning of rights and works created under an employment contract**.

The transfer of rights to subject matter for persons **under an employment contract** is subject to varying regulations across Member States. In the majority of cases, an author who creates subject matter during the course of their employment transfers the **economic rights** to the subject matter to their employer, while retaining the moral rights to it. If the employment contract does not state otherwise, it is considered to remain in effect in accordance with this rule.

In **Denmark**, in the context of employment relationships, rights are frequently transferred from the employee to the employer, despite the absence of an explicit agreement to that effect. If no such agreement is in place, the rights transfer may be implied from the employment relationship itself. This is particularly the case where no collective agreement exists. A similar situation exists in **Czechia**,[372] **Croatia**,[373] **Greece**,[374] **Hungary**, **Romania**,[375] **Slovakia**[376] and **Spain**[377]. In **Lithuania**, the economic rights are transferred to the employer for a period of five years,[378] while in **Slovenia** they are transferred for a period of ten years.[379] In **Latvia** and **Bulgaria**,[380] the author may apply for additional remuneration for the work created under an employment contract if the initial remuneration is disproportionately small in comparison to the revenues resulting from the exploitation of the work. In **Austria**, **Belgium**, **Estonia**,[381] **Finland** and **the Netherlands**,[382] the original ownership of the work remains with the original author, although it may be transferred to the employer under an agreement. In **France**[383] and **Germany**,[384] the employee remains the original author of their work.

In **Romania**, the rights belong in principle to the employee, but may be contractually transferred to the employer for a period of three years from the date of delivery, after which they revert to the authors.[385] However, in the case of works of visual arts and photographic works created under an employment or commission contract, the rights are presumed to belong to the employer or the commissioning party. However, the law limits this presumption to three years, unless the contract specifies otherwise.[386]

[372] Section 58 Copyright Act.
[373] Articles 100 and 101 CRRA.
[374] Article 8 Copyright Law.
[375] Article 39 of the Law on Copyright and Neighbouring Rights No. 8 of 14 March 1996 (Law No. 8/1996) (CNRA), available at: https://monitoruloficial.ro/Monitorul-Oficial--PI--60--1996.html.
[376] Section 90(1) of the Act on Copyright and Rights related to Copyright of 4 December 2003 (Copyright Act) (*Zákon o autorskom práve a právach súvisiacich s autorským právom*), available at: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2003/618/20070301.
[377] Article 51 IPL.
[378] Article 9(2) CRRA.
[379] Article 101(1) ZASP.
[380] Article 41(3) CNRA.
[381] Section 32 of the Copyright Act (*Autoriõiguse seadus*), available at: https://www.riigiteataja.ee/en/eli/527122022006/consolide.
[382] Article 7 Copyright Act.
[383] Article 111-1, sub-para. 3 IPC.
[384] Section 43 UrhG.
[385] Article 44 CNRA.
[386] Article 86(2) Law No. 8/1996.

With regard to the **ownership of computer programs** developed under an employment relationship, a number of Member States have established a derogation for this situation. In particular, in **France**,[387] **Germany**,[388] **Lithuania**,[389] **Malta**[390] and **Poland**,[391] the employer is granted rights to the software.

In the **Portuguese** legal system, the ownership of copyright is determined in accordance with the **agreement** between the parties. In the absence of an agreement, ownership of the copyright in a work created on behalf of another party is presumed to belong to the intellectual creator of the work.[392]

Conclusions

The **principle of contractual freedom**, a cornerstone of contract law, allows parties to determine the terms of their agreements. With the aim of protecting weaker parties in a contractual relationship, international and EU copyright instruments provide safeguards to protect the rights of authors and performers. However, with regard to the transferability of rights, these mechanisms are limited to the types of rights granted to them and their duration, and lack specific rules on the transferability of rights, such as mechanisms to combat the complete transfer of economic rights.

More specifically, **international conventions** provide general principles and minimum standards of copyright law for authors and performers applicable to all sectors. In addition, specific rules have been enacted for some sectors (such as the Beijing Treaty, which applies to performances in the audiovisual sector).

The Berne Convention, the WPPT and the Beijing Treaty **grant moral rights to authors and performers**, independently of economic rights, even after the transfer of the economic rights. Under these conventions, moral rights cover the right to claim authorship of the work or to be identified as a performer, and to object to any distortion, mutilation or other modification of the work or performance which would be prejudicial.

Regarding economic rights, **several exploitation rights are harmonised.**[393] EU law, in particular the recent DSM Directive, contains certain measures to address the balance of rights between contractual parties. It also highlights that lump-sum payments should be exceptional. The directive does not regulate when rights transfer agreements and lump-sum payments can be used. Many of the specific protection mechanisms that protect authors and performers in the case of buy-out contracts are **left to national legislation**, which may go beyond the minimum standards established in international and/or EU instruments.[394] Several protection mechanisms focusing on formal and material requirements for rights transfers have been identified through national desk research.

Rules requiring rights transfer agreements to be concluded **in writing** increase transparency and legal certainty as to the scope of the rights transferred, especially if such

[387] Article L. 113-9 IPC.
[388] Section 69b UrhG.
[389] Article 10(2) CRRA.
[390] Article 11(1) Copyright Act.
[391] Article 74(3) Copyright Law.
[392] Article 14 of the Code of Copyright and Related Rights (Copyright Code) *(Decreto-Lei n. 63/85, de 14 de Março, que aprova o Código do Direito de Autor e dos Direitos Conexos*), Official Gazette no. 61/1985, Series I of 1985-03-14, available at: https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1985-34475475.
[393] Examples include reproduction right, distribution right and right of communication to the public under the InfoSoc Directive, as well as the rental and lending right under the Rental and Lending Directive.
[394] See especially Article 19 and 20 of the Berne Convention, Articles 7, 13, 14 and 22 of the Rome Convention, Article 3 and 3 TRIPS Agreement.

rules are a condition for the validity of a contract and not a mere condition of proof that a contract has been concluded.

As regards the rules on the scope of the rights transferred, the desk research shows that most Member States **do not allow a full waiver of moral rights**. However, the stakeholder consultation presented in Chapter 3 shows that authors and performers are often required to transfer their moral rights in addition. With respect to the transfer of economic rights, some Member States also **disable the transfer of the ownership of rights** (e.g. Austria, Germany[395] and Hungary). In these countries, buy-out practices that require authors/performers to transfer the ownership of exploitation rights as well as moral rights would in all likelihood not be legal. However, the prohibition of the transfer of the ownership of rights may be undermined by the fact that rights may be transferred through licensing agreements, which may have the same *de facto* effect as a transfer of the ownership of rights. As the analysis of contractual practices in Chapter 3 shows, licence agreements are often exclusive, and the duration of the transfer often coincides with the duration of the protection of the IP rights (e.g. in the literary works sector) or the agreements are concluded in perpetuity.

The results of the stakeholder consultation presented in Chapter 3 reveal that the transfer of exploitation rights may cover all types of works and all forms of exploitation, both present and future/unknown. Several solutions have been identified at Member State level, with some countries **limiting or even prohibiting the transfer of rights in future works and subject matter or exploitation for unknown or unforeseeable activities**.

In addition, national rules limiting the scope of the rights transferred to what is necessary to fulfil the purpose of the contract (i.e. **the purpose limitation principle**) or requiring **copyright exploitation contracts to specify the rights transferred** may protect authors and performers from being required to transfer an unreasonably wide range of rights beyond what is necessary for the exploitation of their protected work or subject matter.

Finally, in numerous national laws, the authors or performers of the subject matter created under **an employment contract** transfer the economic rights to the subject matter to their employer, while only retaining moral rights to it. This transfer may be automatic or subject to prior agreement. The implications of such a rights transfer in terms of an appropriate and proportionate remuneration are discussed in the next chapter.

5.1.1.2. Mechanism addressing remuneration for rights transfers

As previously noted in Chapter 3 of the report, lump-sum payments represent the majority of remuneration practices in the creative sector, particularly in the fields of audiovisual (64%) and visual arts (51%), and also in the music sector (41%). The contracts that are typically entered into in this manner predominantly take the form of **buy-out contracts**, whereby all exploitation rights are transferred in exchange for a single defined payment, which is sometimes supplemented by a bonus or royalties. Individual authors and performers often find themselves in a position of weakness in negotiations with entities seeking to exploit their rights, which can adversely affect the income they receive.

There are several international and EU legal instruments regulating the issue of remuneration with regard to rights transfers in the creative industry. While in some cases they are very detailed, in others the rules appear to be more general in nature. This chapter examines the landscape of this legislation. It will present the provisions related to fair remuneration guarantees and subsequently discuss and propose possible improvement

[395] This is because of a monist view on copyright and therefore not a result of the protection of authors.

options that could boost protection and legal security for authors and performers when entering into exploitation contracts with third parties.

Remuneration rights are rights which require the user to make a payment for the exploitation of a protected work or subject matter. A distinction can be made between statutory remuneration rights, appropriate and proportionate remuneration rights and compensation rights. **Statutory remuneration rights** are granted for the statutory transfer of exclusive rights and give authors and performers the right to **equitable remuneration**. The **right to appropriate and proportionate remuneration** applies when authors and performers contractually transfer their rights to third parties. Statutory remuneration rights can be distinguished from the **right to obtain 'compensation'**, which will not be explicitly addressed here. The latter is intended to adequately compensate rightholders for the prejudice incurred as a result of an exception to or limitation of their exclusive rights. In contrast, statutory remuneration rights are meant to **replace an exclusive right or to be seen as a result of the transfer of it**. Both the rights to fair compensation and the right to equitable remuneration can be managed by a third party, i.e. a CMO which collects the revenues generated by the rights and distributes it to rightholders.[396]

Rules at international and/or EU level

The remuneration of authors and performers as referenced in various legal instruments at international and EU levels is examined and analysed below. For a review of the main legal acts, please see Annex III.

At **international level**, the previously introduced **Berne Convention** contains regulations addressing remuneration. It introduces the **artist's resale right** (*droit de suite)* **applicable to original works of art and original manuscripts by writers and composers**, based on which they or their descendants are entitled to a portion of the proceeds from the re-sale of a tangible piece of artwork, subsequent to the initial transfer of ownership by the author. This right allows **authors of works of art and manuscripts**, who are in a distinctive position with regard to the type of subject matter they are creating, to benefit from the income generated by subsequent sales of their creations. This may help to provide a balance between the economic circumstances of these artists and those of other creators who have the means to participate in the success of their works and share the profit. This includes, for example, music artists who are entitled to remuneration for subsequent uses of their work. The entitlement resulting from the Berne *droit de suite* may be invoked only if the legislation of the author's home country allows such a provision, and to the extent sanctioned by the jurisdiction where this entitlement is sought. The methodology for the collection process and the determination of royalty amounts is subject to the discretion of national legislation.[397]

Article 12 of the **Rome Convention** introduces a right to a **single equitable remuneration** for performers and producers of phonograms published for commercial purposes for broadcasting or any form of communication to the public. The implementation of this law is subject to domestic law. The **WPPT** contains a similar right to a single equitable remuneration, expanding the right to encompass the **direct or indirect use** of phonograms, in Article 15. In addition, paragraph 4 of said Article 15 states that phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them are considered to have been published for commercial purposes. For both the Convention and the Treaty,

[396] European Audiovisual Observatory, Fair remuneration for audiovisual authors and performers in licensing agreements (2023), p. 9.
[397] Article 14ter of the Berne Convention.

reservations to the right by Contracting Parties are permissible, which may limit the scope of protection, depending on the respective implementation.

The **Beijing Treaty** provides that **independently** of the transfer of exclusive rights from performers to audiovisual producers, national laws may provide performers with a right to receive royalties or equitable remuneration for **any** uses of their performances as provided under the Treaty,[398] which may allow for the payment of recurring remuneration for performers.

In **European Union law** the remuneration of authors and performers is covered in the following directives.

The **Rental and Lending Directive** gives authors and performers the right to permit or disallow the rental and lending of both original works and copies protected by copyright, along with other subject matter,[399] It also grants certain residual remuneration rights for authors and performers as in Article 5, where even after transferring their rental rights concerning a phonogram or an original or copy of a film to a phonogram or film producer, they retain the entitlement to receive **equitable remuneration** for rentals. CMOs representing authors or performers may administer this right to obtain equitable remuneration. Furthermore, Article 8(2) establishes the right to a single equitable remuneration for performers and phonogram producers when their commercially published phonograms are broadcasted or communicated to the public, similar to the right under Article 15 WPPT. In addition, the directive allows for a derogation from the exclusive right to authorise or prohibit the public lending of works if at least the authors obtain a remuneration for such lending.[400]

Both the **Satellite and Cable Directive 93/83/EEC[401] (SatCab)** and the **Satellite and Cable II Directive**[402] **(SatCab II Directive)** make it easier for broadcasters and retransmission operators to clear copyright and related rights. They establish that the exclusive right to retransmission provided by cable (Sat Cab I) or by other means, including by satellite or online retransmission in a secured environment (Sat Cab II), can only be exercised through mandatory collective management. These directives also introduce the country of origin principle for the transmission by satellite (Sat Cab I) and for ancillary online transmission (Sat Cab II). Article 3(2) of SatCab II provides that the payment to the rightholders for the utilisation of their creations in an ancillary online service should take all aspects of the service into account. The application of the country of origin principle in Sat Cab II is not an obligation, and broadcasters and rightholders may choose to limit territorially the exploitation of the rights in the programmes.[403]

The **Resale Right Directive (2001/84/EC)** makes the optional Berne ***droit de suite*** mandatory at EU level. This is an exploitation right that allows the author of an **artwork** to receive a royalty for subsequent sales of the work. In contrast to the resale right in the Berne Convention, this right does **not apply to manuscripts of writers and composers**.[404] It

[398] Article 12(3) of the Beijing Treaty.
[399] Article 1 of the Rental and Lending Directive.
[400] Article 6 of the Rental and Lending Directive.
[401] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, pp. 15–21, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31993L0083
[402] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 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 and amending Council Directive 93/83/EEC, OJ L 130, 17.5.2019, pp. 82–91, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2019%3A130%3ATOC&uri=uriserv%3AOJ.L_.2019.130.01.0082.01.ENG
[403] Article 3(3) SatCab II.
[404] Recital 19 Resale Right Directive.

encompasses physical objects, in particular the medium that contains the protected artwork.[405] This right guarantees that artists receive a continuous economic benefit that reflects their ongoing success in the art market, as a result of the increased value of their works over time. Member States may establish a minimum sale price below which the resale right does not apply. This may not exceed the sum of EUR 3,000[406] or EUR 10,000 in cases where the seller has acquired the work of art directly from the artist within the preceding three years.[407] Moreover, a rate of 5% may be applied to the lowest portion of the resale price.[408] The resale right is granted to the author of the original artwork. Following the author's death, this right may be exercised by their heirs or legal successors. However, the resale right does not apply to the first sale of the artwork by the artist or to private sales between individuals without the involvement of an art market professional (such as an art dealer, auctioneer or art gallery).[409]

The **Copyright Term Directive (2006/116/EC)**, as amended by the **Copyright Term Extension Directive (2011/77/EU),** introduces certain measures to ensure that performers benefit from the term extension (from 50 years prior to 70 years under the revised directive). One of these measures[410] provides that where a performer has transferred or assigned their right in return for an one-off payment, the performer is entitled to obtain an **annual supplementary remuneration** from the phonogram producer for each full year that immediately follows the 50th year after the phonogram was lawfully published, or, in the event that such publication did not occur, the 50th year after it was lawfully communicated to the public. Performers cannot waive their right to obtain such annual supplementary remuneration. To that effect, Article 3(2c) makes it mandatory for phonogram producers to set aside, at least once a year, a sum corresponding to 20% of the revenues from the exclusive rights of distribution, reproduction and making available of phonograms. Under Article 3(2c) Member States must ensure that phonogram producers are required to provide performers who are entitled to the annual supplementary remuneration with any information that may be necessary to secure payment of that remuneration upon request.

Chapter 3 of Title IV of the Directive (EU) 2019/790 (the DSM Directive)[411] **(Articles 18-23)** regulates fair remuneration practices in exploitation contracts of authors and performers. It introduces the **principle of appropriate and proportional remuneration** and lays down obligations which include increased transparency, mechanisms for adjusting contracts when the initial remuneration is disproportionately low in relation to subsequent revenues from exploitation, alternative dispute resolution procedures and the right to revoke non-used work or performances. As stated in Recital 72 of the DSM Directive, Chapter 3 of Title IV applies to exploitation contracts and does not apply to situations where the contractual counterparty acts as an end user (e.g. consumer agreements) or does not exploit the work or performance itself. This may be the case for some employment agreements, but not all.[412]

[405] Recital 2 Resale Right Directive.
[406] Article 3 Resale right Directive.
[407] Article 1 Resale Right Directive.
[408] Article 4(2) Resale Right Directive.
[409] Article 1 Resale Right Directive.
[410] Article 3(2b) Copyright Term Directive.
[411] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125, available at: https://eur-lex.europa.eu/eli/dir/2019/790/oj
[412] Furgal, U., '*Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market*', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 9.

Applicability of Chapter 3 of Title IV of the DSM Directive in employment relationships (Opinion on Case C-575/23)

The CJEU received its first preliminary reference on the DSM Directive in the case ONB and Others (C-575/23) regarding inter alia the question of whether Articles 18 to 23 of the directive apply in the case of a transfer of the related rights of performers that takes place in the context of an employment relationship, specifically employment under the status of public agent – in this case, musicians of the Belgian National Orchestra, who contested a Royal Decree that would set the amount of remuneration due to them. In the Opinion issued on 24 October 2024,[413] Advocate General Szpunar considered that Articles 18 to 23 should apply not only in the scenario where there is a contract exploiting exclusive rights in the strict sense, but each time a performer gives their consent to the exploitation of their related rights for remuneration. This is also the case for employment relationships, in which there may also be a contract assigning related rights between the employed performer and their employer, whether in a separate from or incorporated into the employment contract.

Further, in the Advocate General's Opinion, a different interpretation would deprive the directive of a large part of its effectiveness. Performers such as theatre actors or orchestra musicians frequently find themselves in an employment relationship, and their work consists to a large extent in giving live performances. However, their employer may exploit their performances in other ways. Excluding those performers from availing of the provisions of that directive would severely limit its scope and, consequently, its effectiveness.

As further observed in the Advocate General's Opinion, Recital 72 of the directive, which states that natural persons require the protection under the directive 'to be able to fully benefit from the rights harmonised under Union law' supports this interpretation, considering that the rights harmonised under EU law, in particular those related to performers, exist independently of the employment situation of their holders, in this case, the same should be true with respect to the applicability of the directive. Although the cited recital also refers to situations in which the need for protection does not exist, particularly in regard to certain employment relationships, these situations do not concern the exploitation of protected subject matter. Rather, they concern only the end use of the subject matter in question. This, however, does not apply to the case in question. As will be presented in this subchapter, the mechanisms set forth in the directive may assist in combating adverse remuneration practices for authors and performers, such as buy-out contracts and other arrangements that affect their financial sustainability. However, there are some aspects of the directive that could be strengthened in order to enhance the effectiveness of the rules.

According to Article 18 whenever authors and performers transfer or licence their exclusive rights in works or other subject matter by entering into copyright exploitation contracts, they are entitled to receive **an appropriate and proportionate remuneration**. **Recital 73** of the directive further clarifies that the remuneration should be proportionate to the economic value of the licensed or transferred rights, considering the contribution of the author or performer to the work or subject matter and all relevant circumstances, such as market practices or the actual exploitation of the work. Therefore, the assessment should

[413] Opinion of AG Szpunar delivered on 24 October 2024 (ECLI:EU:C:2023:575).

be both quantitative and qualitative.[414] The historical context and underlying purpose of the provision seem to support this interpretation, as well as the implicit understanding of proportionality within the contractual adjustment mechanism as set out in Article 20.[415] Article 18(2) of the directive specifies that when implementing the principle of appropriate and proportionate remuneration, Member States should take into account the principle of contractual freedom and a fair balance of rights and interests. Moreover, under **Recital 82**, authors and performers should be able, if they so choose, to authorise the use of their subject matter free of charge. The use of such subject matter may be permitted through non-exclusive free licences, for the benefit of any users.

As stated in Recital 73, while **a lump-sum payment** can be considered proportionate remuneration, it should not be seen as the norm.[416] It is indicated that lump sums can be applied under specific circumstances, taking into account the specificities of each sector, and should not be seen as the default or standard choice to ensure that remuneration is at least proportionate.[417] In addition, Member States can implement the principle of appropriate and proportionate remuneration through various existing or new mechanisms, which could include collective bargaining and other mechanisms. A number of Member States do not specify in their implementing legislation the circumstances in which a lump sum is a permissible form of remuneration,[418] as will be examined below. As national implementation is likely to vary between Member States, this may pose a challenge for authors and performers navigating different jurisdictions with distinct levels of protection, for example, when entering into crossborder contracts, considering their legal knowledge gaps under national legal frameworks with which they are unfamiliar.

To combat such difficulties, consideration could be given to the circumstances in which a lump-sum payment would be deemed an appropriate and proportionate remuneration in the light of the revenues generated from the use of the subject matter in question in order to provide the weaker contractual parties with more legal certainty and balance the level of protection in various EU jurisdictions.

Article 19 of the DSM Directive establishes a **transparency obligation**, which requires authors and performers to receive regular updates, at least once a year, from the parties to which they have licensed or transferred their rights, or their successors in title. The information provided should be up-to-date, relevant and comprehensive, and should include details on the exploitation of the works and performances in question, including the modes of exploitation, all revenues generated and the remuneration due. The obligation of transparency is presumed to apply equally to proportional and flat-rate remuneration and Article 19 does not distinguish between these forms of payment. As a result, even if authors or performers have been remunerated by means of a lump-sum payment, they are still entitled to the relevant information under Article 19(1).[419]

Furthermore, in the event that the rights have been licensed further, authors and performers or their representatives should, upon request, receive **additional information from sub-**

[414] Furgal, U., '*Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market*', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 11.
[415] Carre, S., Le Cam, S., Macrez, F., '*Buy-out contracts imposed by platforms in the cultural and creative sector*', European Parliament, 2023, p. 33.
[416] Recital 73 to the DSM Directive.
[417] Quintais, J. P., 'The new copyright in the Digital Single Market Directive: A critical look', European Intellectual Property Review, Vol. 1, 2020, p. 20.
[418] Furgal, U., 'Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 13.
[419] Carre, S., Le Cam, S., Macrez, F., '*Buy-out contracts imposed by platforms in the cultural and creative sector*', European Parliament, 2023, p. 35.

licencees, provided that the first contractual counterparty does not possess all the necessary information. In the event that further information is requested, the initial contractual partner of authors and performers is obliged to provide details of the identity of the sub-licencees. This extension of the transparency obligation beyond the direct contractual partner is to be viewed as rather unique. In the context of a digital environment, it may be seen as useful where the works and performances are made available on a mass scale by internet platforms.[420]

The obligation of transparency must be proportionate and effective in ensuring a high level of transparency in every sector. In duly justified cases where the **administrative burden** resulting from the obligation would become **disproportionate** in the light of the revenues generated by the exploitation of the work or performance, Member States may limit this obligation to the types and level of information that can reasonably be expected in such cases. Similarly, Member States may provide that **if the contribution of the author or performer is not significant** in relation to the overall work or performance, the transparency obligation does not apply, unless the author or performer demonstrates that they require the information for the exercise of their rights under the contract adjustment clause.

Moreover, the transparency rules set forth in the relevant collective bargaining agreement may be applicable to agreements subject to them. The transparency obligation set forth in Article 19 of the DSM Directive does not apply to agreements concluded by CMOs and IMEs as defined in the **Collective Rights Management Directive (CRM Directive)**, as the CRM Directive provides for an equivalent obligation.[421] According to **Article 18(1) of CRM directive** a **CMO** must make available, at least once a year, to each rightholder to which it has attributed rights revenues or made payments in the period to which the information relates, at least the following information: contact details provided by the rightholder to the collective management organisation for the purpose of identifying and locating the rightholder; the rights revenues attributed to the rightholder; the amounts paid by the collective management organisation to the rightholder per category of rights managed and per type of use; the period during which the use took place for which amounts were attributed and paid to the rightholder, unless objective reasons relating to reporting by users prevent the collective management organisation from providing this information. Any deductions made in respect of management fees, as well as any deductions made for any purpose other than in respect of management fees, including those that may be required by national law for the provision of any social, cultural or educational services, and any rights revenues attributed to the rightholder which are outstanding for any period.

It is also noteworthy that the DSM Directive does not establish any penalties or remedies for instances of non-compliance with the transparency obligation. However, disputes related to this obligation may be settled under the alternative dispute resolution mechanism, as mentioned below in Subchapter 5.1.1.3. Furthermore, some Member States have introduced mechanisms to support the enforcement of the transparency requirement, as explained in the chapter below.

The **contract adjustment mechanism** set out in **Article 20 of the DSM Directive** introduces solutions at the level of Union law similar to the so-called '**best-seller clause**' found previously in the national laws of some Member States (e.g. Germany and the

[420] Furgal, U., '*Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market*', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 15.

[421] Furgal, U., 'Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 15.

Netherlands), allowing for the revision of remuneration in exploitation contracts where authors or performers enjoy particular commercial success, acknowledging that commercial success should lead to improved financial conditions.[422] If the remuneration initially agreed upon is disproportionately low compared to the revenues generated by the subsequent exploitation of the subject matter by the contractual counterparty, the authors or performers **can claim 'additional, appropriate and fair remuneration'** from their counterparty (or their successors in title). According to **Recital 72**, as authors and performers are often in a weaker contractual position when granting a licence or transferring their rights, particular harmonised protection needs to be granted under EU law. In addition, as mentioned in **Recital 78**, contracts for the exploitation of rights can be of long duration, offering authors and performers limited possibilities for renegotiating the initial arrangements.

The remuneration received is to be based on the subsequent revenues from the exploitation of their work, about which the contractual party is obliged to inform the author or performer on a consistent basis under Article 19 of the DSM Directive. Accordingly, awareness of a right to future revision of remuneration for both contractual parties may help combat the use of buy-out clauses, as a more careful consideration of the allocation of financial risk between the author/performer and the party to which they are transferring their rights may take place during the contractual negotiations. Keeping this in mind, the parties may negotiate some form of protection (e.g. indemnity) against the risk that the remuneration paid will be judged to be disproportionately low in the future.

Furthermore, in one opinion,[423] the wording of the provision on the contract adjustment mechanism could possibly introduce uncertainty regarding the interpretation of certain terms. In particular it is considered that it is not clear whether the author may exercise this right to claim additional remuneration in the case of a sub-licence from both parties or exclusively from the subcontractor.

For authors and performers, another issue is the possibility and, perhaps even more crucially, the willingness to enforce their rights. When asked about their level of understanding and awareness of contractual practices and rights, the majority indicated that they had limited knowledge (24%) or were only somewhat knowledgeable (46%) about these matters. Nevertheless, pursuing legal action to enforce their rights following a transfer does not appear to be a widely preferred option. The findings presented in Chapter 3 also indicated that only 11% of respondents had initiated individual civil proceedings to enforce their rights. Some respondents indicated that there had been no need to date to pursue legal action, while others emphasised the financial and temporal costs involved, as well as the unpredictability of the outcome. Furthermore, concerns were expressed regarding the potential for industry blacklisting and job losses, which were identified as significant barriers to litigation.

In view of this, it has to be noted that disputes regarding the **transparency obligation** under Article 19 and the **contract adjustment mechanism** under Article 20 may be subject to the **voluntary ADR procedure**, introduced in Article 21 of the DSM Directive. This mechanism is discussed in more detail in the subchapter on ADR, which provides insights into its potential effectiveness in helping authors and performers to enforce their rights as an alternative to litigation. The availability of this procedure may contribute to overcoming some of the difficulties mentioned by authors and performers in relation to enforcement efforts.

[422] Aguilar, A., '*The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part II, Articles 20-23*', Kluwer Copyright Blog, Wolters Kluwer, August 2019, available at: https://copyrightblog.kluweriplaw.com/2019/08/01/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-ii-articles-20-23/.
[423] Treppoz, E., Arbant, G., '*The EU Copyright Directive: The new best-seller right*', MediaWrites, 2019, available at: https://mediawrites.law/the-eu-copyright-directive-the-new-best-seller-right/.

As pointed out in this chapter, the EU legislative framework setting out the remuneration rules for authors and performers for the use of their works provides mechanisms which could be helpful in combatting buy-out contract practices. However, there are some potential gaps that would be worth acknowledging and addressing. In some cases, national legislators may be afforded significant discretion in implementing the provisions set out in Chapter 3 of Title IV of the DSM Directive, such as the principle of appropriate and proportionate remuneration, which in effect may impact the ability to enforce the rights of those working in creative environments. The following chapter will provide a more detailed examination of remuneration-related legislation at national level.

Rules at national level

The DSM Directive provides for **minimum harmonisation on fair remuneration in exploitation contracts of authors and performers**. This means that Member States can retain or introduce a greater level of safeguards for authors and performers subject to compatibility with EU law. For example, Recital 76 of the DSM Directive explicitly confirms this possibility in the context of the transparency obligation, giving Member States the option to provide further measures to ensure transparency for authors and performers. As mentioned above, Member States are thus free to implement the **principle of appropriate and proportionate remuneration** through **different existing or newly introduced mechanisms**, such as collective bargaining and other mechanisms, provided that these mechanisms comply with applicable Union law or define specific cases for the application of lump sums, taking into account the particularities of each sector.[424]

None of the Member States explicitly prohibits the use of lump-sum payments for the right to exploit subject matter. Furthermore, only a few countries have introduced regulation related to using lump sums. For example, in **Czechia**, it is necessary to examine whether the payment may be considered appropriate and proportionate.[425] In **Germany**, flat-rate remuneration must ensure that the author receives an equitable share of the **expected total revenues** from such use and must be justified in the light of the specificities of the sector.[426]

In **France**, under Article L. 131-4 of the Intellectual Property Code (IPC) the remuneration of authors may be calculated on a flat-rate basis, in six specific cases as follows:

- the basis for calculating proportional contribution cannot be practically determined;
- the means to control the application of contribution is lacking;
- the costs of the calculation and control operations would be out of proportion to the results to be achieved;
- the nature or conditions of the exploitation make it impossible to apply the rule of proportional remuneration, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work, or because the use of the work is only of an accessory nature in relation to the subject matter exploited;
- the rights transfer relates to software;

[424] Recital 73 of the DSM Directive.

[425] Section 2387 of the Law No. 89/2012 Coll. Act of 3 February 2012 Civil Code (*Zákon č. 89/2012 Sb Občanský zákoník*), available at: https://www.zakonyprolidi.cz/cs/2012-89.

[426] Section 32 UrhG.

- In other cases provided for in the IPC.

Considering the fact that the DSM Directive refers to lump-sum payments in a general way and establishes that such forms of remuneration should not be widely used in practice, the introduction of precisely defined situations in which lump sums are allowed at national level seems to be beneficial, as it leaves less leeway for contractual practices that could be considered exploitative and further limits the possibility of lump-sum payments to a certain number of cases where such payments are permitted.

Several Member States have included provisions stating that any agreement that deviates from the right to appropriate and proportionate remuneration to the detriment of the author or performer is **null and void**. This includes **Austria**,[427] **Cyprus**,[428] **Estonia**,[429] **Germany**,[430] **Greece**[431] and **Italy**.

Czechia,[432] **Ireland**,[433] **Latvia**[434] and **Malta**[435] stipulate that the **calculation of remuneration must meet certain requirements** in order to establish equity. These requirements are based on the economic value of the licence, considering the creative contribution of the author or performer, market prices, actual use and the licence's scope.

In addition to the principle of appropriate and proportional remuneration that applies in contractual relationships, several Member States have also introduced rules further regulating **contractual remuneration**.

Remuneration rules of authors in Croatia (publishing sector)

The remuneration of authors in **Croatia** is regulated by defined rules. In the event that the author's remuneration is calculated as a percentage of the retail price of copies sold, the publishing contract must stipulate a minimum number of copies for the initial edition and a minimum remuneration amount that is independent of sales figures. In the event that remuneration is to be provided on a lump-sum basis, the contract must stipulate the total number of copies to be printed. In the absence of any such stipulation, a default maximum of 500 copies shall be assumed, unless fair business practices dictate otherwise.[436] In addition to their salary or initial contract remuneration, journalists and photographic reporters are entitled to further remuneration for the internet use of their publications.[437]

[427] Section 37b(2) and Section 68(4) UrhG.
[428] Article 12(2) Copyright Law.
[429] Section 14 Copyright Act.
[430] Section 32a UrhG.
[431] Article 32a(3) Copyright Law.
[432] Explanatory report to Act No. 429/2022 Coll., dated December 8, 2022, which amends Act No. 121/2000 Coll. on copyright and related rights, and on amendments to certain acts (the Copyright Act) as amended, along with other related laws, available at: https://www.psp.cz/sqw/text/orig2.sqw?idd=199910, p. 69.
[433] Regulation 26 European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021, available from S.I. No. 567/2021 - European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 (irishstatutebook.ie)).
[434] Article 47(10) Copyright Law.
[435] In the absence of an agreement for the payment of an appropriate and proportionate remuneration, the Copyright Board, as established under Article 45 of the Copyright Act, may determine the amount of the remuneration. Several factors are to be taken into consideration, such as the market practices when quantifying the appropriate remuneration to the actual or potential economic value of the licensed or transferred rights.
[436] Article 77 CRRA.
[437] Article 167 CRRA.

In **Czechia**, authors of **works published in printed form** specifically have the right to a fair share of the revenues generated by the publisher from the use of their publications by information society service providers. This concerns authors of literary, artistic and photographic works.[438]

One interesting case is the regulation of remuneration rights in relation to certain digital uses. **Germany** has introduced a unwaivable remuneration right for authors and performers for the use of their works and performances by online content-sharing service providers (in the context of Article 17 of the DSM Directive).[439] **Spain** also has a mechanism in place that establishes an unwaivable remuneration right for authors and performers in the area of VOD platforms. Moreover, this has been extended to also cover UGC platforms.[440] **Belgium** has introduced three unwaivable and non-transferable remuneration rights for authors and performers; these are collected through collective mechanisms from three sources: i) aggregators of news content in relation to Article 15(5) of the DSM Directive, ii) online content sharing platforms (e.g. YouTube or Dailymotion) in relation to Article 17 of the DSM Directive, and iii) streaming services (e.g. Spotify or Netflix). The aforementioned rights must be collectively managed through collective management organisations or sectoral rules.[441] The introduction of a mandatory remuneration right for authors and performers for the use of their works and performances by online and streaming platforms was challenged before the Belgian Constitutional Court which requested a preliminary ruling from the Court of Justice of the European Union as to whether such legislation is in line with EU law (including with Articles 17 and 18 of the DSM Directive).[442]

In their implementation of the contract adjustment mechanism under Article 20 of the DSM Directive, the Member States tend to closely follow the wording of the directive in the transposition into national law, which often results in a rather short and very general provision.[443] Only a few Member States offer more comprehensive protection and mechanisms for authors and performers to adjust their contracts or claim additional remuneration.[444] For example, the **Dutch** legal system provides a very close wording for introducing the mechanism, stating that the author or performer may claim additional fair remuneration from the other party in the event that the agreed remuneration is disproportionate in relation to the proceeds derived from the exploitation of the work. However, there is no further guidance as to when remuneration is to be deemed inequitable. On the other hand, **Austria** has enacted provisions allowing for additional remuneration and termination rights for authors and performers, extending beyond the base requirements of Article 20 of the DSM Directive, with conditions under which additional remuneration can be claimed. **Germany** has also established several mandatory rules aimed at enhancing the ability of authors and performers to terminate or revise their contract, thereby demonstrating a broader interpretation and implementation of the Article as presented below.

Revision of remuneration in German law

[438] Section 25b of the Act No. 121/2000 Coll. on Copyright, on Rights Related to Copyright and on Amendments to Certain Acts (Copyright Act) (*Zákon č. 121/2000 Sb. o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů)*, available at: https://www.zakonyprolidi.cz/cs/2000-121.

[439] Section 4(1) of the Act on the Copyright Liability of Online Content Sharing Service Providers (*Urheberrechts-Diensteanbieter-Gesetz – UrhDaG*), available at: https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html.

[440] Johansson, D., & Yule, N., '*The Impact of the DSM Directive on EU Artists and Musicians. Part 2*', International Artist Organisation, 2024, p. 8.

[441] Article XI.228/11 Economic Law Code.

[442] See https://www.const-court.be/public/f/2024/2024-098f.pdf.

[443] Furgal, U., '*Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market*', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 18.

[444] Analysis based on 22 Country Factsheets.

In **Germany**, if the author or performer has granted a right of exploitation to another party on terms which result in the agreed remuneration proving to be disproportionately low in relation to the benefits derived from the exploitation of the subject matter, the other party **is obliged**, at the request of the author or performer, to agree to an **amendment of the agreement** which grants them a further equitable share appropriate to the circumstances. It is irrelevant whether the parties to the agreement have foreseen or could have foreseen the amount of the benefits obtained.

If the other party has transferred the right of exploitation or granted further rights of exploitation, and if the disproportionately low remuneration of the author or performer is caused by the benefits received by a third party, the latter is directly liable to the author, taking into account the contractual relationships within the licensing chain. The other party is not liable.

These rights cannot be waived in advance. An anticipated benefit is not subject to compulsory execution and any disposition with respect to the anticipated benefit is void. The author or performer may, however, grant a free, non-exclusive right of exploitation to anyone.

However, the author or performer does not have the right to request the amendment of the agreement if the remuneration has been determined in accordance with a joint remuneration agreement or in a collective agreement and expressly provides for a further equitable participation.[445]

In addition, the German Copyright Act provides a right to equitable remuneration for each author and performer for **forms of exploitation which become known subsequently**. The author or performer is entitled to a **separate** equitable remuneration if the other party to the contract **commences a new type of exploitation of their subject matter which was agreed but not yet known at the time the contract was concluded**. The other contracting party is obliged to inform the author or performer without delay of the commencement of the new type of exploitation.

If the other contracting party has transferred the right of use to a third party, as in the case of the contract amendment rules, the third party is obliged to pay the remuneration when the new type of exploitation commences. There is no liability on the side of the contracting party. No prior waiver of rights is possible here either. The author or performer may, however, grant a free non-exclusive right of use to anyone.[446]

Some countries subject contract adjustment to temporal requirements. In **Spain**, the right to claim additional remuneration lasts for a period of ten years,[447] whereas in **Slovakia** it is three years.[448] On the other hand, according to the laws of **Bulgaria**, **Finland**, **Germany**, **Greece** and **France** the right of authors and performers to claim additional remuneration is not subject to limitation or obstruction.

Furthermore, authors may negotiate remuneration within their employment contracts or appoint a CMO for voluntary collective management or utilise an independent rights

[445] Section 32a(1) – (4) UrhG.
[446] Section 32c(1) – (3) UrhG.
[447] Article 47 IPL.
[448] Section 69(8) Copyright Act.

manager. The implementation of voluntary collective management is subject to the prior authorisation of the relevant authorities.

'Unreasonable conditions' in Finnish copyright transfer agreements

In **Finland**, if a condition in a copyright transfer agreement is deemed to be unreasonable according to industry standards, or results in an unreasonable situation, it may be adjusted or disregarded. The reasonableness of a condition is determined by considering the entire agreement, the positions of the parties and prevailing conditions at the time and after the conclusion of agreement. If adjusting a condition in the agreement makes the rest of the agreement unreasonable, the agreement may be further adjusted or terminated. The remuneration for the transfer of a right is also considered a condition in the agreement.[449]

The introduction of a clause allowing for the renegotiation of contractual terms in the event of a significant change in the circumstances of the contract, including the prevailing economic conditions, is another potential mechanism that allows remuneration adjustment. In this regard, some the **copyright contract laws** of some Member States already provide for **the possibility of a periodic review** of the conditions of copyright exploitation contracts (**Belgium**, **France**). Furthermore, **French copyright law requires** publishing contracts for e-books to include a clause providing for a periodic review of remuneration arrangements over time.[450]

Bulgaria has introduced a system for determining and subsequently updating the remuneration of authors. In general, the remuneration of authors for any form of usage of their work may be contracted as a share of the income received as a result of the usage of the work, as a single one-time amount, or otherwise. The law lays down some default standards for different types of contracts. However, the parties are free to contract below and above these standards.[451]

In addition, the renegotiation of contracts is possible in accordance with the **general principles of contract law**. In accordance with the provisions set forth in the **French** Civil Code, a party that has not borne the risk associated with a set of unforeseeable circumstances may request a revision of the contract if the aforementioned circumstances render the performance of the contract excessively disadvantageous for that party. If the parties are unable to reach an agreement through renegotiation, a court may be called upon to determine the terms of an amended contract. Similarly, the **German** Civil Code establishes a number of conditions that must be met in order for the possibility of revising a contract to be applicable. First, the changes in question must be both highly significant and unforeseeable. Furthermore, it is necessary to demonstrate that prior awareness of these changes would have dissuaded the parties from entering into the contract, or under different terms. Ultimately, the amendments must result in one of the parties being unable to reasonably anticipate the contract's continued enforcement without alteration. Under **Dutch** law, the parties to a contract may petition a court to amend the contract in the light of unforeseen circumstances that render the other party's legitimate expectation of the

[449] Section 29 of the Act No. 404/1961 of July 8 1961, amended up to Act No. 1216/2023 of December 21 2023, Copyright Act (*Tekijänoikeuslaki*), available at: https://www.finlex.fi/fi/laki/ajantasa/1961/19610404.

[450] Article L. 132-17-7 IPC.

[451] Article 38 CNRA.

contract's unaltered enforcement unreasonable. In this regard, the Dutch legal standard aligns with the German legal requirement.[452]

In some Member States, **a link has been established between the transparency obligation and the revenues generated from the exploitation of the subject matter impacting the received remuneration**. In accordance with the **Polish** Copyright Law, if authors are entitled to receive an annual supplementary remuneration for a rights transfer or the granting of an exclusive licence, which is paid by way of a lump-sum payment, they are entitled to receive the relevant information and review, to the extent necessary, any documentation that is crucial for determining the amount of that remuneration.[453]

Transparency obligations have been further specified in two jurisdictions. **French** law requires transferees to inform authors about revenues generated by the various modes of exploitation of their works. This enables account presentation modalities to be specified by professional agreements or contracts.[454] A similar transparency provision is in place for performers, [455] with further transparency obligations for online content-sharing services towards authors and related copyrights holders.[456] Additionally, there are specific, more detailed provisions for CMOs. In contracts between performers and phonogram producers, where the remuneration is based on exploitation profits, the law requires producers to inform performers twice a year about the revenues derived from their work. In the event that a performer deems it necessary to request justifications from a producer, they are permitted to do so and, furthermore, to have them reviewed by an accountant of their choosing.[457] In the context of performance contracts between authors and broadcasters, the law requires entertainment companies to provide the exact performance programme and a justified statement of revenues to the contracting authors or their CMOs.[458] French law further requires audiovisual producers to provide authors and co-authors with annual transparent information on the exploitation of their work and to supply documents verifying account accuracy upon request. Furthermore, the relevant article stipulates that producers must inform authors in advance of any subsequent assignment of the production contract.[459] The law requires audiovisual media service providers to regularly report to professional organisations of authors about the number of times transferred works have been downloaded, consulted, listened to or viewed. This enables CMOs to inform each author individually.[460] **German** copyright legislation includes a collective action for non-compliance with mandatory information obligations. Authors' associations can represent individual authors or even have statutory standing to sue in their own name for equitable remuneration and accessory information claims. In the event that a licensee fails to provide information to rightholders in multiple instances that are identical or similar, they may be subject to legal action for injunctive relief. Claims must be substantiated by clear and verifiable evidence and are invalid if the information obligations are covered by a joint remuneration or collective agreement.[461]

Under the **Resale Right Directive**, which establishes a **right for the author to receive remuneration** for the subsequent resale, a minimum selling price below which the *droit de suite* does not apply may be established. Consequently, **the established selling prices**

[452] Vanherpe, J., Towards a fair balance in the digitised music industry. Facing the music, 2022, PHD THESIS (LIRIAS), p. 354f, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43
[453] Article 47 Copyright Law.
[454] Article L. 131-5-1 IPC.
[455] Article L. 212-3-1 IPC.
[456] Article L. 219-3 IPC.
[457] Article L. 212-15 IPC.
[458] Article L. 132-21 IPC.
[459] Article L. 132-28 IPC.
[460] Article L. 132-18 IPC.
[461] Section 36d UrhG.

differ depending on national regulations. For instance, the right to remuneration arises when the resale price is EUR 400 in **Germany**, but EUR 800 in **Spain**.[462] The **total amount of the royalty** may not exceed EUR 12,500, although this amount varies from country to country. In **Germany** and **Estonia**, for example, the maximum royalty payable is EUR 12,500, while in **Spain** the amount may not exceed EUR 10,000 (excluding taxes).[463] The creation of a price framework with fixed amounts can contribute to legal certainty in the event of the sale of subject matter. In this respect, it is a desirable development that could possibly be extended to creative works other than works of art.

In the case of resale rights, specific regulations pertaining to information rights apply. Under **German** law, art dealers and auctioneers are obliged to provide authors with information regarding the resale of their original works of art within the previous three years. Furthermore, the vendor's name and address, and the selling price may be requested in order to substantiate a claim, should this be necessary. Art dealers or auctioneers may decline to provide the vendor's details if the vendor is responsible for the author's share. Such claims must be made through a collecting society. Furthermore, in the event of reasonable doubt regarding the accuracy or completeness of the information provided, the collecting society may request access to accounting records or other documents for verification by a chartered accountant or sworn auditor. Should the information in question prove to be inaccurate or incomplete, the party responsible for its provision is liable for the costs of any examination that may be deemed necessary.[464]

Conclusions

There is a wide range of international and EU legislation that deals with remuneration rights in copyright matters and provides safeguards for authors and performers in a considerable variety of situations when transferring the rights of ownership or licensing their rights to third parties. However, having regard to the information presented above, it is possible to identify certain gaps in the legal framework that may affect the rights of authors and performers in terms of being fairly remunerated in the case of exploitation contracts, despite the defined rules.

The international treaties and agreements tend not to be very prescriptive about the remuneration of artists or performers, but seem instead to propose rules for specific sectors and circumstances, where fair and equitable remuneration may need to be strengthened. Moreover, the contracting parties have the possibility to derogate and to limit the scope of application in the implementation of these provisions. No international treaty makes any reference to lump-sum payments. This renders the international framework only partially effective for ensuring just remuneration for authors and performers.

Under EU law, according to the DSM Directive lump-sum payments may be considered a proportionate remuneration, but they should not be applied as usual practice. At national level, only a few Member States have established criteria governing the circumstances under which a lump-sum payment may be deemed proportionate remuneration. For example, French legislation includes circumstances, such as the difficulty in establishing and calculating the contribution of the author or performer or the mere accessory nature of the author's contribution to the subject matter exploited, which may be considered as plausible justifications for lump-sum remuneration.

[462] Article 24 IPL.
[463] Ibid.
[464] Sec. 26 UrhG.

A more detailed regulation of the use of lump sums may lead to limit the use of lump-sum payments in contractual agreements. These regulations may, for example, specify the details that must be included in transfer agreements to ensure that they do not disadvantage the artists or performers as more vulnerable contractual parties. While respecting the principle of contractual freedom, it could also prove beneficial to consider safeguards that go beyond the contractual realm (e.g. a limitation on buy-out contracts), as there is also a risk that the focus on granting too much autonomy to the parties may not guarantee sufficient protection for authors and performers as weaker parties in exploitation arrangements. This weakness, as will be discussed below, is also reflected in their reluctance to enter litigation owing to an asymmetry of power experienced.

A further supportive measure which could help to combat the practice of lump-sum payments would be the introduction of soft law or policy documents at European level, encouraging a more restrictive approach in national implementation.

The DSM Directive introduced minimal harmonisation across Member States to ensure fair remuneration of authors and performers in exploitation contracts. Member States were allowed a margin of discretion in the implementation at the level of national legislation, subject to compliance with EU law. In this regard, certain national approaches are worthy of attention, since they address the concept of various factors having to be taken into consideration when determining if remuneration is equitable: for example, customary and fair business practice, the nature and possibility of exploitation of the subject matter, as well as the expected share of the author or performer in the projected total proceeds from the use of the work and sector-related specificities when permitting flat-rate remuneration under law. A nuanced approach to evaluating the fairness of remuneration facilitates a more comprehensive determination of the appropriate arrangements for authors and performers.

In addition, in the publishing sector, greater clarity during the contractual stage may be provided by specifically defining the subject matter (for example, as in Croatian legislation, the number of copies printed) for which the remuneration is defined as a lump sum. This could contribute to a clear remuneration context for the exploitation of specific works, and, even though referring to a lump sum, support clearer contractual terms for authors, who are better prepared with regard to expected financial outcomes, encouraging them to make informed decisions.

Regarding the contract adjustment mechanism, it is important to note that it requires rightholders to have the relevant knowledge and willingness to be able to effectively enforce their rights under the mechanism. The difficulties experienced by authors and performers linked to this enforcement were highlighted during the stakeholder consultation, for example a reluctance to initiate litigation for fear of a ‘lost case’, i.e. one where the chances of a satisfactory outcome for them seem slim. Moreover, an asymmetry of power in the industry in terms of procedures often prevents authors and performers from seeking such enforcement at all. Litigation in matters related to copyright remains an unpopular option for authors and performers, who also mentioned the length, cost and potential stigmatisation associated with legal proceedings as reasons for this reluctance. Considering this, it also has to be noted that Recital 78 of the DSM Directive provides for the possibility for authors and performers to be assisted by representatives in cases relating to requests for the adjustment of contracts, which should protect the identity of the author or performer for as long as is deemed necessary. This could potentially encourage the use of such enforcement mechanisms. Resolution through ADR which applies to, but is not limited to, disputes over transparency obligations and the contract adjustment mechanism could help to safeguard the interests of all contractual parties, while simultaneously relieving the burden of involvement in a lengthy and arduous legal dispute. ADR is analysed in the next chapter. A strengthening of the protection could also be envisaged by means of a combination of rights.

Considering the specificities of the audiovisual sector (in particular the production value chain, new online distribution models), this could be seen as a solution for authors and performers to retain their remuneration rights after having transferred exclusive rights to a subject matter to producers and, by extension, for producers when transferring their rights to streaming service providers. A few Member States have introduced unwaivable remuneration rights for authors and performers in relation to utilisation on online sharing platforms and streaming platforms. The compatibility of such measures with EU law is expected to be clarified following a request for a preliminary ruling submitted to the Court of Justice of the European Union by the Belgian Constitutional Court.

In relation to the **obligation of transparency** in Article 19 of the DSM Directive more detailed approaches have been noted in the case in France and Germany. Special attention should be paid to how the possibility of limiting transparency in the case of a disproportionate administrative burden is used in practice so as to prevent its effectiveness being impaired.

5.1.1.3. Mechanisms addressing the imbalances in bargaining power

Rules at international and/or EU level

International conventions do not include harmonised rules on the revocation of rights transfer agreements or mechanisms providing alternative ways for parties to settle their disputes. Nevertheless, many legal systems allow authors and performers to revoke the transfer of the ownership of rights or licences under certain conditions.

Revocation and alternative redress mechanisms are harmonised at EU level. As stated in Recital 79 of the DSM Directive, authors and performers may be hesitant to **enforce** their rights against their contractual partners before a court or a tribunal. Hence mechanisms that address the imbalance of power, such as the revocation mechanism and the use of alternative procedures, which can also be initiated by their representatives, can be helpful for the enforcement of rights.

Article 22 of the DSM Directive provides authors and performers with the **right to revoke** a licence or a transfer of the ownership of rights if their works or protected subject matter are not being exploited. This right applies when the lack of exploitation is evident over a certain period. The right of revocation requires prior notice to be given to the party to which the rights have been licensed or transferred. Revocation can be partial or total, depending on the extent of the non-exploitation,[465] which gives the parties a chance to renegotiate the terms of exploitation to avoid revocation. Once revocation takes effect, the rights revert to the author or performer. This right does not apply to non-exclusive licences and is limited to those exploitation rights that have been harmonised at EU level.[466] However, given the minimum harmonisation nature of the DSM Directive, Member States are allowed to extend this mechanism. This revocation mechanism gives Member States significant leeway as to its implementation.[467] For example, Article 22(2) allows Member States to take into account the specificities of different sectors and different types of works and subject matter; or within a work or subject matter containing the contribution of more than one author or performer, to take into account the relative importance of individual contributions and the legitimate interests of all authors and performers that may be affected by the application of the revocation mechanism by a single author or performer. Member States may also exclude certain works or subject matter from the application of the revocation mechanism where such works or subject matter normally contain contributions of a plurality of authors or

[465] Article 22(1) DSM Directive.
[466] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), p. 286, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.
[467] Article 22(2), (4) and (5) DSM Directive.

performers. Moreover, Member States may restrict the revocation mechanism to certain time frames, where such restriction is duly justified by the specificities of the sector or of the type of work or other subject matter concerned.[468][469]

In addition to the abovementioned revocation mechanism, a specific revocation mechanism for performers is set out in Article 3(2a) of the **Copyright Term Directive**. **This applies after 50 years of the contract**, in the event of a lack of exploitation or insufficient exploitation of phonograms by the phonogram producer. It enables performers to terminate the contract if '*the phonogram producer does not offer copies of the phonogram for sale in **sufficient** quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them*'. This mechanism, which was introduced to accompany the term extension for performers from 50 to 70 years, is therefore possible from the 51st to the 70th year of protection.[470]

Article 21 of the DSM Directive lays downs that **disputes regarding the transparency obligation** under Article 19 and **contract adjustment mechanism** under Article 20 can be resolved through a voluntary ADR procedure, which can be initiated by representative organisations of authors and performers (e.g. by a CMO) at the request of one or more artists or performers and does not impinge upon the right of the parties to assert and defend their rights through court action. The DSM Directive does not specifically establish any penalties or remedies for instances of non-compliance with the transparency obligation.[471] As such, ADR may serve as a tool to help authors and performers to effectively enforce their rights.

As the provision in Article 21 DSM Directive offers minimum harmonisation, Member States may broaden the scope of ADR to include other disputes, such as those relating to fair scope, fair exploitation, or the principle of fair remuneration. Member States may also determine the allocation of costs for the dispute resolution procedure at their discretion.

With regard to buy-out practices and the importance of their confidentiality aspects, a recent study argues that ADR could be better accepted than other official forms of dispute resolution by online platforms and other actors using buy-out contracts or clauses.[472] However, no such evidence was found in the survey results and interviews conducted for this study. The reasons for this apparent reluctance to use this mechanism may lie in its voluntary nature. The stakeholders perceive that the voluntary nature of ADR lacks enforceability or finality, which might deter them from using ADR. Stakeholders also have doubts about the practical outcomes of ADR versus litigation.

Rules at national level

Copyright laws in several Member States provide for specific **rules to exploit certain types of work**, especially in the publishing/literary sector and music sector. The sanction for non-compliance can even be termination of contract, but often only after due notice has been given. For example, under **Belgian** law, a **publishing contract** must provide for a certain minimum number of copies for the first edition of the publication.[473] In **Bulgaria**, authors can

[468] Article 2(2) DSM Directive.
[469] Carre, S., Le Cam, S., Macrez, F., '*Buy-out contracts imposed by platforms in the cultural and creative sector*', European Parliament, 2023, p. 37.
[470] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), p. 294, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.
[471] Furgal, U., '*Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market*', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 17.
[472] Carre, S., Le Cam, S., Macrez, F., p. 37.
[473] Article XI.195 Economic Law Code.

terminate a contract if the publisher fails to produce a subsequent issue within a year after the previous one is exhausted, without requiring the author to return the remuneration.[474] National legislation in **Croatia,**[475] **France,**[476] **Luxembourg, Portugal and Slovenia** also includes rules concerning the non-use of exploitation rights in the publishing sector. However, as the notion of copies in the case of a publishing contract relates to the reproduction of the publication in a fixed material form, the obligation to reproduce a publication in a fixed material form does not have much impact in the digital sphere.[477]

In application of Article 22 of the DSM Directive, **several Member States have added further details** to adapt this mechanism to their national legal systems. **Austrian** law, for example, provides for a termination right owing to the *inadequate* or *non-use* of rights. However, this right to terminate may be suspended for up to three years from the licence's issuance date. In **the Netherlands**, authors and performers may revoke the contract wholly or in part if the other party to the contract does not *sufficiently* exploit the copyright to the work within a reasonable period after concluding the contract, or does not sufficiently exploit the copyright after having initially performed acts of exploitation.[478] The **Romanian** Copyright Law allows authors and performers to terminate or revise contracts if their works are not *adequately* exploited.[479] **Slovenian** law allows authors and performers to revoke rights transfers if the rights are not *sufficiently* exploited, thereby affecting the author's interests. This can be implemented after two years from the transfer, giving the user time to comply, with shorter periods for publishing works.[480] Rules in **Slovakia** stipulate that if the acquirer does not utilise the exclusive licence *as agreed*, the author can terminate the licence agreement, unless the non-use is because of the author's circumstances and can be reasonably rectified.[481] In **Czechia,**[482] **Denmark,**[483] **Estonia**, **Finland,**[484] **France,**[485] **Ireland,**[486] **Italy,**[487] **Latvia,**[488] **Lithuania,**[489] **Malta,**[490] **Poland,**[491] **Portugal**, **Spain,**[492] and **Sweden**[493] this rule seems to be limited to cases of a lack of exploitation. **Hungarian**[494] law allows authors and performers to terminate a contract with an exclusive use licence if the user fails to begin using the work within a specified or a reasonable time, or if the usage is unsuitable. This national provision does not provide for a general use-it-or-lose-it revocation right, but rather allows creators to reclaim their rights only when they were not exploited in the initial phase following the conclusion of the agreement. For future works, either party

[474] Article 50 CNRA.
[475] Article 82 CRRA.
[476] Article L 132-17-2 - L. 132-17-8.
[477] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), p. 283, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43
[478] Section 25e Copyright Act.
[479] Article 47 Copyright Law.
[480] Article 83 ZASP.
[481] Article 73 Copyright Act.
[482] Section 2378 Civil Code.
[483] Section 54(1) Copyright Act.
[484] Section 30b Copyright Act.
[485] Article L. 131-5-2 IPC.
[486] Regulation 29 of the 2021 Regulations.
[487] Article 110-septies introduced by Legislative Decree n° 177/2021.
[488] Article 45.3 Copyright Law.
[489] Article 403 Copyright Law.
[490] Arbitration Act (Chapter 387 of the Laws of Malta), available at:https://legislation.mt/eli/cap/387/eng/pdf.
[491] Article 57 Copyright Law.
[492] Article 48 bis IPL.
[493] Section 29d of the Copyright Act (URL) (*Lag om upphovsrätt till litterära och konstnärliga verk*) SFS 1960:729, available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-1960729-om-upphovsratt-till-litterara-och_sfs-1960-729/.
[494] Article 51 Copyright Act.

can terminate the contract, subject to six months' notice, after five years and every five years thereafter.[495]

Moreover, **national rules vary considerably** as allowed by Article 22(2) of the DSM Directive. This applies especially to the reasonable time that needs to elapse following the conclusion of a licence or the transfer of the ownership of rights or different rules for works or performances involving multiple authors or performers. It seems that the option on the consideration of the relative importance of each individual contribution is rarely used, possibly because a number of Member States already support different revocation provisions for specific works or subject matter. Although the majority of Member States do not address the issue of collective works, some of them provide however for special solutions for collective works and works with contributions from several authors.[496]

Due to the **specificities of the audiovisual sector**, several Member States exclude the possibility to revoke certain rights (e.g. Germany, Greece[497] and Portugal), for example, once filming has started. However, in **Finland**, the author can terminate the contract, keep the remuneration, and may claim additional damages, if the work is not produced within five years despite the author's contractual compliance.[498] Also, in **Croatia,**[499] **France**[500] and **Hungary**[501] authors have the right to terminate an exploitation contract in the audiovisual sector.

In some Member States (examples include Bulgaria, France, Germany, Ireland, Lithuania, Latvia, the Netherlands, Portugal, Slovenia and Slovakia), **computer programmers**, including those working on videogames, cannot rely on the revocation mechanism.

Because of the general principle of contractual freedom, not many national **copyright laws** provide for rules on the duration of copyright exploitation contracts. Publishing contracts can be terminated if there are no copies of the work left (this is the case, for example in Belgium, France and Germany). Some national laws provide for contracts to be terminated if the publisher or producer becomes **insolvent** (e.g. Belgium, France and Germany).

Finally, the abovementioned revocation and termination mechanisms **usually do not apply if the protected subject matter is concluded within the framework of an employment relationship** (as is the case in Finland).

In addition, **general contract law** and **rules on unfair contract terms** may also provide for possibilities for authors and performers **to terminate contracts involving full transfers of rights and other similar practices**. These include, for example, termination on the basis of changed circumstances (*rebus sic stantibus* clause) or provisions relating to the duty of good faith in the performance of the contract, which extends to the duty to exploit the subject matter of the contract.[502] However, the national mapping did not identify jurisprudence covering this aspect.

As concerns the implementation of Article 21 of the DSM Directive, ADRs procedure are initiated in most Member States by identifying the applicable mechanism such as mediation,

[495] Article 52 Copyright Act.
[496] Furgal, U., '*Creator contracts: Report on the implementation of Chapter 3 of the Directive on copyright in the Digital Single Market*', ESCA - European Composer & Songwriter Alliance, 2022, available at: https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf, p. 22.
[497] Article 15B(4) Copyright Law.
[498] Section 40 Copyright Act.
[499] Articles 90 and 95 CRRA.
[500] Article L. 132-30 IPC.
[501] Article 66(6) Copyright Act.
[502] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), p. 284, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.

arbitration, collaborative negotiation and/or the body competent for such a procedure. In addition, Member States implement different approaches to the scope of ADR procedures: while some jurisdictions provide for general ADR mechanisms also covering copyright issues, several countries have established **specialised ADR procedures** for copyright issues alongside general procedures. These are presented below.

- **Austria** employs a voluntary mediation committee for copyright-related contractual negotiations and disputes in all creative sectors.[503]

- **Bulgaria** uses tailored mediation for disputes involving CMOs, rightholders and users across all sectors.[504]

- **Croatia** uses mediation proceedings through the Council of Experts for contract amendments aimed at achieving fair profit distribution and complying with transparency obligations.[505]

- In **Estonia,** the Copyright Committee resolves disputes related to copyright, serving as an additional dispute resolution conciliation body.[506]

- **Finland** provides tailored arbitration, mediation and conciliation for copyright disputes, with some arbitration processes being mandatory for defining remuneration and for the authorisation of copies.[507]

- **France** employs a Music Mediator, a public body for the conciliation of disputes in performance contracts between authors and broadcasters in the music sector.[508]

- **Germany** allows for voluntary arbitration to establish joint remuneration agreements if agreed by the parties. Additionally, authors and users can use mediation or other voluntary out-of-court dispute resolution procedures for disputes over rights and claims, preventing agreements that disadvantage the author.[509]

- In **Greece**, an ADR mechanism is available for creators and parties exploiting their rights through mediation by the Hellenic Copyright Association (HCA).[510]

- **Hungary** provides for the Conciliation Board within the IP Office to facilitate agreement on remuneration and other terms of use.[511]

- **Italy** offers ADR through the Authority for Guarantees in Communications (AGCom) for disputes concerning transparency and contractual adjustments, emphasising a special procedure for copyrights.[512]

[503] Section 24b UrhG.
[504] Article 94z CNRA.
[505] Article 239 CRRA.
[506] Section 79 Copyright Act.
[507] Foundation for Cultural Policy Research Cupore: Assessing Copyright and Related Rights Systems: Availability of Alternative Dispute Resolution Mechanisms. Report on Piloting in Finland. (Cupore webpublications 39:18 May 2016), p. 7.
[508] Ministry of Culture, The Music Mediator (Le Médiateur de la Musique), available at: https://www.culture.gouv.fr/Thematiques/Musique/Musique-enregistree/Le-Mediateur-de-la-musique.
[509] 32f UrhG.
[510] Articles 15A and 32A Copyright Law.
[511] Article 103 Copyright Act.
[512] Article 110-sexiesCopyright Law.

- In **Lithuania,** the Copyright and Neighbouring Rights Commission acts as an additional body to resolve disputes arising from copyright provisions.[513]

- The law in **Luxembourg** allows for a mediator to assist in negotiating transfer agreements when parties cannot agree on a transfer of the ownership of rights or licence of copyright or related rights.[514]

- In **Latvia**, copyright law provides for ADR procedures to settle disputes concerning rights transfers.[515]

- In the **Netherlands**, a committee, known as the Copyright Business Disputes Committee and hosted by the Disputes Committee Foundation, handles disputes between CMOs and other parties regarding the fairness of the fees charged and their application.[516]

- In **Portugal** disputes over information obligations or additional remuneration can be submitted to an institutionalised arbitration centre or voluntary arbitration.[517]

- In **Slovakia**, CMOs initiate mediation under specific regulations to resolve disputes with legal entities representing users. In addition, ADR procedures, including mediation, are also available to individual authors and performers for their disputes with users.[518]

- **Slovenian** copyright law allows for ADR procedures through mediation or in other forms, primarily addressing disputes concerning rights transfers, remuneration and transparency. Parties can choose their ADR procedure and provider, sending a proposal to the Slovenian Intellectual Property Office (UIL) to initiate the process.[519]

- **Spain** has an Intellectual Property Commission for mediation, arbitration and tariff determination in copyright cases.[520]

In **Ireland**, discussions on the establishment of an independent copyright council for ADR procedures are ongoing, but such a mechanism has not yet been implemented.

[513] Article 7230(3) Copyright Law.
[514] Articles 12 and 49 Copyright Law.
[515] Chapter X.1 of the Copyright Law.
[516] Section 23 of the Supervision of Collective Management Organisations Copyright and Neighbouring Rights Act (Wtcb) (*Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten*), available at: https://wetten.overheid.nl/BWBR0014779/2022-10-01.
[517] Article 44-D Copyright Code.
[518] Section 152(4) Copyright Act.
[519] Regulation on mediation in copyright and related rights disputes (*Uredba o mediaciji v sporih v zvezi z avtorsko ali sorodnimi pravicami*), available at: https://pisrs.si/pregledPredpisa?id=URED8791.
[520] Article 194(5) IPL.

In all other countries, **general ADR procedures** exist for use in disputes arising from copyright exploitation contracts. Examples include Belgium,[521] Cyprus,[522] Czechia,[523] Denmark,[524] Malta,[525] Poland,[526] Romania,[527] and Sweden.[528]

The establishment of specialised ADR mechanisms for copyright disputes across various jurisdictions reflects a growing recognition of the need for effective and accessible dispute resolution methods. However, while specialised and general ADR mechanisms are beneficial, the effectiveness of these processes largely depends on the willingness of the parties to use such mechanisms. As there were practically no comments from respondents on ADR mechanisms, it is not possible to ascertain the effectiveness of specialised and general ADR mechanisms in practice. The survey data also shows that **66% of respondents have not engaged with ADR mechanisms**, mentioning a lack of understanding of the procedure, concerns about potential blacklisting, or scepticism about the effectiveness of such mechanisms.

Conclusions

The mechanisms intended to address imbalances in bargaining power, particularly through revocation and ADR procedures, also present some legal challenges. These arise primarily from **variations in the implementation and scope of relevant provisions across different jurisdictions within the EU**.

The DSM Directive's **minimum harmonisation nature** permits Member States to adapt the revocation mechanism in Article 22 to their national legal system, by extending or modifying said revocation mechanism, resulting in significant variations in rules. For example, some Member States exclude certain sectors from the revocation mechanism or restrict the mechanisms to certain types of rights. In addition, in some countries, some audiovisual rights become irrevocable once filming begins.

The effectiveness of the revocation and contract termination mechanisms also heavily relies on the **awareness and willingness of rightholders** to assert and enforce their rights under the law. The practical arrangements for terminating or revising contracts require careful negotiation and, in some cases, **legal action, which can be complex and costly**. The effectiveness of these provisions also depends on contractual specifics and the ability of copyright holders to assert their rights.

ADR mechanisms can offer a potential solution to the reluctance of authors and performers to enforce their rights through courts. Nevertheless, the results of the survey also show that 66% of respondents have not made use of ADR mechanisms owing to a lack of knowledge of this mechanism, the fear of being blacklisted or doubts about the effectiveness of ADR.

[521] The Belgian Judicial Code provides for alternative dispute resolution mechanisms (Articles 1676 to 1723/1), voluntary mediation (Articles 1724 to 1737) and collaborative negotiations (Articles 1738 to 1747).
[522] Article 10B(1) Copyright Law.
[523] Section 101 et seq. Copyright Act.
[524] As regards ADR, this is typically voluntary in Denmark, meaning that parties may choose to use mediation or arbitration to resolve their disputes instead of going through the court system.
[525] Malta does not have an ADR procedure specifically for copyright disputes. Under Maltese law, however, disputes concerning civil, family, social, commercial and industrial matters may be referred for mediation. Generally, there is no explicit restriction on the use of mediation for disputes regarding rights transfers as the parties may voluntarily apply for mediation.
[526] In general, there are mechanisms in the Civil Procedure Code aimed at facilitating the use of ADR procedures for all kinds of civil and commercial cases.
[527] ADR is largely voluntary, promoting a consensual and customised approach to dispute resolution.
[528] Sweden does not have any ADR procedures. The form of dispute resolution that the Swedish state provides for handling disputes in the field of private law is primarily the administration of justice that is provided via the general courts. However, if the parties to a dispute under private law wish to resolve the dispute out of court, they are permitted to do so and they may themselves agree on the terms of the procedure.

Article 21 of the DSM Directive encourages the use of voluntary ADR for disputes concerning transparency and contract adjustments. While **the scope of ADR is limited by the directive's minimum harmonisation approach**, Member States could decide to encompass all categories of disputes pertaining to rights transfer agreements, including disputes relating to appropriate and proportionate remuneration under Article 18 of the DSM Directive.

The lack of knowledge which in all likelihood discourages authors and performers from using such mechanisms could be addressed by promotional and educational activities and other **soft law measures,** such as guidelines and manuals.

5.1.1.4. Mechanisms facilitating the implementation and enforcement of rules

The role of CMOs

CMOs are entrusted by rightholders – their members – to manage their exclusive rights, for example by granting licences to third parties. Collective management can play a crucial role in combating clauses involving a full or partial transfer of rights deemed abusive, such as buy-outs. Through the pooling of the rights of multiple rightholders, CMOs can gain collective bargaining power and greater leverage in negotiations with users. This collective approach helps to establish standardised terms and conditions for licensing, thereby contributing to an environment where creators have a higher chance of receiving fair remuneration for the use and exploitation of their protected subject matter over time. Moreover, CMOs can provide a robust framework for monitoring the use of copyrighted materials, enforcing rights and collecting royalties efficiently on behalf of their members.

CMOs can play a significant role in the management of rights for authors and performers, even in cases where these rights have been transferred to other parties, such as phonogram producers or publishers. For instance, when a performer transfers their rights to a phonogram producer, the transfer typically involves the economic rights necessary for the producer to commercially exploit the recording (e.g. reproduction, distribution and public performance rights). Despite this transfer, CMOs often retain the authority to manage certain rights on behalf of the performer, particularly remuneration rights. For example, a performer's rights to equitable remuneration for broadcasting and communication to the public are often administered by CMOs.[529] Another example would be when an author transfers their rights to a publisher. Such a transfer would usually include the economic rights required for the publication and distribution of the work (e.g. rights to print, distribute and sell copies of the work). Even if an author transfers the publishing rights to a publisher, the CMO may still collect royalties for the public performance of the work (e.g. readings, performances) and for uses such as radio or television broadcasting.[530]

When asked about the impact of contractual practices on operations and the effectiveness of CMO operations in general, **21% of the survey respondents** consider that certain contractual practices, such as transferring all rights for a lump-sum payment (i.e. buy-outs) and contracts governed by non-EU law, significantly hinder the functioning and effectiveness of CMOs, while 8% stated that such practices significantly increase the operations and effectiveness of CMOs. In addition, 23% of respondents answered 'don't know', while 16 % of respondents do not feel that they have a significant impact and 13% of respondents are of the opinion that they somewhat reduce the operations and effectiveness of CMOs. A breakdown by sector indicates that 29% of respondents from the

[529] WIPO Good Practice Toolkit for CMOs (The Toolkit), 11 January 2018, available at: https://www.wipo.int/edocs/mdocs/copyright/en/wipo_ccm_ge_18/wipo_ccm_ge_18_toolkit.pdf.
[530] WIPO, Managing Intellectual Property in the Book Publishing Industry - A business-oriented information booklet, Creative industries – Booklet No. 1, available at: https://www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub_868.pdf.

music sector view these practices as detrimental, followed by 25% and 20% from the audiovisual and visual arts sectors respectively. A large proportion of audiovisual respondents (33%) are uncertain. On the other hand, the stakeholders highlighted that **CMOs are struggling to ensure that authors and performers retain their remuneration rights – including their right to equitable remuneration**. Key issues include lump-sum payments and exoneration clauses hindering the collective exercise of certain exclusive rights through professional organisations. As a result, CMOs risk losing the ability to oversee secondary uses and distribute associated remuneration, ultimately diminishing potential income for authors and performers.[531]

Despite buy-out contracts, CMOs continue to play an important role in managing certain rights for authors and performers. They primarily handle remuneration rights, ensuring that rightholders receive payment for uses of their works and protected subject matter that go beyond the initial commercial exploitation covered by the transferred rights, thereby providing ongoing financial benefits to authors and performers.[532]

However, there are specific rights areas where CMOs are generally not involved. These areas typically include rights that are best managed individually because of their nature and the specific commercial arrangements involved. For instance, rights to publish, reproduce, distribute and license works for films, books, recordings, etc. are not usually delegated to CMOs, because these rights often involve significant commercial contracts where individual negotiation is crucial.[533] Authors, performers and their representatives (e.g. agents, managers) negotiate terms directly with publishers, producers and record labels to maximise their financial and creative control. The terms of such agreements tend to be highly specific and customised to the work and the commercial strategy of the rightholder.[534] Furthermore, as moral rights are inherently personal and are designed to protect the personal connection between the creator and their work they cannot be transferred or waived in the same way as economic rights. Accordingly, authors and performers usually assert their moral rights directly, as these rights pertain to their personal and reputational interests.[535] In addition, depending on the creative sector,[536] licensing for streaming services, digital downloads and other online platforms where direct deals are made, are not typically managed by CMOs, because the digital market is highly dynamic, and direct licensing potentially allows rightholders to quickly adapt to changes in technology, consumer behaviour and commercial opportunities. Furthermore, digital platforms often require specific licensing terms, such as subscription models, pay-per-view or ad-supported services, which are best negotiated directly.[537] Authors in the music sector continue to have a significant relationship with CMOs, despite the rise of direct licensing and digital platforms. CMOs in the music sector play a key role in licensing rights, collecting royalties and

[531] For further details, please see Subchapter 5.1 - Implications of contractual practices for authors and performers.
[532] Trapova A., Reviving collective management -will CMOs become the true mediators they ought to be in the Digital Single Market?, January 2020, available at: https://www.researchgate.net/publication/348152278_Reviving_collective_management_-will_CMOs_become_the_true_mediators_they_ought_to_be_in_the_Digital_Single_Market.
[533] WIPO, Basic Notions of Copyright and Related Rights, available at: https://www.wipo.int/export/sites/www/copyright/en/docs/basic_notions.pdf.
[534] Kramer Bussel, R., How Literary Agents Negotiate the Best Contract Terms For Their Authors, available at: https://www.forbes.com/sites/rachelkramerbussel/2020/03/02/how-literary-agents-negotiate-the-best-contract-terms-for-their-authors/.
[535] Lucena, C. (2015). Collective Rights Management. In: Collective Rights and Digital Content. SpringerBriefs in Law. Springer, Cham., available at: https://doi.org/10.1007/978-3-319-15910-2_4.
[536] As such, direct licensing happens more in the music industry. See Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), p. 82. soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.
[537] BitMar Blog, The Legal Landscape of Streaming: Copyright, Licensing, and Piracy, available at: https://blog.bitmar.com/2023/03/the-legal-landscape-of-streaming.html.

distributing revenues to authors, particularly in cases involving public performances, broadcasting and online usage.[538]

Trade unions and **independent authors' and performers' associations** also help facilitate the implementation and enforcement of rules that enhance the protection of authors and performers through **collective bargaining**. For instance, collective agreements, which are the result of collective bargaining, have long been established in the European audiovisual sector, particularly in countries such as Germany, France and Denmark. These agreements typically outline the terms between authors, performers and other stakeholders, with the aim of safeguarding the interests and rights of authors and performers alike.[539]

For example, trade unions are able to conclude **collective agreements,** i.e. legally binding formal contracts concluded between trade unions representing authors and performers and their employer and which outline the terms and conditions agreed by both parties. The rules on the conclusion of such collective agreements are usually provided in general labour law codes. Trade unions may support and represent **rightholders** in negotiations with corporate partners and contribute to industry-wide good practices through model contracts and collectively set remuneration standards.[540] Moreover, associations of freelance authors and performers can conclude **joint agreements** - a form of collective bargaining agreement - which extend beyond labour law and **apply to freelance authors and performers**. Such agreements usually set general minimum standards regarding the royalties due for the use of copyrighted material. For instance, in **Germany**, collective agreements would be typical for employee contracts, whereby joint agreements would be typical for freelance authors and performers. German copyright contract law contains provisions that encourage the conclusion of collective agreements and joint agreements, by allowing deviations from author-protective rules only by way of such collective action.

Rules at international and/or EU level

The international legal instruments on copyright discussed in Annex III do not regulate the role of collective bargaining, the conclusion of collective agreements or joint agreements when it comes to the transfer of rights between a rightholder and their contractual counterparty.

In the EU, several directives govern the collective management of rights, particularly the **CRM Directive**, which standardises the relationship between CMOs and their members and delineates CMO governance structures. The CRM Directive defines a CMO as an organisation authorised by law or contractual arrangement to manage copyright or related rights on behalf of multiple rightholders for their collective benefit, either owned or controlled by its members or operating on a not-for-profit basis. Article 1 outlines the rules governing CMOs and the multi-territorial licensing of musical works for online use, while Article 4 mandates that CMOs act in the best interests of rightholders without imposing unnecessary obligations. Article 5 allows rightholders to choose any CMO to manage their rights, grants them the ability to license non-commercial uses, and provides the option to terminate or withdraw authorisation with reasonable notice. CMOs can issue licences for works and engage in extended collective licensing, covering all works in a category, including those of non-members.

[538] Arenal, A., Armuna, C., Ramos, S., Feijoo, C., Aguado, J.M, Digital transformation, blockchain, and the music industry: A review from the perspective of performers' collective management organizations, Telecommunications Policy, Volume 48, Issue 8, 2024, 102817, ISSN 0308-5961.

[539] For further details, please see Subchapter 3.2.1. - In-depth look at contractual practices involving transfers of rights.

[540] Vanherpe J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), pp. 336-347.

As for the **DSM Directive,** Article 8 allows CMOs to conclude non-exclusive licences with cultural heritage institutions for non-commercial use of out-of-commerce works in their collections. These licences can be granted even if not all rightholders have mandated the CMO, provided the CMO is sufficiently representative of the relevant rightholders and ensures equal treatment for all. Additionally, Article 8(3) of the DSM Directive provides an exception for cultural heritage institutions to use out-of-commerce works in their collections. This exception only applies in the absence of a CMO that represents the relevant rightholders and can grant licences for such uses. If a CMO is available and capable of granting licences for these works, then the institution must obtain a licence from the CMO rather than relying on the exception provided by the DSM Directive.

Furthermore, Article 12 of the DSM Directive introduces the possibility for Member States to introduce collective licensing with an extended effect applicable within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical, while safeguarding the legitimate interests of rightholders.

In the audiovisual sector, the SatCab and **SatCab II Directives**, which simplify the process for broadcasting organisations and retransmission operators to clear copyright and related rights in crossborder situations, provide that the exclusive right to retransmission via cable (Sat Cab I) or via other means, such as satellite or online retransmission in a secure environment (Sat Cab II),[541] can only be exercised through mandatory collective management.

To summarise, the rules governing the collective management of rights at EU level encompass several principles aimed at fostering fair and transparent practices.

Rules at national level

The CMO landscape across the EU covers a wide array of approaches in managing the rights of authors and performers, particularly with regard to negotiating, implementing and enforcing rights transfer agreements. For instance, CMOs might furnish template contracts and model agreements to help standardise terms and safeguard the rights of visual artists. Such templates are valuable resources, providing a benchmark for what artists may reasonably anticipate concerning their rights and remuneration. For literary works, although CMOs do not engage in the exploitation of primary rights, they do participate in the exploitation of secondary rights and act as intermediaries for other rights, including public lending rights and private copyright.[542] In the audiovisual sector, the survey respondents reported that collective agreements had led to enhancements in their contracts, for 38% of authors and 65% of performers.[543]

It is important to distinguish between **voluntary** (or optional) and **mandatory** collective management of rights by CMOs. Within the voluntary scheme, for exclusive rights that require explicit consent, rightholders may opt to delegate the management of their rights to CMOs. Voluntary collective management is primarily driven by practicality, as monitoring all individual uses of a work, especially in a digital context, is nearly impossible. Within the mandatory collective management scheme, CMOs collect equitable remuneration and transfer it to the rightholders after deducting their administrative costs.[544]

In addition, **extended collective licensing (ECL) schemes**, initially in use in the Nordic countries, have also been introduced into EU law by Article 12 of the DSM Directive, Several

[541] SatCab II, Recitals 9, 14, 15, 16-18, 20-23, 25, Chapter III.
[542] For further details, please see Subchapter 3.4.1.- In-depth look at contractual practices involving rights transfers.
[543] For further details, please see Subchapter 3.2.2.- In-depth look at contractual practices involving rights transfers.
[544] Vanherpe J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), pp. 74-82.

Member States rely on ECL schemes in certain sectors, allowing CMOs to issue licences on behalf of non-represented authors or performers, thus facilitating a more streamlined and centralised process for acquiring licences.[545] For instance, in **Sweden**, individuals are permitted, within a specifically delimited area of exploitation (i.e. where the extended collective licence applies) for the authorities, educational institutions, archives, libraries and broadcasting organisations, to reproduce copies of works (such as literary works, musical works, educational works, works in archives and libraries, radio and television broadcasts), or make works available to the public.[546] This exploitation is contingent upon the user being granted the right, through an agreement with the organisation, to exploit works as specified in the agreement, even if the authors of the works in question are not represented by the organisation.

Example of collective licensing scheme – Finland

In Finland, ECL is used: in photocopying - reproduction; in internal information use - reproduction and communication to the public; in teaching and scientific research - reproduction and making available to the public; in archives, libraries, museums - reproduction and communication to the public; in out-of-commerce works - reproduction, distribution and communication to the public; in a work of art included in a collection - reproduction and communication to the public; in broadcasting - radio and television; in recording by means of transmission - for reproduction; in the reuse of archived software - for reproduction and communication to the public; in the reuse of a work included in a journal - for reproduction and communication to the public; in retransmission; in online recording services - for television programmes using a work included in a press publication.

CMOs, often working alongside trade unions and associations representing freelance creators, significantly influence the collective bargaining culture within different Member States. The number of CMOs present in a country does not always correlate directly with the strength of its collective bargaining culture. For instance, countries with a similar quantity of CMOs may differ in the extent of their legal frameworks, mandatory representation rules and the breadth of functions performed by CMOs. Given this diversity across Member States, categorising countries presents challenges. For instance, **Danish** CMOs such as the Composers' Rights in Denmark (Koda)[547] and the Gramophone Record Experts (Gramex)[548] oversee the collective management of music rights, whereas in other Scandinavian countries (e.g. Finland), a particular form of support for performers is in place, where **collective agreements** exist between **labour unions** and the **national public broadcasting company** to support performers. In this system, CMOs collect and pay copyright remunerations for secondary use.

Legislative reform in the Netherlands

A recent legislative proposal in the Netherlands aims to allow associations of creators and operators to **collectively negotiate the rights and obligations outlined in the**

[545] See extensively Tryggvadóttir, R., European Libraries and the Internet: Copyright and Extended Collective Licences (Intersentia 2018), 448 pp.
[546] Act on copyright in literary and artistic works (Swedish statute book, sfs, 1960:729, as last amended by sfs 2020:540), Chapter 3 a. on extended effect of collective licences.
[547] See https://www.koda.dk/.
[548] See https://gramex.dk/.

copyright contract law.[549] This legislative change provides for the possibility of concluding collective agreements with the aim of negotiating fair remuneration as provided for in the national transposition of Article 18 of the DSM Directive. Associations of creators will be entitled to collectively negotiate further details of the rights and obligations arising from the copyright contract law provisions in Chapter 1a of the Dutch Copyright Act.

Conclusions

The approaches across Member States to collective management are very diverse, reflecting varying legal frameworks, cultural practices and industry dynamics.

Overall, CMOs play a crucial role in managing certain rights on behalf of authors and performers, even after the transfer of economic rights to publishers or producers, such as ensuring remuneration by retaining authority over specific remuneration rights, negotiating standardised rates and engaging in collective licensing with different types of users. CMOs could provide protection against unfair contractual terms and practices, ensuring contractual fairness by providing template contracts and model agreements, in order to help standardise terms and conditions across the industry.

CMOs do not generally manage certain rights owing to the need for individual negotiation and customised agreements. These rights include exclusive economic rights for primary exploitation, which involve significant commercial contracts requiring personalised terms to maximise financial and creative control; moral rights, which are inherently personal and protect the creator's connection to their work; specific licensing agreements, which demand tailored terms for specific uses, durations, territories and financial arrangements; commissioned works, which address the unique needs and expectations of the commissioning party; and digital licensing, which requires direct negotiation to adapt swiftly to technological and market changes and meet the specific terms required by digital platforms.

Situations where a complete transfer of exclusive rights takes place at the outset of the contract, such as in the case of a certain buy-out clauses for the complete transfer of rights, result in the role of CMOs to represent and negotiate on behalf of authors' or performers' representatives being limited.

5.1.2.Rules applicable to audiovisual producers

Audiovisual producers play a central role in the production process as they are the ones that acquire the economic (exploitation) rights from various rightholders (screenwriters, composers, actors, etc.) and then further negotiate the transfer of such economic rights to ensure the audiovisual production. There are two different types of rights that audiovisual producers transfer to broadcasters/streamers, namely: (i) the transfer of their original rights in the audiovisual work; and (ii) the further transfer of rights of authors and performers.

The 2023 European Media Industry Outlook revealed a trend with significant imbalances in the control and ownership of IP rights in the contractual relationships between producers and broadcasters/streamers. The strong bargaining power of non-EU streaming companies and to a lesser extend broadcasters is particularly problematic for audiovisual producers,

[549] New legislative proposal: Bill to amend the Copyright Act, the Neighbouring Rights Act and the Copyright Contracts Act in connection with further strengthening the position of the creator and performer in copyright and neighbouring rights agreements *(Voorstel van wet tot wijziging van de Auteurswet, de Wet op de naburige rechten en de Wet auteurscontractenrecht in verband met de nadere versterking van de positie van de maker en de uitvoerende kunstenaar bij overeenkomsten betreffende het auteursrecht en het naburig recht; Wet versterking auteurscontractenrecht*), https://www.internetconsultatie.nl/acr2/document/8899.

that might find themselves in a position of contractual weakness, unable to exploit their own rights and works and invest in new content.[550] For more information on the contractual practices affecting producers in the audiovisual sector, please see Subchapter 4.1.4. and Subchapter 4.1.5.

This chapter identifies and analyses legal provisions, in addition to those already discussed in Subchapter 4.1.5. above, applicable to audiovisual producers in contractual practices involving transfers of their rights, including buy-out clauses. This chapter first discusses rules at international and EU levels, followed by national rules, including potential challenges, and a short concluding chapter.

Rules at international and/or EU level

The international and EU copyright legal frameworks specify to some extent the type of rights granted to audiovisual producers[551] and the rules for the transfer of applicable rights from authors/performers to producers.[552] However, the analysis **did not reveal any protective rules for the further transfer of their rights to broadcasters/streamers in case of practices involving rights transfers, such as buy-out clauses,** as in the case of authors and performers. The scope of the provisions in Chapter 3 of Title IV of the **DSM Directive** covers authors and performers, while producers are not explicitly included. This means that audiovisual producers cannot rely on the same legal safeguards available in EU law for authors and performers in exploitation contracts.[553]

As explained in Subchapter 4.1.3. and Subchapter 4.1.5., there are policy instruments that protect independent producers in IP rights ownership, including support measures and definitions of independent producers. In particular, in the implementation of the **Audiovisual Media Services Directive (AVMSD)**, as discussed in Subchapter 4.1.5., some national rules allow independent producers to retain IP rights in certain cases, when entering into agreements with streamers/broadcasters, based on criteria linked to the definition of independent producers or productions which VOD/broadcasters have to finance or include in their programming/catalogue.[554] Although these provisions do not include safeguards against perpetual transfers of the ownership of rights, they may have an impact on the choice of financing model and, ultimately, on the imbalance in bargaining power between producers and streamers/broadcasters.

As discussed in Subchapter 5.1.1.1., the **general principles of (EU) contract law** are also relevant to address the practices involving a full transfer of rights, including in particular the principles of ***rebus sic stantibus*** and ***force majeure***. *Rebus sic stantibus* is a legal principle allowing the termination or modification of a contract on the grounds of unforeseen, fundamental changes in circumstances that make fulfilling the original terms unjust. *Force*

[550] See, for example, Kautio, T. & Lefever, N., Changing contractual relations: copyright issues in the audiovisual sector (*Sopimussuhteet muutoksessa: Audiovisuaalisen alan tekijänoikeudellisia kysymyksiä*), Cupore online publications 74, Cultural Policy Research Centre Cupore, 2023, pp. 6-7. See also Carre, S. et al. (2023), Buy-out contracts imposed by platforms in the cultural and creative sector, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)754184 and https://www.writersguilditalia.it/andrea-renato-il-recepimento-della-direttiva-copyright/.

[551] For example, the InfoSoc Directive provides audiovisual producers with a set of rights that allow them to control the reproduction, distribution, and public communication of their works (Articles 2-4); the Rental and Lending Directive grants audiovisual producers the exclusive right to authorise or prohibit rental and lending of the first fixation of an audiovisual work in respect of the original and copies of it, as well as a distribution right (Article 9(c)).

[552] For example, Article 12 of the Beijing Treaty states that performers' exclusive rights may be transferred to the producer. The Rental and Lending Directive provides for the presumption that authors and performers transfer their rental rights to audiovisual producers when they contribute to an audiovisual work (Article 3(4) and (5)).

[553] Mechanisms that enhance the position of authors and performers are explained in Subchapter 5.1.1.

[554] For example, Recital 71 of the AVMSD provides a non-prescriptive list of criteria that Member States may adopt to define an independent producer, including the retention of rights, while Article 13(2) provides an option for Member States to require media service providers to contribute financially to the production of European audiovisual works, and Article 13(1) establishes a quota rule for European works in VOD catalogues. Finally, Articles 16 and 17 AVMSD lay down obligations for broadcasters to promote the distribution and production of European works, in terms of transmission time and budget.

majeure refers to unforeseeable and unavoidable events such as natural disasters that prevent contract fulfilment. The two principles are not codified under EU law, and their application depends on national laws, with courts considering each case based on contractual terms and the nature of unforeseen events. These two principles are general principles of contract law. However, in practice, they can be difficult to use extensively for the protection of audiovisual producers.

It should be noted that the EU does not have direct competence to legislate comprehensively in the area of contract law. The recent **EU Regulation on platform-to-business relations (P2B Regulation)**[555] is of some relevance, providing for the first ever set of rules for creating a fair, transparent and predictable business environment for smaller businesses and traders on online platforms. Although applicable to B2B relationships, the P2B Regulation's impact is limited to those audiovisual producers that engage in platform-to-business relations. This means that the P2B Regulation applies only to those streamers that can be classified as online intermediaries (platforms) and which intermediate between audiovisual producers and consumers. In cases where the streamers directly acquire content, the relationship between audiovisual producers and streamers may not fall under the rules of this regulation.

In addition, certain **non-binding instruments** (e.g. model rules) have extended their protection efforts to the weaker parties in contractual relationships and could thus be used by producers that find themselves in a position of contractual weakness. However, such rules are only enforceable if the parties to an exploitation contract have chosen them as part of the governing framework. Otherwise, their relevance is limited to supporting the interpretation of contractual rules. The **Principles of European Contract Law** (PECL),[556] which represent a set of model rules of contract law and the law of obligations, extend, for example, the rules on unfair terms of the Directive 93/13/EEC to all contracts in general. Although the PECL is grounded in the principles of contract freedom, Article 4:110 allows a party to avoid a term in a contract that was not individually negotiated if it contravenes the principles of good faith and fair dealing by creating a significant imbalance in the parties' rights and obligations to the detriment of that party.[557] Similarly, the **Draft Common Frame of Reference** (DCFR),[558] which also contains principles, definitions and model rules in the area of European civil law, expands the regulatory focus from the specific category of consumer contracts to the more inclusive category of asymmetric contracts.

In summary, the international and EU copyright frameworks offer limited direct protection to audiovisual producers in relation to the further transfer of their rights, focusing instead on protecting authors and performers. Mechanisms to protect producers depend on the national policy context. While policy instruments such as the AVMSD and national rules on independent producers provide some leverage in retaining IP rights, they do not fully address perpetual transfer practices. Finally, general principles of contract law seem to be

[555] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, pp. 57-79, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150.
[556] Principles of European Contract Law – PECL. See also the Communication from the Commission to the Council and the European Parliament on European contract law, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52001DC0398.
[557] This determination is made by considering the nature of the contractual performance, the entirety of the contract's terms and the circumstances at the time the contract was formed. However, this provision excludes terms that define the main subject matter of the contract, provided such terms are expressed in clear and intelligible language. Additionally, it does not apply to the assessment of the adequacy of one party's obligations relative to those of the other party.
[558] Draft Common Frame of Reference – DCFR.

of limited relevance. Protection of the weaker contracting party at EU level remains limited and general, with no specific legal instruments tailored to audiovisual producers.[559]

Rules at national level

Similar to the EU legal framework, national laws regulate the transfer of exclusive rights from audiovisual producers to broadcasters/streamers from two angles, namely the transfer of their original rights and their derivative rights. In both cases, national laws leave audiovisual producers with a broad freedom to contract. However, while national laws provide for rules on the scope of the transfer of exploitation rights of audiovisual producers, the desk research at national level shows that only a few Member States provide for specific safeguards in favour of audiovisual producers in the case of practices affecting the rights transfer, such as of buy-out contracts,

As regards the **further transfer of the derivative rights of authors and performers**, in most EU Member States it is presumed that the exploitation rights have been transferred from the authors and performers to the audiovisual producers via contracts concluded for the production of audiovisual works.[560] The goal of such national rules is to protect the investment of audiovisual producers.

As regards the **transfer of original rights** of audiovisual producers, it appears that in some national laws the scope of the rights of audiovisual producers is more limited than that of authors or performers or even phonogram producers (such as in Croatia[561]).

To fight unfair contractual terms in rights transfer agreements, the regulatory frameworks of most Member State primarily rely on **general rules and principles of civil law**, such as rules and principles that govern contractual terms in a B2B context, competition rules, or rules regulating unfair contractual terms or practices, if not limited to B2C relationships. These rules and the general principle of contract negotiation and fairness can also be applied when negotiating terms in the context of audiovisual production. For example:

- In **Austria**, contractual terms which are considered grossly disadvantageous for one party are inadmissible pursuant to Section 879 of the Austrian Civil Code (ABGB).[562] This might be the case if one party demands extensive one-sided opening clauses for amendments or far-reaching non-compete clauses. In this regard Austrian antitrust law must also be considered; this provides that all business agreements which lead to a prevention, restriction or distortion of competition are forbidden (Section 1 of the Austrian Antitrust Act - *Kartellgesetz*). Exclusive agreements with large companies in small markets in particular represent a risk in this regard. Remuneration must also comply with general civil law rules. If a contractual party does not receive even half of the value in exchange for their contractual performance – including the provision of a licence – this contract can be deemed invalid under Section 934 ABGB.

[559] On the civil procedural protection afforded by the CJEU case to B2B contracts, see: Váradi, Á. (2017). Social and Economic Challenges, Legal Answers: Protection of the Weaker Party in Contractual relationships, available at: https://real.mtak.hu/86706/. See also: Mańko, R. (2013).

[560] See rights transfers under Subchapter 5.1.1.

[561] For example, Croatian audiovisual producers have only the following rights: reproduction right, distribution right, public presentation right, making available right, ancillary online service right and right in respect to 'user generated content' rights. Other communication to the public rights, such as broadcasting and retransmission, are not originally rights of audiovisual producers (but are managed based on the transfer of authors' rights). On the other hand, other types of producers (such as phonogram producers and even press publishers in respect to videoclips) have all types of communication to the public rights. See Article 152 CRRA.

[562] *Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*, JGS N°. 946/1811 as latest amended by BGBl. I N°. 182/2023, available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622.

- Desk research in **Croatia** shows that audiovisual producers could for example rely on the 'rebus sic stantibus' clause in the Obligations Act.[563]

- Under **Dutch** contract law, parties are generally free to negotiate the terms of their contracts, including those related to remuneration for the use or exploitation of audiovisual productions. However, Dutch law also contains principles of good faith and reasonableness (*redelijkheid en billijkheid*) that apply to contractual relationships. These principles may be interpreted by courts to impose certain obligations on parties to act fairly and equitably in their dealings with each other.

- Also in **Germany** audiovisual producers are not granted special protection as they are considered as traders within the meaning of Section 14(1) of the German Civil Code (BGB).[564] Thus, the contractual arrangements and the general civil code rules on the termination of a contract for the performance of a continuing obligation apply. However, the question of whether audiovisual producer contracts can also be terminated in the absence of a rule in the contract and a compelling reason in line with Section 314 BGB is disputed and has not yet been settled by case-law.

- In **Finland**, a contractual term that is unfair or where its application would lead to an unfair result (including the amount of remuneration), may be adjusted or set aside.[565]

- The **Italian** Civil Code, although not directly targeting creative industries, embeds fundamental principle of fairness and good faith[566] and adjustment for unforeseen events.[567]

- The **Spanish** Civil Code establishes the principle of good faith and fair dealing in contractual relationships. It requires contracts to be performed honestly and fairly and provides a basis for challenging unfair or ambiguous terms.[568] In addition, Article 1124 of the Spanish Civil Code allows for the termination of a contract if one party fails to fulfil their obligations. This includes the non-exploitation of the transferred rights.

In addition to relying on general rules and principles of civil law, some EU Member States have **specific legal provisions in their copyright laws** governing the position of audiovisual producers in the contractual relationship involving the transfer of their rights to broadcasters/streamers.

First, only two Member States (Denmark and Ireland) appear to **extend to audiovisual producers the protection granted to authors and performers on the basis of the national implementation of the provisions of Chapter 3 of Title IV of the DSM Directive**. In **Denmark**, the transparency obligation in the Danish Copyrights Act[569] has been extended to the benefit of audiovisual producers. In **Ireland**, audiovisual producers are among the class of persons designated as an author by the Copyright and Related

[563] Obligations Act, OG 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23, available at: https://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima.
[564] Civil Code (*Bürgerliches Gesetzbuch – BGB*), available at: https://www.gesetze-im-internet.de/englisch_bgb/index.html.
[565] Section 36 of the Finnish Contracts Act 228/1929.
[566] Article 1337 of the Civil Code, REGIO DECREE No. 262 of 16 March 1942 (*Codice Civile, REGIO DECRETO 16 marzo 1942, n. 262*), available at: https://www.gazzettaufficiale.it/anteprima/codici/codiceCivile.
[567] Article 1467 Civil Code.
[568] Article 1258 of the Royal Decree of 24 July 1889 publishing the Civil Code, available at: https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763.
[569] Act No. 1093 of 20 August 2023 on copyright, available at: https://www.retsinformation.dk/eli/lta/2023/1093.

Rights Act 2000,[570] and therefore the contractual arrangements relating to fair remuneration and revocation of contracts apply to them with equal force.

Secondly, some Member States have introduced specific rules in their copyright laws, but these are **less extensive than the protection granted to authors and performers**. For example:

- In **Greece**, an agreement for the broadcasting of an audiovisual work is not exclusive[571] and subsequent broadcasting (apart from the first presentation) of an audiovisual work is permissible.[572] Unless there is an agreement to the contrary, the broadcasting organisation is obliged to pay a minimum additional fee to the audiovisual producer of 50% for the first repetition and 20% for the subsequent repetition.

- The **French** IPC contains several provisions that guarantee the exploitation rights of audiovisual producers, at the level of both platform service providers and users.[573]

- Based on Article 40(2) and (3) of the **Lithuanian** Copyright Law, the general principles applicable to rights transfer agreements also apply to agreements concluded between audiovisual producers and broadcasters/streamers. For example it is presumed that only as many rights as are necessary to achieve the purposes of the agreement can be transferred under a rights transfer agreement. Moreover, if the agreement does not specify a time limit for the rights transfer, a party to the agreement may terminate the agreement by giving one year's written notice of termination to the other party; if the agreement does not specify the territory of validity, the rights will be deemed to have been transferred in the territory of the Republic of Lithuania; if an agreement transfers all the economic rights, these rights are deemed to have been transferred only in respect of the uses of the work specified in the agreement; if the agreement does not specify the uses of the work, it will be deemed to have been concluded only in respect of those uses of the work which are necessary for the parties to the agreement in order to achieve the purpose for which the agreement was concluded. However, the additional remuneration and the right to transparency do not seem to be applicable to audiovisual producers.[574]

- According to Article 25e of the **Dutch** Copyright Act, audiovisual producers may terminate the contract in whole or in part if the other party does not sufficiently exploit the subject matter within a reasonable period of time after the conclusion of the contract or, after initially performing acts of exploitation, no longer sufficiently exploit the subject matter.

- A newly adopted Article 134a of the **Slovenian** Copyright and Related Rights Act (ZASP) provides for a rule that audiovisual producers should be entitled to equitable remuneration for each instance of the broadcasting or any other communication to the public of a videogame. In addition, based on a general rule for licensing contracts, if the agreed remuneration for the licence has become manifestly

[570] S.21 Copyright and Related Rights Act 2000, available from Copyright and Related Rights Act, 2000 (irishstatutebook.ie)) as amended by s.7 Copyright and Other Intellectual Property Provisions Act 2019, available from Copyright and Other Intellectual Property Law Provisions Act 2019 (irishstatutebook.ie)).
[571] Article 35(2) Copyright Law.
[572] Article 35(1) Copyright Law.
[573] Article L. 215-1(2) IPC.
[574] Article 60(4) of the Copyright Law in conjunction with Articles 40^2 and 40^1 of the Copyright Law.

disproportionate in relation to the income accruing to the licensee from the exploitation of the subject matter of the licence, the interested party may request its modification.[575] A licensing agreement for an unlimited duration can always be unilaterally terminated subject to a notice period.[576]

- **Spanish** legislation addresses the concept of fair remuneration, particularly in relation to the rights of authors and, by extension, is applicable to audiovisual producers when they hold the transferred rights. Article 74 of Royal Decree 24/2021, which establishes the principle of adequate and proportionate remuneration, states that the negotiation of the corresponding authorisations must be carried out in accordance with the principles of good contractual faith, due diligence, transparency and respect for free competition, which excludes the exercise of a dominant position.

Lastly, it should be noted that **further legal developments** are underway in some Member States. For example, in the **Netherlands**, the proposed Article 45db of the Dutch Copyright Act contains a rule for issuing a general administrative measure by the Dutch government on the basis of which the exploitation of a film work via video-on-demand can be brought under collective management pursuant to Article 45da of the Copyright Act.

As illustrated above and in Subchapter 4.1.5., regulatory and policy instruments that provide producers with mechanisms to either improve the imbalance of bargaining power or to address practices that affect the rights transfer, such as buy-out contracts, depend on the national framework. In addition, this chapter presents several examples from national copyright law that include, in particular, provisions pursuant to the DSM Directive that extend to producers the obligation to receive transparent information and fair remuneration. Moreover, in Greece, provisions include a minimum remuneration to be paid, while in Slovenia provisions entitle producers to equitable remuneration, and in the Netherlands there is provision for contract termination in the event of insufficient exploitation.

Conclusions

In conclusion, EU law provides limited protective measures for audiovisual producers to use in their contractual negotiations in case of buy-out contracts when transferring rights to broadcasters/streamers. While the scope of the provisions in Chapter 3 of Title IV of the DSM Directive applies only to authors and performers and not to producers, provisions of the AVMSD provide for a broader mechanism that may affect the imbalance in bargaining power between producers and streamers/broadcasters.

At national level, in addition to the policy mechanisms discussed in Subchapter 4.1.5., two Member States extend certain protection mechanisms granted by Chapter 3 of Title IV of the DSM Directive to audiovisual producers. In addition, several other Member States discussed above (e.g. Greece, France, Lithuania, the Netherlands, Slovenia, Spain) have introduced specific rules in their copyright laws, but these are less extensive than the protection granted to authors and performers. This means that in principle, the negotiation of contractual content with broadcasters/streamers, including IP retention, remuneration and contract termination is in general up to the contracting parties.

From a legal perspective this can be explained by the assumption that audiovisual producers are in a better bargaining position vis-à-vis broadcasters/streamers than authors and performers when transferring their rights directly to broadcasters/streamers. However, **small and medium size independent audiovisual producers** might not have the same

[575] Article 720 of the Obligations Code (*Obligacijski zakonik – OZ*), available at: https://pisrs.si/pregledPredpisa?id=ZAKO1263.
[576] Article 727 OZ.

negotiation power as broadcasters/streamers. As explained in Subchapter 4.1.3., the bargaining power of broadcasters/streamers and audiovisual producers is linked to the choice of financing models and the balance of risks of financial investment. In this respect, additional legal or policy support can improve the market position of this group of audiovisual productions.

5.2. Rules on choice of law and jurisdiction clauses

This chapter analyses how the rules of private international law could be used to challenge clauses on the choice of law (Subchapter 5.2.1.) and the choice of jurisdiction (Subchapter 5.2.2.) inserted in rights transfer agreements. As these rules do not distinguish between the different actors involved in the rights transfer, both authors and performers as well as audiovisual producers are considered. Both chapters follow a uniform structure, first discussing rules at international and EU levels, followed by national rules and an analysis of legal gaps and challenges. The main findings are presented in the concluding Subchapter 5.2.3.

Overall, while interviewed stakeholders reported that contracts subject to the law of an EU Member State offer more consistent legal safeguards, stakeholders also underlined that the effective use of private international law to choose the law of a Member State implementing EU law standards depends on the degree of the intervention of intermediaries in the protection of authors and performers (see Subchapter 3.7. above) and the sector in question. In the audiovisual sector, contracts are typically executed with local or EU-based producers, ensuring the application of EU legislation and jurisdiction. The survey data indicates that 80% of contracts are governed by the law of an EU Member State, while 15% are governed by the law of a third country (predominantly US law),[577] which often results in less favourable terms for authors and performers (see Subchapter 3.2.). Regarding audiovisual producers, global streamers explained that they prefer to use contracts under US law based on a single global template. Some ensure that these contracts comply with the laws of the Member States where production companies are based. However, audiovisual producers and legal experts see the choice of US law as a legal challenge, especially in conflict cases (see Chapter 4).

There are significant concerns about the prevalence of US 'buy-out' contracts, which may be less favourable for European authors and performers (see Subchapter 3.3.). Although the literary works sector predominantly applies the laws of EU Member States in publishing contracts, major publishing houses sometimes attempt to impose non-EU terms. Translators' associations play a crucial role in ensuring that contracts remain under EU or national law (see Subchapter 3.5.). In the videogames sector, the choice of governing law is often contentious, usually following the legislation where the studio or developer is based, frequently the US or China (see Subchapter 3.3.).

Regarding choice of jurisdiction, in the music sector, the competent court is usually determined by the location of the label or publisher, with 15% of respondents applying a non-EU jurisdiction, including EEA countries and US law, particularly in contracts with major VOD platforms acting as producers (see Subchapter 3.3.). In the audiovisual sector, 80% of the authors and performers surveyed reported that the law of an EU country is usually applied in their contracts. Meanwhile, 15% indicated that non-EU law was applied, and 5% of respondents were uncertain (see Subchapter 3.2.). The visual arts sector faces substantial challenges with non-EU jurisdictions that permit broader rights assignments, often to the disadvantage of artists, particularly with US clients (see Subchapter 3.4.).

[577] The remainder (5%) of respondents were unsure of the answer.

In general, parties to a contract prefer to choose the laws and jurisdiction of their own country to govern their contracts. However, given the bargaining power asymmetries, the strongest party can impose their law and jurisdiction on the other party in order to safeguard their own interests or to circumvent the more protective rules of their contractual counterparty's legal system. In this regard, it appears from the French Presidency report that foreign laws are often chosen to circumvent EU legal requirements and collective agreements or to impose buy-out models on creators.[578] It is therefore necessary to identify the EU rules on choice of law and jurisdiction that authors, performers and/or producers can leverage in order to avoid having foreign standards and contractual models imposed on them, as well as the extent to which these rules may limit such contractual practices.

5.2.1. Choice of law

Rules at international and/or EU level

As pointed out in the French Presidency final report on 'the effectiveness of the European framework on copyright law',[579] in international contracts on copyrights transfers, the law applicable to the contract may affect the level of protection guaranteed to authors, performers and producers. Indeed, the rules governing exploitation rights vary from one country to another. As explained in Chapter 3 above, the choice of a foreign law may impact the ability of rightholders to exploit their rights as well as the lawfulness of buy-out clauses. Choice of law constitutes a strategic element of the contract (see Chapter 3 above). The French Presidency report also points out that the choice of foreign law in contracts may enable the parties to circumvent collective agreements protecting authors' remuneration.[580]

In European private international law, the sources of the rules on conflicts of laws regarding copyright and related rights are twofold: the *lex loci protectionis*, i.e. the law of the country where the protection of copyrights or related rights is sought, and the *lex contractus*, the law applicable to the contract. The ***lex loci protectionis***, on the one hand, determines **the requirement of protection, the scope of the protection, the remedies against an infringement and the transferability of copyrights and related rights.**[581] It only governs the rules applicable to rights ownership and does not touch upon the contractual aspects surrounding the economic exploitation of rights.[582]

The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) do not establish rules on conflicts of laws. However, some authors, although not unanimously, argue that the

[578] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.
[579] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.
[580] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: p. 25-26, https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.
[581] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43, and Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 1), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/17/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-1/.
[582] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 1), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/17/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-1/ and Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.

principle of equal treatment and some provisions laid down in these conventions operate as a rule on conflict of laws.[583]

The Berne Convention, as amended in 1979, applies before the jurisdiction of a Member State of the Berne Union[584] to all literary, scientific and artistic works defined in Article 2, which, at the moment of its entry into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.[585] Overall, the convention establishes a principle of territoriality, which favours **the domestic law of the Contracting State where the protection is claimed.**[586] Apart from the provisions of this convention, the extent of protection, as well as the means of redress afforded to the author to protect their rights, are governed exclusively by the *lex loci protectionis*.[587]

Similarly, **the Rome Convention** applies to **performers, phonogram producers and broadcasting organisations** that are subject to the jurisdiction of a Contracting State based on their nationality, habitual residence or establishment and the first release of the work concerned.[588] Article 2 of the Rome Convention establishes a general principle of equal treatment by reference to **the law of the Contracting State in which the protection is claimed**. According to Article 7 of the Rome Convention, the level of protection of **performers in their relations with broadcasting organisations** is determined by '*the domestic law of the Contracting State where protection is claimed'* **without prejudice to the ability of performers to control, by contract, their relations with broadcasting organisations**.

The ***lex contractus***, on the other hand, determines the rules applicable to the contract transferring copyrights. To date **there is no international agreement specifically dealing with conflicts of law in relation to copyright contracts.**[589] However, at EU level, the **Rome I Regulation**[590] (**the RIR**) applies universally to civil and commercial contractual obligations involving a conflict of laws before EU jurisdictions[591]. It lays down conflict of law rules relating to the interpretation, the performance, the consequences of a party's liability for breach of contract, the nullity of the contract as well as the different modes of extinction of the obligations undertaken.[592] In particular it determines the rules applicable to the terms and conditions of the transfer as well as the protective measures which can be used to avoid *lex shopping* or to correct potential asymmetries in the bargaining powers of the parties.

Regarding choice of law agreements, Article 3(1) of the RIR gives priority to free choice of the *lex contractus*. No written clause is required if the choice can clearly be deduced from the terms of the contract or the circumstances of the case. Nevertheless, corrective measures apply to avoid the circumvention of provisions considered mandatory or which

[583] HCCH and WIPO (Authors: Bennett, A. and Granata, S.), 'When Private International Law Meets Intellectual Property Law – A Guide for Judges'), 2019, available at: https://www.wipo.int/publications/en/details.jsp?id=4465.
[584] A list of the Contracting Parties to the Bern Convention is available at: https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=15.
[585] Articles 1, 2 and 18 of the Berne Convention.
[586] HCCH and WIPO (Authors: Bennett, A. and Granata, S.), 'When Private International Law Meets Intellectual Property Law – A Guide for Judges'), 2019, available at: https://www.wipo.int/publications/en/details.jsp?id=4465.
[587] Article 5(2) of the Berne Convention.
[588] Article 2 of the Rome Convention.
[589] To be complete, the 2015 Hague Principles on Choice of Law in International Commercial Contracts could also be mentioned, although not exclusively applicable to copyrights. However, their non-binding nature prevents them from benefiting from Article 25 of the RIR and superseding the conflict-of-laws rules set out in the regulation. HCCH, Principles on Choice of Law in International Commercial Contracts, 19 March 2015, paragraph I.8 and I.9, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.
[590] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, pp. 6-16, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593.
[591] Articles 1 and 2 of the RIR.
[592] Article 12 of the RIR.

cannot be derogated from by contract, or to correct imbalances of bargaining powers in the presence of a vulnerable party.

Article 3(3) and (4) limits the effectiveness of the choice **in favour of the '*provisions which cannot be derogated from by agreement'* laid down in the law of the legal order where all other relevant elements of the contract are located**. In such cases, the national courts apply the provisions which cannot be derogated from by contract of the State more closely connected to the contract,[593] or the EU provisions, as transposed by a Member State, where all other relevant elements of the contract are more closely connected to the territory of the European Union.[594]

In this regard, **Article 23(1) of the DSM Directive** expressly identifies Articles 19, 20 and 21 on the remuneration of authors and performers as rules which cannot be derogated from by contracts. **Recital 81** of the Directive specifically specifies that **Article 3(4) of the RIR** triggers the application of these articles, **as implemented in the State of the *forum***, where all other elements relevant to the situation, at the time of the choice of applicable law, are located in one or more Member States. It follows that, where the parties to a contract for the transfer of copyrights has inserted a choice of law clause in favour of the law of a third country, such as the US, whereas all other elements relevant to the situation at the time of the choice are located in one or more Member States, the EU national court before which the dispute is brought will apply the country's domestic provisions transposing Articles 19, 20 and 21 of the DSM Directive. Despite its objective of tackling the circumvention of these protective mechanisms, the use of this mechanism in a private international law context appears limited (see gaps below).

Vulnerable parties are also considered by the RIR in order to correct unbalanced bargaining powers. Choice of law agreements inserted in an employment or a consumer contract cannot deprive the weaker party of the protective provisions afforded by the law applicable to the contract in the absence of choice.[595] In practice, these protective provisions would be the provisions which cannot be derogated from by contract in the country whose law would have been applicable in the absence of choice pursuant to Article 6(1) or 8(2), (3) and (4) of the RIR. Unfortunately, authors, performers and audiovisual producers would benefit only marginally from these provisions (see gaps below).

If the parties do not choose the applicable law and such choice cannot be inferred form their will, Article 4 of the RIR applies. Article 4 sets out different rules **based on the nature of the contract**. Article 4(1) provides a list of rules applicable to several types of contracts, such as sales of goods and the provision of services. If the contract cannot be qualified as either a sales or service contract, the applicable law will be '*the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence'*.[596] Secondarily, where the applicable law cannot be determined pursuant to Article 4(1) or (2) of the RIR, the contract will be governed by the law of the country with which it is most closely connected.[597] During the legislative preparatory work of the RIR,[598] the inclusion of intellectual property contracts was considered and the connecting factor selected by the proposal was **the place of residence of the person who**

[593] Article 3(3) of the RIR
[594] Article 3(4) of the RIR.
[595] Articles 6(2) and 8(1) of the RIR.
[596] Article 4(2) of the RIR.
[597] Article 4(2) of the RIR.
[598] European Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, 15 December 2005, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005PC0650.

transfers or assigns said right.[599] However, this solution was not maintained in the final text of the regulation.

Academic discussion surrounding the inclusion of a fixed connecting factor for intellectual property contract

In reaction to the Commission's proposal, academics argued that the unique fixed connecting factor envisaged by the proposal would fail to achieve its standardisation goal.[600] First, this category and the absence of a clear definition for such contracts fail to comprehend the variety of existing IP rights contracts.[601] Experts from the European Max Planck Group on Conflicts of Laws in Intellectual Property (CLIP)[602] also argued that this connecting factor would only be relevant in simple contracts, such as a buy-out contracts, where transferors would conclude an outright sale of their rights in exchange of a lump-sum remuneration. However, in more complex situations involving reciprocal obligations, such as publishing contracts, where the performances of both parties are essential, the selected fixed connecting factor would no longer be justified and would often be neutralised by the escape clause.[603] In those situations indeed, the IP rights transferred may not always be exploited in the authors' or performers' place of residence and there would be as many laws applicable as there are authors involved in case of co-authorship.[604]

In the absence of a specific connecting factor for IP rights contracts in the RIR, the other named contracts of the RIR could be considered with regard to authors and performers. However, given the object of rights transfer agreements, the application of sales of goods or provision of services is difficult. As copyrights are intangible property, the qualification of goods is inappropriate. Regarding the provision of services, the CJEU has expressly excluded such a qualification for licence contracts allowing the exploitation of IP rights.[605] Indeed, the Court has qualified the provision of services as the positive execution of an activity in exchange for a remuneration, which differs from the remuneration of an IP rightholder merely granting a third party the right to exploit said IP rights.[606] The Court further

[599] Article 4(1)(f) of the Commission's proposal.

600 P. Torremans, 'Intellectual Property and the EU Rules on Private International Law: Match or Mismatch?' in Stamatoudi, I. and Torremans P., EU Copyright Law A Commentary, 2014, Elgar Online, available at: https://www.elgaronline.com/edcollchap/edcoll/9781781952429/9781781952429.00030.xml; Torremans, P., 'Licences and assignments of intellectual property rights under the Rome I Regulation', *Journal of Private International Law*, Vol. 4 2008, n° 3, pp. 397 to 420, available at: https://heinonline.org/HOL/P?h=hein.journals/jrlpil4&i=395 and CLIP, Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ('Rome I') of 15 December 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of 22 August 2006, 2007, available at: https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Comments_clip-rome-i-comment-04-01-20062.pdf.

[601] P. Torremans, 'Intellectual Property and the EU Rules on Private International Law: Match or Mismatch?' in Stamatoudi, I. and Torremans P., *EU Copyright Law A Commentary*, 2014, Elgar Online, available at: https://www.elgaronline.com/edcollchap/edcoll/9781781952429/9781781952429.00030.xml.

[602] CLIP, Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ('Rome I') of 15 December 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of 22 August 2006, 2007, available at: https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Comments_clip-rome-i-comment-04-01-20062.pdf.

[603] P. Torremans, 'Intellectual Property and the EU Rules on Private International Law: Match or Mismatch?' in Stamatoudi, I. and Torremans P., EU Copyright Law A Commentary, 2014, Elgar Online, available at: https://www.elgaronline.com/edcollchap/edcoll/9781781952429/9781781952429.00030.xml.

[604] See, Torremans, P., 'Licences and assignments of intellectual property rights under the Rome I Regulation', *Journal of Private International Law*, Vol. 4 2008, n° 3, pp. 397 to 420, available at: https://heinonline.org/HOL/P?h=hein.journals/jrlpil4&i=395 and CLIP, Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ('Rome I') of 15 December 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of 22 August 2006, 2007, available at: https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Comments_clip-rome-i-comment-04-01-20062.pdf.

[605] Judgment of the Court of 23 April 2009, *Falco Privatstiftung*, Case C-533/07, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0533

[606] Judgment of the Court of 23 April 2009, *Falco Privatstiftung*, Case C-533/07, paragraph 31 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0533.

added that the mere fact that a contractual partner is granted the right to use the rights subject to the contract against remuneration cannot be construed as a service either.[607]

As a result, **the law applicable to rights transfer agreements will, by default, be the law of the country where the party expected to execute the characteristic performance of the contract has their habitual residence**.[608] This criterion requires a case-by-case analysis to identify what is the characteristic obligation of the contract.[609] As mentioned above, in contracts involving complex transfers of rights, the identification of the characteristic obligation may also be challenging (see box above). Where the contract contains reciprocal commitments from the parties, such as an obligation to use the transferred rights under certain conditions, more than one characteristic obligation can compete, neutralising the rule on conflicts of laws laid down in Article 4(2) of the RIR.[610] The determination of applicable law under Article 4(2) of the RIR would then become more difficult and the use of the escape clause laid down in Article 4(4) may be preferred.[611]

To stick to the economic reality of the contract, Article 4(3) and (4) sets out complementary **derogations** to the rules laid down in Article 4(1) and (2), allowing the court to set aside the normally applicable law in favour of the law of the country to which the situation appears more closely connected. It is only where the whole situation is **manifestly** more closely connected to another country[612] **or, if the determination of the law normally applicable pursuant to Article 4(1) and (2) is impossible**[613] that the court is authorised to apply the laws of a single country with which the contract in question appears more closely connected. For transfers that involve reciprocal obligations, Article 4(2) cannot apply as the identification of the main obligation of the contract is impossible if both parties have undertaken essential commitments. In such a case, it is more likely that the centre of gravity of the contract lies in the country where the rights are exploited[614] rather than that of the authors, performers or producers transferring their rights. Moreover, owing to the globalisation of the IP economy and its digitalisation, it is becoming increasingly difficult to establish a close connection with one single territory.[615]

Other provisions of the RIR might be leveraged to enhance the ability of authors, performers and audiovisual producers to exploit their rights: Articles 6 and 8 on the **contracts concluded with vulnerable parties**, Article 9 on **overriding mandatory rules (*lois de police*)** and Article 21 on the **public policy of the forum**.

First, the provisions protecting vulnerable parties could be considered as a way to correct potential imbalances in the bargaining powers of the parties to a rights transfer agreement.

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[607] Judgment of the Court of 23 April 2009, *Falco Privatstiftung*, Case C-533/07, paragraph 32; available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0533.

[608] Article 4(2) of the RIR.

[609] See for instance the example used in Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), pp. 438-439, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.

[610] See Torremans, P., 'Licences and assignments of intellectual property rights under the Rome I Regulation', *Journal of Private International Law*, Vol. 4 2008, n° 3, pp. 397 to 420, available at: https://heinonline.org/HOL/P?h=hein.journals/jrlpil4&i=395 and CLIP, Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ('Rome I') of 15 December 2005 and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of 22 August 2006, 2007, available at: https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Comments_clip-rome-i-comment-04-01-20062.pdf.

[611] Torremans, P., 'Licences and assignments of intellectual property rights under the Rome I Regulation', *Journal of Private International Law*, Vol. 4 2008, n° 3, pp. 397 to 420, available at: https://heinonline.org/HOL/P?h=hein.journals/jrlpil4&i=395.

[612] Article 4(3) of the RIR.

[613] Article 4(4) of the RIR.

[614] Torremans, P.,'Intellectual Property and the EU Rules on Private International Law: Match or Mismatch?' in Stamatoudi, I. and Torremans P., EU Copyright Law A Commentary, 2014, Elgar Online, available at: https://www.elgaronline.com/edcollchap/edcoll/9781781952429/9781781952429.00030.xml.

[615] Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), pp. 438-439, soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.

However, under the current RIR, only employment contracts may be efficiently leveraged to enhance the position of rightholders provided that a link of subordination exists between the author or performer and the other contracting party.

Indeed, the **qualification of consumer** requires vulnerable parties to establish that the contract transferring their rights has been '*concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)'*.[616] This criterion **appears incompatible with the purpose of transfers of rights**, which imply the economic exploitation of rights stemming from a work or subject matter of related rights. Although the possibility of using professional skills to conclude a consumer contract is not excluded by the RIR,[617] such a qualification would only benefit a very small circle of non-professional authors, performers or producers that create and conclude copyright transfers as a secondary activity. Even in the context of online-sharing platforms, the monetisation mechanism would in all likelihood prevent authors, performers or producers of user-generated contents from being qualified as consumers beyond a certain degree of popularity. For those reasons, the special provisions laid down in Article 6 cannot be proactively interpreted in favour of authors, performers and producers.

The conclusion could be slightly different for **employment contracts**. Under EU law, an employment contract exists when '*a person performs services of some economic value for and under the direction of another person in return for which he/she receives remuneration'*.[618] This autonomous definition is interpreted broadly and *in concreto* by the CJEU.[619] Although it may apply to authors and performers, it would not apply systematically and **requires an effective link of subordination which cannot be assimilated to an asymmetry of bargaining powers**.

Article 8 of the RIR sets out rules for the choice of law, including the scenario where the parties have not chosen an applicable law. **In the case where there is agreement on the choice of law**, Article 8(1) prevents the clause from depriving the employee of the benefit of the provisions which cannot be derogated from by contract laid down in the law normally applicable to the contract **in the absence of choice**. In such case, a cascade of connecting factors applies, depending on the worker's conditions of performance of the contract.[620] Similarly to the general rules laid down in Articles 4 and 8(4) of the RIR, the court of the forum is allowed to favour the law of the country to which the contract is more closely connected. **The condition of manifest connection is omitted in this provision**.

Secondly, the regime of **overriding mandatory rules (*lois de police*)** could also be leveraged. Overriding mandatory provisions are provisions safeguarding major public interests *'that are considered so crucial that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract'* .[621] When qualified as such, overriding mandatory provisions apply even if some of these interests are sectoral

[616] Article 6(1) of the RIR.
[617] Judgment of the Court of 3 October 2019, *Jana Petruchovà v. FIBO*, Case C-208/18, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0208.
[618] Judgment of the Court of 3 July 1986, *Lawrie-Blum v. Land Baden-Württenberg*, Case C-6/85, paragraph 17, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61985CJ0066.
[619] See for instance Judgment of the Court of 10 September 2015, *Holterman Ferho,* Case C-47/14, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0047.
[620] Article 8(1) to (4) of the RIR.
[621] Article 9(1) of the RIR.

or protect a limited circle of operators such as authors and performers.[622] As derogations, they are however interpreted restrictively. Recital 37 of the RIR specifies that **such rules shall be construed as an autonomous concept which differs from the public policy of the forum and from the rules which cannot be derogated from by contracts under national law**.

In practice, overriding mandatory rules supersede the law normally applicable to the contract to safeguard the public interest they are meant to protect.[623] In other words, even if a copyright transfer agreement contains a valid choice of law agreement in favour of a foreign law, as commonly used in the music industry and the visual arts sector where contracts are governed by US law (see Subchapters 3.3.2.xi. and 3.4.2.xi.), the EU or national provisions qualified as overriding mandatory rules would apply notwithstanding that choice, if the situation has a connection with EU territory. At the same time, it is not clear to what extent copyright protection rules could qualify as overriding mandatory law.[624]

While some national legislators have identified certain provisions as overriding mandatory rules (*loi de police*)[625] (see Rules at national level below), this qualification has not been confirmed by **any case-law** at national level. At EU level, Article 9 of the RIR also enables the acknowledgement of overriding mandatory provisions of EU law.[626] However, at the time of the report, no case-law admitting the existence of an overriding EU mandatory rule in copyright law has been identified.

Lastly, the public policy of the forum (*ordre public*) may also be leveraged in cases where the concrete application of the law to the contract designated by the rules of the RIR **appears manifestly incompatible with the public policy of the forum**.[627] However, this provision only applies when **the effects** of the law normally applicable to the contract appear **manifestly incompatible with the public policy of the forum**. However, Italian courts use this rule to set aside the provisions of a foreign law that contravene public policy (see chapter on the rules at national level below).

It follows therefore that authors, performers and producers have limited possibilities to use the rules of the RIR to their advantage. As demonstrated, the provisions protecting vulnerable parties can only apply to a limited number of authors and performers. Similarly, the use of Articles 3(3), 3(4), 9 and 21 of the RIR largely depend on the approaches adopted by national legislators and courts.[628]

Rules at national level

[622] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/; and Vanherpe, J., Towards a fair balance in the digitised music industry: facing the music, 2022, PHD THESIS (LIRIAS), soon to be published at: https://www.cambridge.org/core/books/music-contracts-in-the-streaming-age/058312010BBF689FAF2EC1DB41F01E43.

[623] Article 9(1) of the RIR.

[624] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

[625] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

[626] See as an illustration Judgment of the Court of 17 October 2013, *Unamar*, Case C-184-12, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0184 on the acknowledgement of an EU overriding mandatory rule laid down in Directive 86/653/EC protecting commercial agents.

[627] Article 21 of the RIR.

[628] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 1), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/17/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-1/.

As explained above, contracts for transfers of rights fall within the scope of the RIR and its harmonised rules on conflicts of laws, while the rules on ownership and the protection of rights fall within the scope of other rules. Considering the universal application of the RIR ,[629] which applies before all EU courts notwithstanding whether or not the law eventually applicable to the contract is that of an EU Member State, the RIR leaves no room for additional national rules on conflicts of law for contracts transferring rights. It is only where the RIR does not apply, that national rules on conflict of laws can take over. Indeed, national desk research did not identify any national rules of private international law derogating from or complementing the general rules of the RIR.

Nevertheless, national rules making use of the corrective mechanisms of the RIR or the provisions laid down in Recital 81 of the DSM Directive have been reported. As the table below shows, national protective provisions on the remuneration of authors and performers have been interpreted by national legislators, either as overriding mandatory rules[630] or as provisions which cannot be derogated from by a contract containing a choice of law agreement.[631] In some Member States, the use of Article 21 of the protection of the public policy of the forum has been preferred.

Table 20: Overview of national protective mechanisms applicable to choice of law clauses

Overriding mandatory rule (Article 9 RIR)	Rules that cannot be derogated from by contract (Article 3(3) and/or (4) RIR)	Public policy of the forum (Article 21 RIR)
Austria: Overrides choice of law agreements if it leads to a loss of rights related to unfair remuneration, access to transparent information and access to the national mediation committee when the chosen law is non-EU/EEA but the contract's elements are within the EU/EEA.	**France**: Prevents authors of musical compositions within audiovisual works from waiving protective rules on transparency, contract adjustment and alternative dispute resolution, regardless of the law chosen by the parties. This provision only protects authors of musical compositions within audiovisual works.	**Italy**: Italian law sets aside foreign law provisions that contravene its public policy, protecting authors and performers by ensuring that core legal principles cannot be undermined by foreign laws. In national case-law, the term 'public order' encompasses the core principles derived from the Constitution or those foundational to the legal system at large. These principles embody the ethical, social and economic backbone of the national community, giving it a distinct identity and character, as defined in a 2006 case by the Italian Supreme Court.

[629] Article 2 of the RIR.
[630] Article 9 of the RIR.
[631] Article 3(4) of the RIR read in conjunction with Article 23 and Recital 81 of the DSM Directive.

Overriding mandatory rule (Article 9 RIR)	Rules that cannot be derogated from by contract (Article 3(3) and/or (4) RIR)	Public policy of the forum (Article 21 RIR)
Germany: Specific provisions in copyright law make the application of certain sections compulsory, regardless of the foreign law chosen, especially if it involves significant acts of use within Germany or if German law would be the law normally applicable to the contract in the absence of choice.	**Portugal**: Specific provisions ensure that the choice of foreign law does not prejudice the application of local laws related to transparency, contractual amendments and issue resolution, especially for EU-related situations. National law also protects the works of foreign authors, performers and broadcasters if the situation presents a close connection with the national territory.	
Netherland: The national Copyright Act provides for the application of national law, irrespective of any choice of law, if, in the absence of a choice of law, the contract would be governed by Dutch law, or if exploitation takes place or should take place wholly or predominantly in the Netherlands.	**Slovenia**: Provides specific protection under local copyright law for citizens, residents, or entities of Slovenia, EU or EEA States, ensuring that they enjoy local law protections regardless of foreign law choices.	

Other protective mechanisms were identified in the following countries:

- **Ireland:** the common law position views choice of law provisions as acceptance of jurisdiction, with regulations and case-law supporting the enforcement of local legal principles over foreign law choices in contracts.

- **Hungary:** with respect to the right to acquire intellectual property rights regarding the subject of protection that arose in the course of the employment relationship between an employee and his employer, the law that is relevant for their employment contract or other act establishing the employment relationship is applicable.

- **Malta:** the national Arbitration Act states that any dispute required to be determined by arbitration under any other law, foreign or domestic, the provisions of such law, unless they provide for arbitration by a board, tribunal or other authority set up for this purpose, will be construed as though that other law were an arbitration agreement.

- **Spain:** case-law indicates that lack of foreign law evidence leads to the application of Spanish law by default, emphasising the "*lex loci protectionis*" principle for intellectual property rights, hence favouring local law in cases of disputes.

- **Croatia**: the Croatian Act on International Private Law (AIPL) includes a general '*lex loci protectionis*' rule. Furthermore, regarding the right to acquire intellectual property rights for creations developed during the course of employment, the applicable law is the one governing the employment contract or any other act establishing the employment relationship between the employee and the employer.[632]

Legal challenges

The corrective and protective mechanisms under the RIR can only apply in specific circumstances that are strictly regulated by the relevant provisions of the RIR. Additionally, they require an intervention from the legislator, national courts or the CJEU to be leveraged in favour of authors, performers and audiovisual producers. However both EU and national level desk research did not identify any case-law excluding or confirming an effective use of these protective mechanisms by the parties concerned. Thus, the following considerations remain applicable.

The RIR does not set out a specific conflict-of-law rule on contracts for the transfer of copyright, which remain subject to the general rules for determining the applicable law. Furthermore, **EU sectoral legislation regulating copyrights and copyright transfers does not provide specific conflicts-of-law rules**. In the DSM Directive, the EU legislator opted for the use of Article 3(3) and (4) of the RIR as suggested by Recital 81 of the DSM Directive. In the context of a contract transferring rights, **this mechanism of the RIR prevents the circumvention of national provisions transposing the DSM Directive's provisions on the remuneration of authors and performers which cannot be derogated from by contract to mitigate the lower protection conferred by foreign law chosen by the parties to a contract**. Indeed, Article 23(1) of the DSM Directive, read in the light of its Recital 81, provides that the choice by the parties of an applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution as implemented in the Member State of the forum where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States. In practice, based on the national research presented in column 2 of the table above, only **France, Slovenia** and **Portugal** make a clear reference to the use of Article 3(4) of the RIR in relation to the protective provisions of the DSM Directive. It is also noteworthy that **producers are not covered by these provisions**. Furthermore, owing to **globalisation and the online aspects** of copyright exploitation contracts, the relevant connecting elements to the EU territory appear difficult to channel towards a single country.[633]

In that regard, **it is noteworthy that Article 18 of the DSM Directive, on the appropriate and proportionate remuneration of authors and performers, is not listed in Article 23(1).** In international situations, this exclusion from Article 23 renders the application of Article 3(4) of the RIR more difficult. It would indeed require an intervention by the national legislator to make it a provision which cannot be derogated from by contract on grounds of Article 3(3) of the RIR or require additional reasoning from national courts to justify its application in each case.

632 Article 24 of the Act on International Private Law (AIPL).

633 Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 1), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/17/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-1/.

To further enhance the protection of authors, performers and audiovisual producers in cases where the production or exploitation takes place in the EU, it could be worthwhile exploring the possibility mentioned in the final report of the French Presidency,[634] namely extending the protective regimes for vulnerable parties, such as those provided to consumers or employees, to certain copyright transfer agreements **in order** to correct negotiating powers asymmetries between authors, performers or producers, and their contractual counterparties**.**

Indeed, under the current RIR, **authors, performers and producers are not identified as an autonomous category of vulnerable parties,** unless they can qualify as employees or consumers. Meanwhile authors and performers could occasionally benefit from the provisions on employment contracts, but only a very small circle of non-professional authors and performers that create and conclude copyright transfers as a secondary activity could benefit from the provisions on consumer protection (see above). At the same time producers cannot be considered as employees in their relationship with streamers and broadcasters (see chapter on the choice of jurisdiction below).

Therefore, the creation of a specific vulnerable category would need to be considered to correct asymmetries of bargaining powers in certain contracts for transfers of copyright and related rights. This approach would however imply substantial changes to private international law that would require substantial further analysis. Should such a solution be applied, like the consumer protection provisions,[635] the law applicable to contracts for transfers of copyright in the presence of a choice of law agreement could not deprive the weaker party from the national provisions which cannot be derogated from by contract in the State where the protected party has their habitual residence. In the absence of choice, the *lex contractus* could be that of the weaker party's habitual residence.[636] To avoid the abovementioned issues highlighted by the CLIP on the definition of IP contracts (see the box in Subchapter 1.2.1. above), a more specific definition limited to the contracts for the transfer of copyright which could benefit from this mechanism would be necessary.

From a private international law perspective, it must also be borne in mind that the complexity of contracts involving several rights transfers may affect the unicity of the *lex contractus*. If a contract involves several creations, or a work created by a plurality of authors established in different Member States, the law applicable to the contract may be more difficult to locate. The RIR does not provide any provision in favour of the *lex contractus* unity. On the contrary, Article 3(1) admits the possibility for the parties to choose a law applicable to parts of the contract (*dépeçage*). In the absence of choice of a law, Article 4(4) of the RIR suggests that the contract should be governed by the law of the country with which it is most closely connected.

Thirdly, at the time of the report, no overriding mandatory rule within the meaning of the RIR has been identified at EU level. In fact, desk research did not locate any provision that expressly cross-references Article 9 of the RIR or explicitly declares the protective provisions applicable to the remuneration of authors and performers as overriding mandatory rules. On the contrary, as already mentioned above, the only mechanism used by the DSM Directive is Article 3(4) of the RIR and the 'provisions which cannot be derogated from by contract', which, according to Recital 37 of the RIR differ. Moreover, no case-law confirming or contradicting the applicability of Article 9 of the RIR to the provisions

[634] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.
[635] Article 6(1) and (2) of the RIR.
[636] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

of Chapter 3 of Title IV of the DSM Directive has been identified. It can reasonably be concluded that EU law alone does not provide for overriding mandatory rules in this field. However, this may not be the case at national level. In **Germany, Austria** and **the Netherlands**, where the legislator identified an overriding public interest in the protection of authors, performers and producers, to justify setting aside the foreign law normally applicable to **rights transfer agreements** in favour of national law. Overriding mandatory rules could be considered as another means to enhance the protection of authors and performers as it could prohibit or limit the possibility to conclude a buy-out contract. To the extent such overriding mandatory rules fulfil the condition in Article 9, namely to be crucial for safeguarding public interests, such as political, social or economic organisation, they would supersede a choice of law clause, as well as the law normally applicable to the contract in the absence of choice in the State of the forum. Article 9(3) of the RIR would also lead to the prior application of an overriding mandatory rule of the country where the obligations of the contract have to be performed in so far as these overriding mandatory rules would render the performance of the contract unlawful. However, because of the very high threshold set out by Article 9 for a national rule to qualify as an overriding mandatory rule, as well as the effect of such provision, superseding the law normally applicable to the contract, only a few rules currently exist within the EU legal order. At the same, it is not clear to what extent copyright protection rules could qualify as overriding mandatory law.[637]

5.2.2. Jurisdiction

Besides choice of law clauses, rights transfer agreements may contain jurisdiction clauses in favour of certain contracting parties with greater bargaining power (see Chapter 3). Within the framework of this study - addressing the current copyright exploitation chain – the literature review[638] and interviews with relevant stakeholders highlighted that contractual jurisdiction clauses designating forums in favour of US jurisdiction are a growing phenomenon, particularly in the music (see Subchapter 3.3.) and visual arts sectors (see Subchapter 3.4.). The presence of such clauses can have different consequences.

Contracts governed by an EU Member State's law might be referred to a foreign court or arbitration outside the EU, which could be unfamiliar with EU protective measures. This situation could disadvantage the weaker party to the contract, thus both authors and performers, and in some instances producers when transferring their rights. Additionally, pursuing litigation in a distant jurisdiction can impose significant financial, administrative, and personal burdens on smaller businesses and individual artists. These challenges include finding appropriate legal representation, managing high litigation costs[639] and facing non-refundable attorney fees or obligations to reimburse the winning party's costs, which can further complicate the legal proceedings.[640]

Rules at international and/or EU level

[637] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

[638] Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), p. 208. Interview with representatives of an organisation representing authors and performers.

[639] For example on the costs that small businesses encounter in the U.S. judicial system, see: U.S. Chamber of Commerce Institute for Legal Reform, 'The U.S. Lawsuit System Costs America's Small Businesses $160 Billion', available at: https://instituteforlegalreform.com/blog/the-us-lawsuit-system-costs-americas-small-businesses-160-billion/; see also: U.S. Chamber of Commerce Institute for Legal Reform (2021), International.
Comparisons of Litigation Costs', available at: https://instituteforlegalreform.com/wp-content/uploads/media/ILR_NERA_Study_International_Liability_Costs-update.pdf.

[640] See: Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), p. 208.

At EU level, the **Brussels I Regulation**[641] serves as the primary instrument governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. For contracts involving the assignment of copyright and related rights, jurisdiction can be established in two ways. Jurisdiction can be based on a choice of jurisdiction clause included in the contract by the parties. In these cases Article 25 of the Brussels I Regulation applies. In the absence of such a clause, jurisdiction is determined under Article 7 of the regulation, which sets out the rules for matters relating to contracts.

The autonomy of parties to include a **choice of jurisdiction clause** in a contract for the transfer of copyright and related rights is not absolute and is subject to the provisions of the Brussels I Regulation. While Article 25 of the regulation generally allows parties to agree on a court of a Member State to settle disputes arising from their contractual relationship, this autonomy is significantly restricted in contracts where there is a disparity in bargaining power between the contractual parties. Under the Brussels I regime, this restriction applies to insurance, consumer and employment contracts.[642]

The jurisdiction rules with regard to **contractual matters** are governed by Article 7 of the Brussels I Regulation. When a contract involving the assignment of copyright and related rights does not include a jurisdiction clause, Article 7 of the regulation provides the framework for determining jurisdiction. This provision is pertinent for this study because the relationships entailing a transfer of rights between authors and performers and the entities involved in the exploitation/distribution of their protected subject matter (e.g. producers, digital platforms, streamers, broadcasters) and between audiovisual producers and broadcasters/streamers are based on contracts.

Under Article 7(1), the regulation provides that, for 'matters relating to a contract', the defendant may be sued in the 'courts for the place of performance of the obligation in question'.[643] In the context of a contractual relationship for copyright exploitation, as pointed out by Vanherpe (2023), the relevant jurisdiction is that of the court where the exploitation activities and the subsequent remuneration take place.[644] When the protected content has not yet materialised at the time of contract formation (i.e. contracts concerning future content), in the opinion of Vanherpe (2023) the jurisdiction should not be considered linked to the place of exploitation, but rather to the place of creation.[645]

The Brussels I Regulation sets out **special rules** which deviate from the jurisdiction rules on matters relating to contracts established in Article 7. These rules are designed to favour the interests of the weaker party, as outlined in Recital 18. In the context of this study, it is pertinent to delineate the protective rules applicable to **employment** and **consumer contracts** for **two distinct reasons**.

1. The **protective regime** in favour of **employees** appears to be applicable where there is an employment relationship between authors and performers and the entities involved in the exploitation and distribution of their protected works. According to the findings of this study in Chapter 3, while not present across all sectors, employment contracts are used in the videogames sector as well as in the audiovisual sector, where they are relevant in the relationships of directors and actors with producers. Under the Brussels I regime, the key element to activate the

[641] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[642] Article 25(4) of the Brussels I Regulation.
[643] Article 7(1) of the Brussels I Regulation.
[644] Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), p. 208.
[645] *Ibid.* pp. 208 -209.

protection of the favourable jurisdiction regime in the case of **employment contracts** is the existence of an 'individual employment contract'.[646] For the purposes of this study, the rules of the Brussels I Regulation applicable to employment contracts appear relevant in practice, as they can protect authors and performers in the case of an employment relationship with producers and streamers/broadcasters.[647] However, these rules have little relevance to the relationship between producers and streamers/broadcasters, as producers are usually legal entities and therefore do not enter into an employment relationship with streamers or broadcasters.

Article 21 of the Brussels I Regulation ensures that employees can institute proceedings against their employer in courts that are more accessible to them, namely in the courts of the Member State where they are domiciled, or in the courts of the place where they habitually carry out their work or in the courts of the place where the business which engaged them is or was situated.[648] Conversely, the Brussels I regime limits employers in instituting proceedings against their employees to the courts of the Member State in which the employee is domiciled.[649]

In case of a choice of jurisdiction agreement, Article 25(4) of the Brussels I Regulation plays a pivotal role in safeguarding weaker parties, stipulating that jurisdiction agreements or provisions within a trust instrument are rendered ineffective if they conflict with Article 23 on the choice on jurisdiction agreement in employment contracts. Article 25(4) ensures that any jurisdiction agreement that contravenes these protective articles or seeks to evade courts with established exclusive jurisdiction is to be considered void. Article 23 specifies the conditions under which jurisdiction agreements in **employment contracts** might differ from standard rules, allowing deviations only for agreements: (i) made post-dispute or (ii) that permit the employee to litigate in different courts other than those indicated under Section 5 of the regulation (regulating jurisdiction over individual contracts of employment).

2. The protective regimes covering **consumer contracts** under the Brussels I Regulation[650] do not have practical relevance in the case of copyright transfers. However, these provisions are worth discussing in the context of the French Presidency report,[651] which mentions as a possible approach the creation of a new category of vulnerable parties, aligned with the rules applicable to consumer contracts, but tailored to the variety of copyright transfer agreements. Article 18 of the Brussels I Regulation allows the consumer to sue the other party either before the courts of the Member State where the other party is domiciled or, regardless of the domicile of the other party, before the courts of the country where the consumer is domiciled. Consumers have therefore the advantage of being able to bring actions

[646] The Brussels I Regulation does not explicitly define an individual employment contract. Nevertheless, the concept has been comprehensively explored in the case-law of the CJEU. Beyond the typical criteria for defining an employment contract, which include having a designated workplace, set working hours and a signed written agreement, the crucial element is the presence of a subordinate relationship between the parties. This relationship signifies the employer's power to issue directives to the employee and supervise their execution. See: Judgment of 10 September 2015, Holterman Ferho Exploitatie BV, Ferho Bewehrungsstahl GmbH, Ferho Vechta GmbH, Ferho Frankfurt GmbH v Friedrich Leopold Freiherr Spies von Büllesheim, C-47/74, EU:C:2015:574, para. 47.

[647] Rules protecting insurance and consumer contracts are not relevant in practice. However, as will be shown later, the provisions on consumer contracts may offer a way forward.

[648] Article 21(1) of the Brussels I Regulation.

[649] This is established by Article 22 of the Brussels Ibis Regulation. The only exception to this rule is provided in Article 22(2), which allows an employer to bring a counterclaim in any court where they are being sued, in accordance with the rules detailed in Section 5 of the Brussels I Regulation. Merrett, L. 'Jurisdiction over Individual Contracts of Employment, in A. Dickinson, E. Lein and A. James (Eds), The Brussels I Regulation Recast, Oxford, Oxford University Press, 2015.

[650] Articles 17 and 19 of the Brussels I Regulation.

[651] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.

in local courts, making it easier and potentially less costly for them to enforce their rights under the contract. Conversely, Article 18(2) limits the opposing party's ability to bring an action against the consumer by confining such actions exclusively to the courts of the Member State in which the consumer is domiciled.[652] In the realm of consumer contracts, the freedom of the parties to include a jurisdiction clause is also restricted (as in the case of employment contracts, see above in this chapter). Deviations from the protective provisions are only permissible through a jurisdiction agreement that complies with specific conditions, as outlined in Article 19 of the Brussels I Regulation.[653]

In the realm of copyright exploitation, particularly within the creative and cultural industries, it is not uncommon to encounter cases involving **multiple defendants.**[654] Within this framework, Article 8(1) of the Brussels I Regulation represents a key provision. Its aim is to prevent the issuance of conflicting judgments that could arise from separate proceedings, by outlining a procedure for combining lawsuits against multiple defendants into one case in a single court, provided that the claims are 'closely connected'.[655] As raised by academic literature, it should be noted that the precise meaning and effects of the requirement of a close connection remain ambiguous.[656] Furthermore, Article 8(3) introduces a provision for counterclaims, allowing them to be brought in the court where the original claim is pending, provided that they stem from the same contract or facts as the original claim. As observed by Vanherpe (2022), this could be the case of a corporate partner filing a counterclaim for damages based on the artist's alleged violation of the protective legal framework.[657]

At international level, the **2005 Hague Convention on Choice of Court Agreements,**[658] to which the EU is a contracting party, holds significant relevance. This convention applies to international cases involving exclusive choice of court agreements in civil or commercial matters. Specifically, Article 6 is of particular importance. It establishes that a court in a Contracting State, other than the chosen court, must suspend or dismiss proceedings to which an exclusive choice of court agreement applies, unless one of the exceptions listed in the article applies. Letter c) of Article 6 provides an exception, stating that an agreement may not be enforced if doing so would result in 'manifest injustice' or be manifestly contrary to the 'public policy' of the State where the court is deemed to be seised. However, this exception is narrowly interpreted and has a high threshold, making it difficult to apply in most cases, including in the case of copyright transfers. The term 'manifest injustice' applies to exceptional situations, such as when one party may not receive a fair trial in the foreign court due to bias, corruption or other specific circumstances, such as fraud in the

[652] Instead, Article 17 is not relevant for the purposes of this study. It sets jurisdiction rules for consumer contracts related to credit sales of goods, loans repayable by instalments or other credits to finance goods, and other contracts with businesses directing activities to the Member State of the consumer's domicile.
[653] According to Article 19 of the Brussels I Regulation, first, the agreement must be made after the dispute has arisen. Secondly, the agreement may allow the consumer to bring proceedings in courts other than those indicated above in this paragraph. Thirdly, the agreement can be made if both the consumer and the other party to the contract are domiciled or habitually resident in the same Member State at the time the contract is concluded, and the agreement confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.
[654] Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), p. 208.
[655] Pursuant to Article 8(1) of the Brussels I Regulation, a person domiciled in a Member State may also be sued if they are one of a number of defendants in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. See also: Arons, T. M. C., 'Cross-border dimension of collective proceedings in the Brussels Ibis regime: jurisdiction, lis pendens and related actions', in Mankowski, P. (Ed), Research Handbook on the Brussels Ibis Regulation, Edward Elgar Publishing, 2020, p. 5.
[656] Lehmann, M., Lein, E., Rogerson, P. and Ancel, M.E., 'Special Jurisdiction', in A. Dickinson, E. Lein and A. James (Eds), The Brussels I Regulation Recast, Oxford, Oxford University Press, 2015. See also: Jokubauskas, R., 'Practical Problems of the Application of Article 8(1) of the Brussels I Regulation', International Comparative Jurisprudence, Vol. 4, No 2, 2018.
[657] Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), p. 208.
[658] Convention of 30 June 2005 on Choice of Court Agreements.

agreement's conclusion. Public policy, in this context, refers to the fundamental principles, values and societal norms that underpin a country's legal system. A court may refuse to enforce an agreement if doing so would fundamentally violate the country's basic norms, such as human rights or access to justice. This exception is reserved for extreme cases and cannot be invoked for minor breaches or technical violations of domestic law.[659]

Rules at national level

National level desk research revealed that only a limited number of Member States have national rules and/or case-law that specifically enhance the ability of authors and performers to exploit their rights in cases where rights transfer disputes are referred to a foreign jurisdiction or an arbitration tribunal as a result of a choice of court or arbitration clause.

The following Member States stand out:

- **Spain** - According to Article 22b of Organic Law 6/1985, when there is no submission to the Spanish Courts, the Spanish Courts have jurisdiction when the defendant is domiciled in Spain. However, such jurisdiction is excluded in cases where the parties have included a choice of jurisdiction clause in the contracts. In that case, the Spanish courts can only hear the claim if the foreign court declines jurisdiction.

- **France** - The Intellectual Property Code (IPC) establishes a rule that limits the effects of choice of court agreements in specific cases involving authors of musical compositions for audiovisual works. Authors who have transferred all or part of their exploitation rights can bring lawsuits before the French jurisdiction to apply the protective provisions outlined in Articles L.131-4 (on authors' remuneration), L.131-5 (on financial adjustment mechanisms) and L.132-28 (on transparency in audiovisual production contracts concluded between authors and audiovisual producers) of the IPC.[660] However, the personal scope of this provision is limited to authors of musical compositions created for an audiovisual work and transferred within the context of an audiovisual production contract.

- **Denmark** – The Danish Copyrights Act deals with this issue only in relation to disputes involving CMOs and not in relation to disputes involving authors and performers. Disputes between a CMO that issues or offers to issue multi-territorial licences for online rights in musical works and an actual or potential online service provider regarding the application of Section 52a of the Copyrights Act[661] can be brought before the Copyright Licence Board, in Denmark, if the dispute concerns a multi-territorial licence for online rights in musical works.

- **The Netherlands** - Dutch law provides that employees cannot be deprived of the protections that they would have under Dutch (labour) law by the mere inclusion of a jurisdiction clause in their employment contract. This means that even if an employment contract specifies a different jurisdiction for dispute resolution, Dutch courts may still have jurisdiction over certain employment-related disputes,

[659] Hartley, T., & Dogauchi, M. (2006). Explanatory Report on the 2005 HCCH Choice of Court Agreements Convention. In Hague conference on private international law, pp. 819-821.
[660] Article L.132-24 of the IPC.
[661] These subsections stipulate that CMOs and users must negotiate in good faith, exchanging necessary information; licensing conditions must be objective and non-discriminatory, with no obligation for CMOs to apply agreed terms to new online services available in the EU for less than three years; CMOs must inform users about fee criteria and ensure rightholders receive adequate remuneration; CMOs should respond promptly to user requests, offering a licence or a justified refusal without undue delay; and CMOs must facilitate electronic communication with users. The Copyright Licence Board, established by the Minister of Culture, makes final administrative decisions as per the Copyright Act.

especially those involving fundamental labour rights and protections. These rules can also be extended to authors and performers.

Legal challenges

While the Brussels I Regulation provides a general framework for jurisdiction in civil and commercial matters, it does not explicitly address copyright contracts or offer tailored protections for authors, performers and audiovisual producers in their interactions with producers, broadcasters and streaming platforms, nor for producers in their copyright dealings with these platforms and broadcasters. This absence of specific provisions can pose challenges in ensuring fair and predictable outcomes for parties involved in these contracts, particularly given the unique complexities of copyright-related agreements.

As explained above, authors and performers may potentially benefit from the protective measures established under the Brussels I regime if they are employed. This provides a layer of defence against exploitation by dominant commercial entities. However**, the scope of these protections is limited**, especially considering the nature of relationships in the music and audiovisual industries, where authors and performers are very often self-employed. Consequently, these protections would theoretically cover only a limited share of authors and performers in the international market.[662]

It is important to note that, as a general rule, the Brussels I Regulation applies when the defendants are domiciled in an EU Member State.[663] In cases where the defendants are domiciled in a third country, the applicable jurisdiction will be determined according to the rules of a Member State. This principle is regulated by Article 6(1) of the Brussels I Regulation, which specifies that if the defendant is not domiciled in any Member State but in a third country, the national jurisdictional rules will determine whether a court of a Member State has jurisdiction over a case falling within the material scope of the Brussels I regime. However, this rule has four exceptions, including consumer and employer contracts. In order to ensure the protection of consumers and employees the protective rules of jurisdiction on employment and consumer contracts foreseen by the Brussels I regime apply regardless of the defendant's domicile.[664] This means that in employment cases under Article 21(2) and consumer cases under Article 18(1), the *forum actors* principle applies. Thus, in these cases, the Brussels I regime includes in its scope of application cases involving third country domiciled defendants.[665] This has dual importance for the objectives of the study. First, the rules of the Brussels I Regulation on employment contracts apply to cases where defendants are domiciled in non-EU countries. This ensures that courts in disputes involving employed authors and performers can retain jurisdiction within the EU and benefit from the copyright rules offered at EU and Member State levels. Secondly, the regime also applies to consumer protection contracts. This aspect significantly supports the French Presidency's proposal[666] to extend this model to vulnerable parties in copyright contracts with regard to relationships between authors/performers and producers or broadcasters/streamers (see conclusion in Subchapter 5.2.3.).

The inherently global nature of online exploitation presents significant challenges in determining the competent judicial forum for such cases. This complexity means that courts

[662] On this aspect, see also: Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023).
[663] Except for disputes over insurance, consumer and employment contracts, see Recital 14 of the Brussels I Regulation.
[664] Article 6(1) of the Brussels I Regulation.
[665] For a comprehensive overview on this, see: van Lith, Hélène, 'Jurisdiction—General Provisions', in Andrew Dickinson, Eva Lein, and Andrew James (eds), The Brussels I Regulation Recast (2015; online edn, Oxford Academic).
[666] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.

across various jurisdictions may be deemed pertinent for adjudicating transnational copyright disputes.[667]

5.2.3. Conclusions

As explained above, while the DSM Directive does not contain specific private international law provisions in the body of the directive, **it contains a reference to Article 3(4) of the RIR in Recital 81**.This recital favours the application of certain provisions of the DSM Directive (*i.e*. Articles 19, 20 and 21) as '*provisions which cannot be derogated from by contracts'* within the meaning of Article 3(4) of the RIR to contracts containing a choice of law agreement and presenting a connection to, at least, one EU Member State. However, in accordance with the RIR, the use of this mechanism remains subject to two conditions: First, the matter has to be brought before an EU jurisdiction, otherwise, the RIR does not apply, and, secondly, the contract must contain a choice of law agreement, without which Article 3(4) of the RIR cannot apply. Since the DSM Directive does not contain any other mechanism of private international law, in the absence of a choice of law agreement, the ordinary rules of the RIR on conflicts of law apply before EU courts.

Some Member States expressly refer to the RIR mechanism in their national law (see national rules in Subchapter 5.2.1. above and in the box below).

Illustration of an explicit use of Recital 81 in national law

The French IPC establishes a rule that **limits the effects of both choice of court and choice of law agreements** in specific cases involving authors of musical compositions for audiovisual works for the exploitation of their work in France.

Pursuant to Article L.132-24 of the IPC, authors who have transferred all or part of their exploitation rights **can bring lawsuits before the French jurisdiction to apply the protective provisions outlined in Articles L.131-4 IPC (on authors' remuneration), L.131-5 IPC (on financial adjustment mechanisms) and L.132-28 IPC (on transparency)** in audiovisual production contracts concluded between authors and audiovisual producers. **According to the same provision, these three articles apply notwithstanding the law chosen by the parties. Internally these are applied by professional organisations as a rule of public policy which cannot be derogated from by contract.**[668]

However, **the personal scope of this provision is limited** to authors of musical compositions created for an audiovisual producer.

However, while Recital 72 of the DSM Directive acknowledges the possibility of a contractual disadvantage for the exploitation by authors and performers of their rights in certain instances, it follows from sections 1.2.1 and 1.2.2 above, that **neither the RIR nor the Brussels I Regulation define**[669] **or lay down specific rules applicable to copyright**

[667] Vanherpe, J., 'Copyright contracts at the frontiers: A closer consideration from a conflict of laws perspective' in Simon Geiregat and Hendrik Vanhees (eds.), Copyright Contracts Tomorrow (LeA 2023), p. 209.
[668] Interview input from a CMO representing music authors.
[669] European Max-Planck Group for Conflict of Laws in Intellectual Property – CLIP, available at: https://www.ip.mpg.de/en/research/research-news/principles-on-conflict-of-laws-in-intellectual-property-clip.html; Torremans, P., 'Licences and assignments of intellectual property rights under the Rome I Regulation', *Journal of Private International Law*, Vol. 4 2008, n° 3, pp. 397 to 420, available at: https://heinonline.org/HOL/P?h=hein.journals/jrlpil4&i=395 and CLIP, Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ("Rome I") of December 15, 2005

contracts. This leaves rightholders subject to the ordinary conflict rules applicable to all contractual agreements. In certain case (where the elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States) Article 3(4) RIR ensures the application of the DSM Directive provisions on transparency, the contract adjustment mechanism and alternative dispute resolution in relation to authors and performers.

In some cases, the qualification of employment extends to certain copyright transfer agreements, e.g. through a presumption of an employment contract in certain contractual relationships (as is the case in some national laws, for example in **France,** where the Labour Code provides for a rebuttable presumption of employment for performers in the entertainment industry). However, **the personal scope of these provisions is limited**. As already explained, the protection offered to employees covers a limited number of authors/performers, as it does not extend to the self-employed. Stretching those definitions would impair the long-standing legal construction carried out by the Court of Justice since the Lawrie-Blum landmark case. Moreover, Recital 72 expressly states that the need for protection stemming from an asymmetry of bargaining powers '*does not arise where the contractual counterparty acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts'*.

The French Presidency report[670] suggested **creating a new category of vulnerable parties**[671] **aligned with the rules applicable to consumer contracts, but tailored to certain copyright transfer agreements**. As mentioned above, this approach would require further analysis to identify how it could address the difficulties faced by authors, performers and audiovisual producers in the transfer and exploitation of their rights.

Securing the use of the corrective mechanisms offered by the RIR, focusing on rules of choice of law only, could also be ensured by other means, as discussed below. In that case, conflicts of jurisdiction issues would not be addressed but the mechanisms giving precedence to the EU protective measures would be strengthened. This could be achieved in several ways, as noted below.

Article 3(3) and (4) of the RIR constitutes the least intrusive private international law mechanism. It prevents the circumvention of the provision transposing Articles 19, 20 and 21 of the DSM Directive without disapplying the law chosen by the parties, in cases where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States. Those provisions of the DSM Directive only apply to authors and -performers, therefore producers are not covered. Moreover, as mentioned above this mechanism would have only limited impact on complex contracts (see choice of law above).

An argument could be made **for asserting** the overriding mandatory **nature of the DSM Directive's provisions on remuneration of authors and performers** similarly to the protective provisions of the Commercial Agency Directive.[672] This would for instance require

and the European Parliament Committee on Legal Affairs' Draft Report on the Proposal of August 22, 2006, 2007, available at: https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Comments_clip-rome-i-comment-04-01-20062.pdf.

[670] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.

[671] Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

[672] Carre, S., Le Cam, S., Macrez, F., '*Buy-out contracts imposed by platforms in the cultural and creative sector*', European Parliament, 2023, pp. 62-63, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)754184; Vanherpe, J., Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2), 2022, available at: https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

an express reference to Article 9 of the RIR to be inserted in Recital 81 of the DSM Directive or a direct cross-reference to Article 9 to be inserted in Chapter 3 of Title IV of the DSM Directive, emphasising the need to protect the weaker party, mentioned in Recital 72, in private international law contexts.[673] Nevertheless, it has been argued that because of the exceptional nature of the concept laid down in Article 9, it should be narrowly applied and caution exercised to avoid its overreach.[674]

The French Presidency paper[675] mentions as one possibility among others the **prohibition of buy-out clauses that could not be circumvented by a choice of law.** However, an absolute prohibition of buy-out clauses may go against the freedom left to Member States by Recital 73 of the DSM Directive to '*define specific cases for the application of lump sums, taking into account the specificities of each sector'* as well as against the contractual freedom of parties, and raises questions whether this would be justified in all cases.

6. Study Conclusions

The evidence collected in Chapters 3, 4 and 5 through the interviews, online survey and desk research based on relevant literature and the legal analysis highlights trends, impacts and best industry practices for the various creative sectors analysed within the scope of the study.

The following subchapters conclude the findings of the study.

6.1. Authors and performers

The study findings show several challenges faced by stakeholders across the analysed creative sectors, in particular by authors and performers who struggle with power imbalances, with some actors having a high leverage and bargaining power, while other actors are in a weaker position. This latter scenario is particularly true for emerging authors and performers in the industry, as most struggle to negotiate better contracts for themselves. Consequently, they may be compelled to accept unfair terms, leading to the transfer of full rights to counterparties and agreeing to inadequate remuneration, which may jeopardise their long term sustainability within the sectors within the scope of the study. Furthermore, these authors and performers may not have the ability to understand complex contractual terms and may be obliged to sign them without fully understanding their implications. Furthermore, in all analysed sectors (except for the videogames sector), the contracts are negotiated in the initial stages prior to determining the work's full economic worth or even the future rights that the authors may possess. Remuneration decisions are thus based on factors such as the experience, past successes and budget of the authors and performers. One solution to this at Member State level has been to **restrict the transfer of rights for the exploitation of unknown or unforeseeable activities,** as for instance is the case of Belgium, France, Germany, Lithuania and Spain. Another way to protect authors and performers in the case of the transfer of future rights may be to limit the scope of transferred rights to what is considered necessary for fulfilling the purpose of the contract in line with the principle of purpose-limitation (as in the case of Austria, Czechia, Greece, Hungary, Lithuania and Poland).

[673] Carre, S., Le Cam, S., Macrez, F., '*Buy-out contracts imposed by platforms in the cultural and creative sector'*, European Parliament, 2023, p. 63, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)754184

[674] See https://copyrightblog.kluweriplaw.com/2022/10/19/limitations-to-parties-choice-of-law-in-copyright-exploitation-contracts-in-the-digital-era-part-2/.

[675] The French Presidency of the Council of the European Union, 'Effectivité du cadre européen du droit d'auteur – rapport final', 2022, available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf.

At international and EU levels, authors and performers are provided with distinct economic (i.e. exploitation) rights. While both international and EU rules do define certain rules applying to moral and exploitation rights of authors and performers (e.g. Berne Convention, Rome Convention, Beijing Convention and the Copyright Term Directive), contract law also applies and parties can enter agreements and negotiate terms based on contractual freedom. Some actors in the sectors within the scope of the study that have more bargaining power may impose the contract terms, while the actors with a lower bargaining power and leverage may find it more difficult to enforce their rights. Depending on the sector, the actors with a lower bargaining power may be emerging authors and performers, independent authors and performers, or session musicians. In terms of remuneration, the international treaties do not tend to be very prescriptive about the remuneration of authors and performers, but the recent DSM Directive has introduced specific measures to protect the remuneration of authors and performers where they transfer or license their exclusive rights for the exploitation of their works or other subject matter.

Furthermore, protective mechanisms under national legislation typically apply, although they do vary between EU Member States. This results in differing levels of rights retention and rules on remuneration for authors and performers, meaning that outcomes can significantly differ from one State to another. Protective measures have been introduced by the Member States to strengthen the position of authors and performers in their sectors, as well as to limit rights transfers, as such transfers can hamper the long-term sustainability of authors and performers in their sectors. These measures include restricting the transfer of moral rights, as is the case for most of the Member States, and disabling the transfer of rights ownership so that authors can object to a full transfer of rights, as is the case for Austria, Germany and Hungary.

In terms of lump-sum payments, authors and performers often perceive them to be unfair as they take away their ability to generate long-term benefits from their work. This perception arises in cases when such payments are not proportionate or appropriate, as established under the DSM Directive. In some cases mechanisms are in place to ensure that authors and performers can benefit from the future success of their work, for example, in France, lump-sum payments are permissible only in certain specifically defined cases, whereas in Germany, the projected income from the exploitation has to be taken into account. Reference points could therefore be established to help authors and performers assess the adequacy of lump-sum payments. The study findings also underscore the importance of transparency, as stipulated under Article 19 of the DSM Directive, across all sectors. Increased transparency can therefore improve the legal certainty of authors and performers. Although the DSM Directive does not impose penalties in the event non-compliance with the transparency obligation, ADR mechanisms, as established under Article 21 of the DSM Directive, may offer a way to solve related disputes and strengthen the bargaining position of authors and performers. The survey results show that ADR is underutilised at the present time, with 66% of the total survey respondents from all sectors not having made use of ADR procedures. Promotion of ADR could improve the utilisation of such procedures.

Regarding the choice of law and choice of jurisdiction, the current framework of EU private international law does not contain specific mechanisms to address the complexities of copyright transfer agreements in international contexts. While the DSM Directive references Article 3(4) of the Rome I Regulation (RIR) in Recital 81, allowing Articles 19, 20 and 21 of the DSM Directive to override contractual agreements under specific conditions, this mechanism applies only when a contract includes a choice of law and is brought before an EU jurisdiction before which the RIR applies. To further enhance protection in cases where the production or exploitation takes place in the EU, consideration could be given to extending the protective regimes for vulnerable parties - such as those provided to consumers or employees - to certain copyright transfer agreements. However, this would

require further analysis. The feasibility of establishing, at EU level, mandatory (substantive law) rules to protect creators within the meaning of Article 9(1) of Rome I Regulation could also be considered.

The study has also identified some sector specific findings.

Audiovisual sector: in the audiovisual sector, contracts often require authors and performers to transfer all exploitation rights for lump-sum payments or low royalties, with 64% of the survey respondents identifying buy-out mechanisms as the dominant remuneration model. Rights transfers are often the reality for both authors and performers, and include their future rights that may not be known at the time of the transfer.

However, these contracts are more prevalent when authors and performers negotiate on an individual basis directly with exploitation or distribution entities rather than through producers, trade unions or CMOs. The intervention of CMOs or trade unions in negotiations not only helps authors and performers better understand the complex nature of contractual terms, but also improves their negotiation power. In terms of remuneration, the survey results show that in general the remuneration offered to authors and performers is considered unfair, with 51% of creators perceiving it as rarely fair and 33% as never fair.

Challenges in understanding complex contracts further weaken negotiation outcomes, though CMOs provide some support. In addition, CBAs offer varying levels of benefit to performers and authors, with 65% of performers reporting improved contractual terms over the past five years compared with only 38% of authors. Overall, the survey results indicate that performers have experienced an increase in their bargaining position, whereas authors consider that it has declined.

Music sector: in contrast to the audiovisual sector, where authors and performers predominantly negotiate contracts individually, CMOs play a bigger role in the music industry. According to the survey data, while 83% of respondents reported that they had engaged in direct negotiations with counterparties, 63% also seek external support from professional organisations, lawyers and CMOs. The scope of rights transferred by authors and the remuneration they receive varies depending on the negotiating counterparty. Insights gathered from the interviews and survey show that authors often transfer full rights in perpetuity to VOD platforms and royalty-free music companies in exchange for a one-time payment. In quite a few cases, this can also be for all rights, i.e. present and future rights. On the other hand, negotiations with music publishers typically allow authors to retain mechanical and performing rights, which are commonly assigned to CMOs for management.

However, the benefits of CBAs in the music industry appear to be limited and are not fully acknowledged by authors and performers. In terms of the imbalance in bargaining power, the disparities are more pronounced for small, independent authors and musicians, as well as for session musicians, who often end up in weaker negotiating positions. This leads them to enter into commissioning contracts that provide lump-sum payments rather than royalty-based remuneration, which is more common for featured authors and performers.

The survey results further reveal that the perceived bargaining power of authors and performers has not increased in recent years. Indeed, 41% of respondents reported no change, while 38% reported that it had declined over the past five years. Additionally, the remuneration received by authors and performers frequently does not reflect the true economic value of their work, with 49% of the survey respondents indicating that their remuneration is rarely fair and 23% stating that it is never fair.

Visual arts sector: the survey results reveal a general decline in the bargaining power of authors, with 49% reporting a decrease and only 20% perceiving an increase. This decline is attributed to factors such as heightened market competition, advancements in technology, the growing influence of social media and the emergence of artificial intelligence.

Notably, the study finds that the benefits of CBAs are more widely recognised in the visual arts sector compared than in the music and audiovisual sectors. CBAs are seen as contributing to fairer remuneration, enhanced bargaining power and improved recognition of authors' rights.

As regards the fairness of remuneration, the majority of authors in the visual arts industry view remuneration as unfair, with 51% stating that it is rarely fair and 26% asserting it is never fair. Furthermore, commissioning emerges as the dominant contractual model in the sector, typically involving a full transfer of rights in exchange for a lump-sum payment, therefore effectively being the equivalent of a buy-out.

Literary works sector: in the literary works sector, writers and translators mostly enter into licensing agreements with publishers. While buy-out contracts are not standard practice in the industry, certain translation agreements may include terms that resemble buy-out contracts, though perspectives differ on the prevalence of such arrangements. Remuneration is generally based on royalties and advances, but is often considered too low (43% consider that it is never fair), with authors having to seek secondary employment opportunities to supplement their income.

The survey data reveals variations in perceptions between individual authors and organisations representing authors. While 26% of individual authors report an increase in their bargaining power over time and 44% indicate no change, 53% of representative organisations state that bargaining power has remained unchanged, and 42% consider that it has declined.

Although authors do report seeking external support during contract negotiations, the industry remains characterised by individually negotiated agreements. Furthermore, the benefits of CBAs are not fully realised in this sector. CMOs also have limited involvement, and only manage secondary rights. The majority of contracts feature broad clauses resulting in the full transfer of rights, with the applicable jurisdiction being the location of the authors and publishing houses.

Videogames sector: the videogames sector has distinct characteristics compared with the other creative sectors analysed. Game creators are generally employed under '360 contracts' or freelance agreements with game studios or publishing companies, where the IP rights are transferred to the studio for perpetuity, with the game creators retaining only moral rights. In several Member States, computer programmers in the industry are also unable to rely on revocation mechanisms as the revocation can be limited in line with Article 23(2) DSM Directive, though ADR mechanisms in general may be able to offer potential solutions to non-compliance with contracts.

Whenever the remuneration of authors can be considered a salary, national labour law rules would apply. Contractual negotiations are conducted on an individual basis, as CMOs are not involved in the sector. Game creators with greater experience typically have a higher bargaining power in these negotiations. The applicable legal framework is determined by the jurisdiction in which the studio is based. On the other hand, unlike other creative sectors, game creators generally receive salaries from their employers, which are often accompanied by social benefits and are generally subject to scaling over time.

6.2. Producers in the audiovisual sector

The study findings show that producers in the audiovisual sector face several challenges when negotiating with global streamers and, to a lesser degree, with broadcasters, as they may not have sufficiently high leverage to negotiate better terms for themselves. The legal mapping of the rules applicable to the audiovisual producers also shows that in most EU countries there are limited protective measures for audiovisual producers when negotiating with broadcasters and global streamers compared with authors and performers. However, in the case of producers, the AVMSD and other policy instruments at national level do provide some broader mechanisms that can improve the bargaining power of producers.

Such findings are also observed at Member State level with only two Member States extending the protection offered by Chapter 3 of Title IV of the DSM Directive to producers, with a few others providing limited protective measures in copyright legislation. This is because producers are typically considered to be in a better bargaining position when negotiating with broadcasters and global streamers. However, in practice, small and medium-sized independent producers may also be faced with a problem of uneven bargaining power. The principle of contract freedom thus applies with the contracting parties being free to choose the terms. This means that the choice of law and jurisdiction is very important for determining the position of producers in negotiations, in particular, with global streamers.

While some interviewed global streamers noted a shift in the past two to three years toward financing models that involve sharing risks and rights with EU audiovisual producers, such as licensed deals and co-productions, the majority of producers interviewed stated that the commissioning model, in which global streamers retain all or most rights, remains the most common financing model. **Overall, the findings indicate that various financing models coexist,** with no conclusive evidence pointing to the predominance of one model. The interviews with PSBs revealed that they primarily rely on licensing and co-production models, sometimes shaped by regulatory requirements. Private broadcasters reported employing a variety of financing models, but emphasised that a shrinking market poses significant challenges in securing co-financiers for audiovisual projects.

The interview findings indicate that building a catalogue of rights is the foundation on which producers base their future revenue streams and the long-term sustainability of their businesses. Without ownership of a catalogue of rights, audiovisual producers face considerable constraints in investing in the development of new audiovisual works. It is therefore critical for producers to develop assets with long-term value. However, in the context of commissioning contracts where producers do not retain rights to a production, their growth and sustainability in the industry are threatened. The interviews conducted suggest that global streamers, private broadcasters and, to a lesser degree, PSBs rely on a commissioning model for financing, where they hold all or most rights to TV fiction productions. This dynamic weakens the bargaining power of audiovisual producers, making it challenging to negotiate better contractual conditions. The interviews with producers corroborated the findings of the European Media Industry Outlook Report (2023), highlighting a trend of including the transfer of all IP rights in contracts, especially with non-EU streamers. This issue is particularly prevalent for small, independent producers that are placed in highly vulnerable positions. The choices of producers to operate within models where streamers or broadcasters hold rights ownership are shaped by various factors, such as the small pool of commissioners and their preference for financing through the commissioning model of financing.

The interviewed producers outlined that they encounter considerable challenges in building sustainable businesses when they are unable to own rights for future exploitation, particularly in cases where commissioners retain rights without fully financing productions.

The study findings, based on the interviews with producers, show that sometimes producers cannot own and exploit rights even when they are applicants and contribute public funding through mechanisms, such as tax incentives, or invest in development. Other challenges identified through the interviews include issues related to the choice of law and jurisdiction, long licensing periods, the allocation of rights and revenues, ownership of derivative and merchandise rights, and the turnaround time of audiovisual projects (for further analysis, see 4.2).

The inability of producers to exploit their rights or sustain their businesses under unfavourable rights agreements with streamers and broadcasters could threaten the health of EU's audiovisual industries, resulting in fewer independent productions and reduced diversity in content creation. In terms of impact, some interviewed producers and European broadcasters expressed concerns that the adoption of the commissioning model by US-owned global companies has shifted the ownership of the IP of European works away from European entities. The difficulties faced by producers to retain IP rights also has an impact on the diversity of European audiovisual works, the availability and full exploitation of such works, as well as on the diversity of production companies (see 4.2.).

Through interviews and desk research the study identified some best industry practices and mechanisms to improve the standing of producers in negotiations with broadcasters/streamers. For example, it is noteworthy that producers retain more rights when there are certain policies in place that guarantee that their bargaining position is improved when negotiating with broadcasters and global streamers. In addition, Member States could consider ways of supporting independent producers via funding criteria for production incentives (see Subchapter 4.1.5.). Moreover, in terms of the financing of audiovisual works, there is also a need to facilitate conditions for generating cashflow through banks loans during the production cycle. Another challenge outlined by producers in the interviews related to the lack of transparent data on the exploitation of works. The provision of this data by global streamers and broadcasters with regard to the audiovisual works in their programme catalogues could help producers negotiate fairer exploitation terms. Overall, the interviews identified a need for policy and regulatory measures to support audiovisual producers in order to strengthen their bargaining power.

7. Annexes

Annex I- Glossary of terms

Terms	Proposed definition
Applicable jurisdiction	For the purposes of the study, the rules governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters where the facts of a case have a connection with more than one country. Regulation 1215/2012 (Brussels I Regulation) is the key EU legislative instrument determining jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
Audiovisual authors	Individuals who create original content for films, television shows, documentaries and other audiovisual media forms. These encompass the principal director of a film or other audiovisual work, who may be considered as one of the 'authors'. National laws may also recognise others as co-authors: the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work (cf. Article 2 Directive 2006/116/EC).
Assignment of rights	Process of granting a third party (for example, a CMO) the right to manage copyright or related rights in a work or performance on behalf of the original rightholders.
Audiovisual producers	A natural or legal person responsible for the financing of the production of the first fixation of an audiovisual work. The audiovisual producer is responsible for managing the audiovisual work's financial aspects, including securing funding, managing budgets and negotiating contracts for licensing/acquisition. Typically, the producer acquires exploitation rights from authors and performers, and where appropriate, clears the rights attached to any pre-existing works to be able to negotiate on the licensing of the audiovisual work.

Terms	Proposed definition
Broadcasters	Broadcasters deliver radio and television programmes to viewers through different channels such as terrestrial, cable, satellite and online streaming, either freely or through a paid subscription. They need to obtain the necessary rights from the rightholders, which can be arranged through producers, distributors, the original broadcaster, or collective management organisations, in the case of retransmissions.
Buy-out contracts and/or practices	A contract or a clause entailing the transfer of exploitation rights associated with a protected subject matter in exchange for a one-off upfront payment.
Choice of law clause	A clause with which the contracting parties choose the law that governs the contract (*lex contractus*). However, such clauses are subject to restrictions owing to specific EU rules, established by Regulation 593/2008 (Rome I Regulation), and in national law provisions (e.g. overriding mandatory rules, public policy).
Commissioning of rights	Content or work commissioned in the context of an employment relationship between an author or performer and their employer, or in the context of a contractual relationship between an independent contractor and the client. In the US, an analogous concept is used, namely 'work-for-hire', although in this case the commissioner is considered as the original/first author.
Collective Management Organisations (CMOs)	Any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright and related rights on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis (cf. Article 3(a) Directive 2014/26).
Independent management entity (IMEs)	Any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or related rights on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils the following criteria: (i) it is neither owned nor controlled by its members; and (ii) it is organised on a for-profit basis (cf. Article 3(b) Directive 2014/26).

Terms	Proposed definition
Copyright	An exclusive right encompassing two types of rights: - **Moral rights** include the right to claim authorship of the work and the right to object to any derogatory action in relation to the work. They are not harmonised at the EU level. - **Economic rights** (also known as exploitation rights) enable authors to control the use of their works and be remunerated for their use, by allowing them to authorise (or prohibit) the making and distribution of copies as well as communication to the public. Economic rights and their terms of protection are harmonised at EU level and these rights can be transferred to a third party. The laws of almost all EU Member States distinguish between moral and economic rights (dualistic systems), while Germany treats them as inherent parts of a single right (monistic system). This has consequences on the transferability of copyright as a whole and in part.
Authors	Natural persons who create works that are eligible for protection under copyright as an author. This encompasses writers, composers, directors, translators, filmmakers and photographers, illustrators, designers, screenwriters and other visual artists and creative professionals.
Performers	Rightholder of related rights. This encompasses featured and performing artists, session musicians and other visual artists and other creative professionals.
Deficit financing arrangements between audiovisual producers and broadcasters/streamers	Deficit financing is an arrangement whereby the broadcaster/streamer buys exploitation rights in exchange for a licence fee that covers a portion of the budget. The producer can retain the ownership of rights and cover the budget deficit based on sales to other territories and exploitation windows.
Exclusive rights	Rights that enable rightholders to authorise or prohibit particular uses of their work or other protected subject matter. Exclusive rights are preventive in nature, in the sense that any use covered by the rights requires the rightholder's prior consent.

Terms	Proposed definition
Exploitation of work	The process of using and deriving value from protected works and other subject matter, such as literary, artistic, musical or audiovisual works and other subject matter. For the purposes of this study, this includes activities such as publication, distribution, broadcasting, digital streaming and adaptation, with the aim of generating revenues and maximising the work's economic potential.
Subject matter	The content or material that is the focus of intellectual property protection. The term protected subject matter encompasses various tangible or intangible intellectual creations, such as literary works, artistic creations, musical compositions, audiovisual productions and other forms of expression that are protected by copyright or by related rights.
Primary/initial use	The principal or main purpose for which a work or other subject matter is intended or used. In the context of copyright, primary use refers to the initial or predominant manner in which a work is exploited or commercially utilised. It is the primary means by which the work is made available to the public or generates revenues. Some examples are publishing a book, releasing a film in theatres or broadcasting a television programme.
Secondary/future use	The subsequent or additional manner in which a work or is used or exploited after the primary use. In the context of copyright, secondary use refers to activities such as reprints, translations, adaptations, digital distribution, licensing for derivative works or other forms of exploitation that occur after the initial commercialisation or primary exploitation of the work. It involves leveraging the existing creative work for additional revenue streams or purposes beyond its original intended use.
IP retention	Maintenance of the ownership of rights by the audiovisual authors or audiovisual producers in contractual practices with broadcasters/streamers for future exploitation.

Terms	Proposed definition
Joint remuneration agreements	Agreements between freelance authors' associations and associations of users of works or individual users of works regarding the contractual remuneration of rights transfers.
Licensing of rights	The granting of permission by a rightholder where the initial copyright or related rightholder still retains the ownership but authorises a third party to use and exploit the protected subject matter in a particular or in any manner, in an exclusive or non-exclusive way. **Collective licensing** means that a licensing agreement for the exploitation of protected subject matter is concluded by a CMO. The extension of a collective licence to rights of rightholders that have not authorised a CMO to represent them based on a legal mandate or a presumption of representation is called **extended collective licensing** (cf. Article 12(1) Directive 2019/790).
Lump-sum payment	An up-front single payment in exchange for the exploitation rights.
Mandatory collective management	A statutory provision according to which the right to grant or refuse authorisation to use protected subject matter, but also to manage (e.g. the collection of remuneration rights) may be exercised only through a CMO.
Master use licence	Licence required when the entirety or any parts of an original sound recording are being used. It includes the master rights. It applies, for example, when sound recordings are streamed or purchased in a physical or digital format.[676]

[676] GoClip.Org, Common music industry licences. Available at: https://goclip.org/en/music/rights-transfer-and-licensing/common-music-industry-licences

Terms	Proposed definition
Mechanical licence	Licence required to obtain the mechanical rights to reproduce and distribute musical work in a physical or digital format, such as CDs, vinyl, digital downloads and interactive streaming. It is also needed to create and distribute cover versions of existing musical works.[677]
Related rights	Exclusive rights pertaining to subject matter other than original works, such as performances, fixations of phonograms, broadcasts, first fixations of films, press publications, etc. Depending on the national legislation, related rights can include both moral rights and economic/exploitation rights.
Remuneration rights	Remuneration rights require the user to make a payment for the use of protected subject matter. These rights may be granted either instead of an exclusive right (e.g. in case of broadcasting and communication to the public of phonograms) or in addition to an exclusive right. They may be unwaivable or non-transferable and are granted under EU or national laws. This report mentions the following types of remuneration rights: **Compensation rights**, which are remuneration rights as a compensation for an exception or limitation; **Statutory remuneration rights**, which are remuneration rights granted instead of exclusive right; **Additional statutory remuneration rights**, which are granted in addition to exclusive rights (i.e. equitable remuneration).
Revocation of rights	The right to revoke a transfer of copyright or related rights (cf. Article 22 Directive 2019/790).

[677] GoClip.Org, Common music industry licences. Available at: https://goclip.org/en/music/rights-transfer-and-licensing/common-music-industry-licences

Terms	Proposed definition
Rightholders	Original holders of copyright and related rights (authors, performers, phonogram and film producers, broadcasters, press publishers, etc.) and persons that acquired these rights by transfer or inheritance.
Royalty	Contractually agreed remuneration paid to original holders of copyright and related rights for the authorised use of their protected subject matter, typically arranged through licensing agreements and potentially managed by CMOs.
Streamers	On-demand services that deliver media content, such as music, video, audiovisual content or live broadcasts at the moment chosen by the user and at the user's individual request on the basis of catalogue of programmes selected by the provider.
Synchronisation licence	Licence required to use a musical work with visual media in a so-called audiovisual work, such as films, videos, TV shows, commercials, videogames, or websites. A sync licence can include either or both the synchronisation rights for the use of the musical work and the master rights for the use of the sound recording if a pre-existing sound recording is being used.[678]
Rights transfer	Process of passing on copyright or related rights in a work or performance to a third party. A rights transfer means giving to a third party the permission to use, sell, distribute the protected subject matter or manage the rights in respect of such subject matter. For the purpose of this study transfer is understood as an umbrella term covering the transfer of the ownership of rights, the licensing of rights and the assignment of rights. Contractual practices that involve the transfer of copyright and/or related rights to a third party typically refer to the scope of rights being transferred, remuneration conditions, exploitation obligations, termination clauses, rights management, as well as the choice of law and choice of jurisdiction clauses

[678] GoClip.Org, Common music industry licences. Available at: https://goclip.org/en/music/rights-transfer-and-licensing/common-music-industry-licences

Terms	Proposed definition
Transfer of the ownership of rights	Transfer of rights, whereby authors and performers transfer all their ownership rights to another party, who becomes the new owner of those rights.
Unwaivable rights	Rights that cannot be waived with *erga omnes* effect.

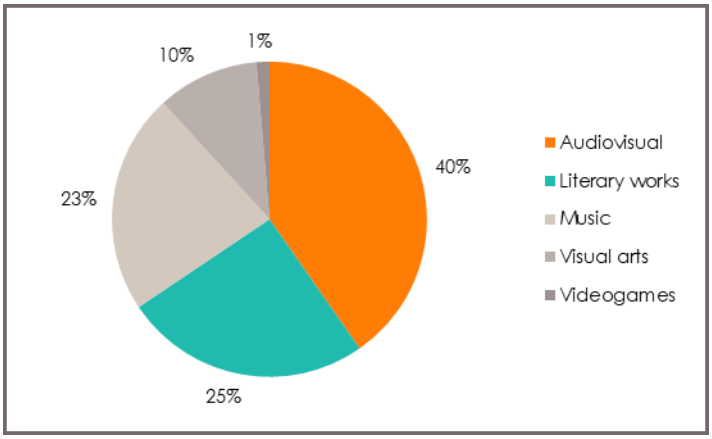
Annex II- Overview of survey results

This annex explores the composition of respondents to the survey conducted in the context of Task 1.

Overall, a total number of 747 survey responses were received, out of which 219 respondents declared that they operated across the entire EU region. The respondents that identified themselves as primarily operating in specific EU Member State(s) represented 24 EU Member States.[679]

Looking at the sectoral coverage, 40% of respondents represented the audiovisual sector, while 25% and 23% represented respectively the literary works and music sectors. Only 10% of respondents represented the visual arts sector, complemented by a 1% representation of the videogames sector.

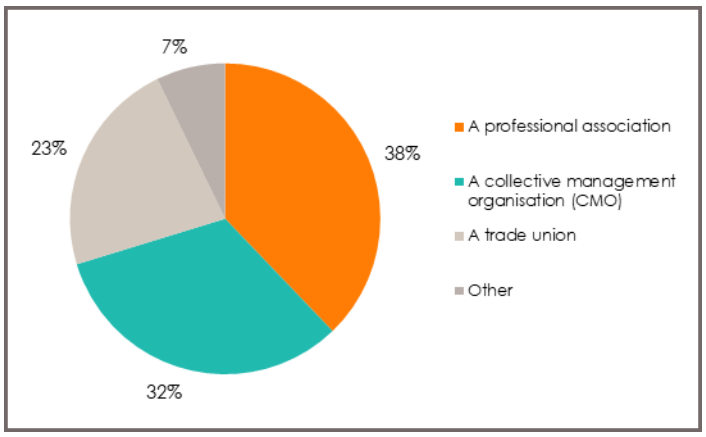
Figure 29: Total respondents per sector



Also, 85% of respondents answered the survey as individuals (out of which, 94% were independent workers and 6% employees of a company), while the remaining 15% answered it on behalf of a professional organisation. With respect to the latter, the types of organisations represented are: professional associations (38%), collective management organisations (32%), trade unions (23%) and other (7%).

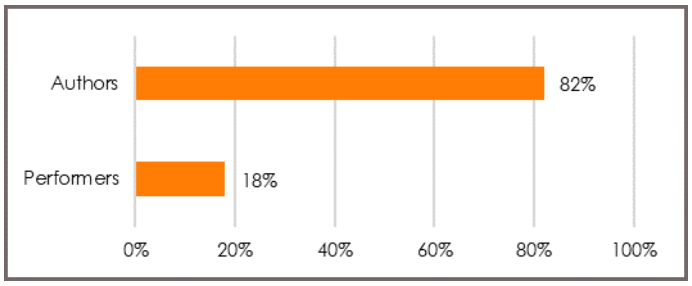
Figure 30: Type of organisations

[679] No respondents declaring that they primarily operated in specific EU Member States represent the following EU countries: Malta, Slovakia and Slovenia.



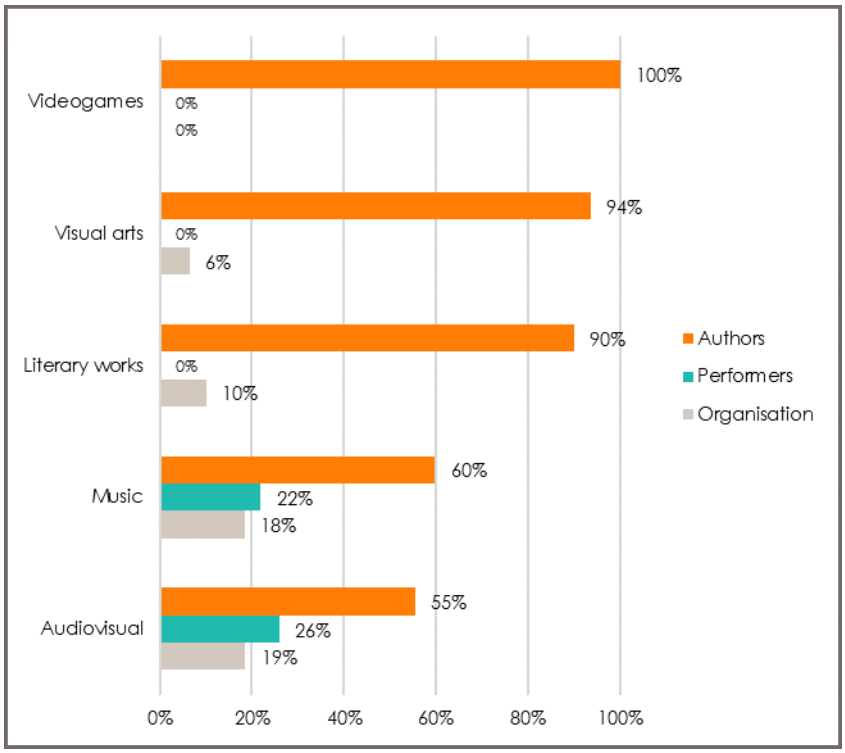
As regards the primary professional role of respondents, 82% indicated that they identified themselves as authors, and the remaining 18% as performers.

Figure 31: Share of authors/performers answering the survey



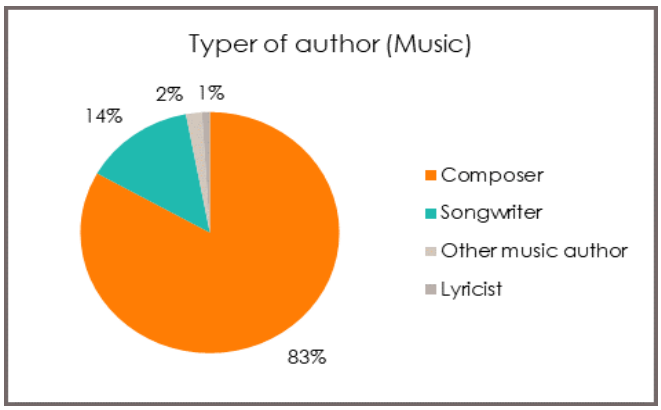
In terms of the distribution of authors, performers and professional organisations per sector, as per the figure below, it emerges that, for all sectors, the majority of respondents were authors (this is particularly true for the videogames, visual arts and literary works sectors, where their representation was above 90%). Performers mainly represented the audiovisual and music sectors (26% and 22% respectively), while professional organisations represented to a certain extent all sectors (with a representation rate of almost 20% in the audiovisual and music sectors), except for the videogames sector.

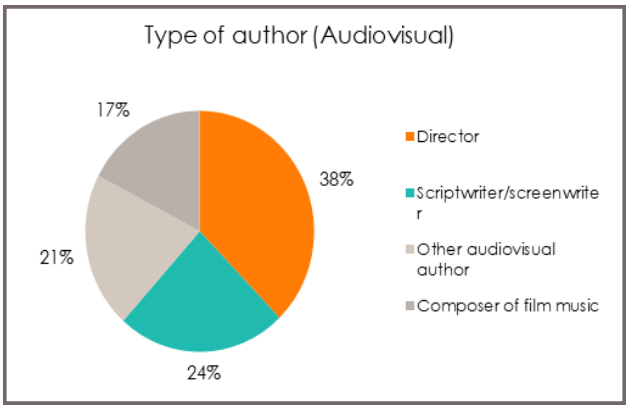
Figure 32: Sector vs authors/performers/professional organisations

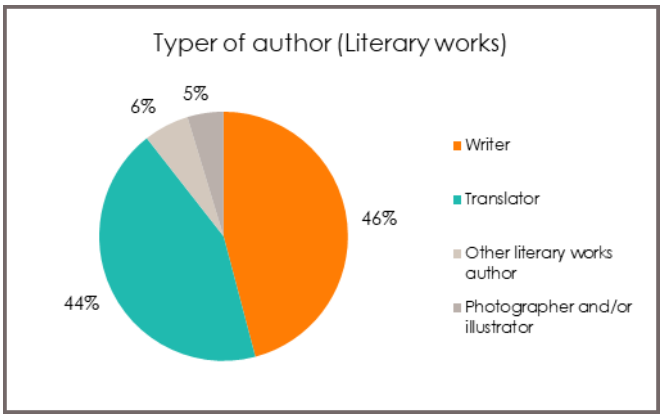


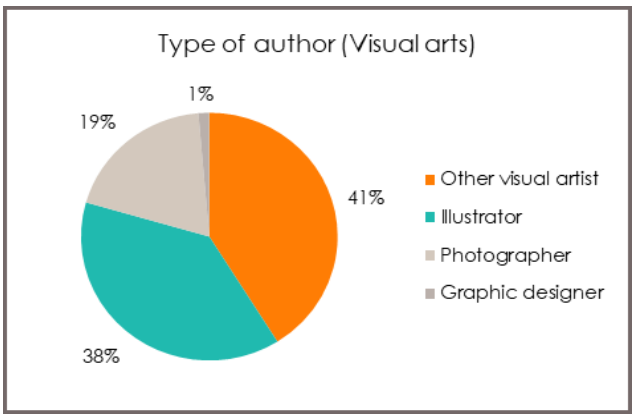
When respondents representing authors were asked to specify their professional role, the answers revealed that:

- For the audiovisual sector, the majority of respondents are directors (38%) and scriptwriters/screenwriters (24%).
- For the music sector, 83% of respondents are composers, followed by 14% of songwriters.
- For the literary works sector, respondents are mainly writers (46%) and translators (44%).
- For the visual arts sector, 41% of authors classified themselves as other visual artists, and 38% as illustrators.
- All authors representing the videogames sector identified themselves as other videogames authors.





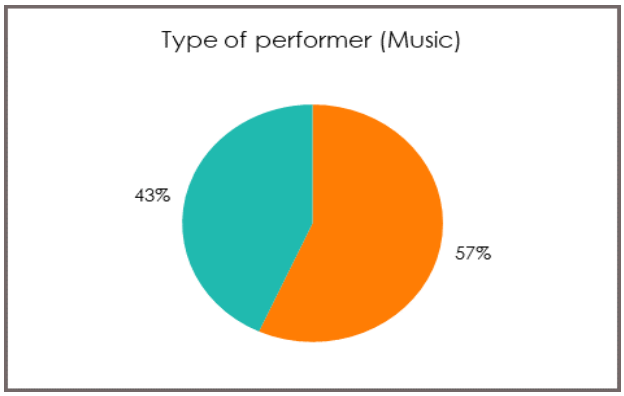


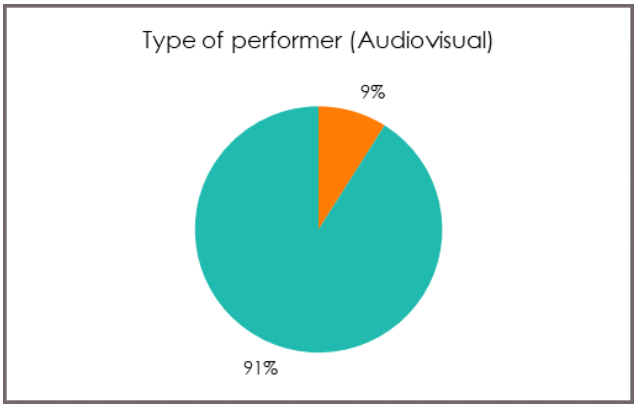


Likewise, looking closely at the types of performers answering the survey, these can be broken down as follows:

- For the audiovisual sector, 91% of respondents are actors/actresses, plus 9% of voice actors.

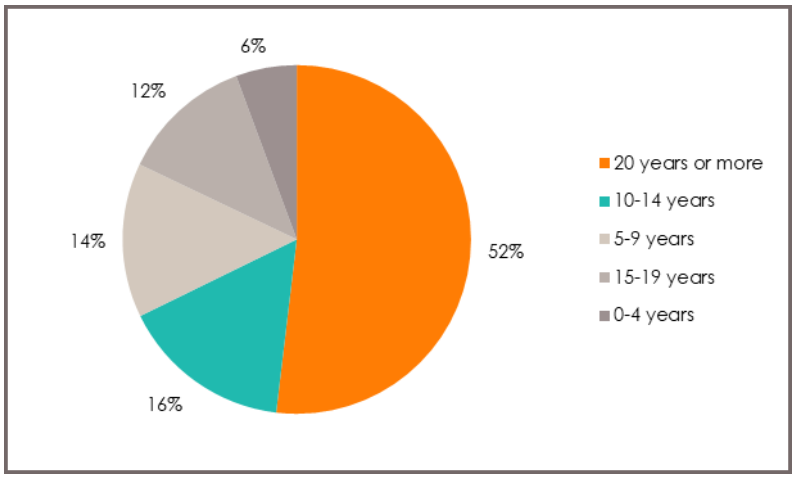
- For the music sector, 57% of respondents represent non-featured artists, while 43% identified themselves as featured artists.





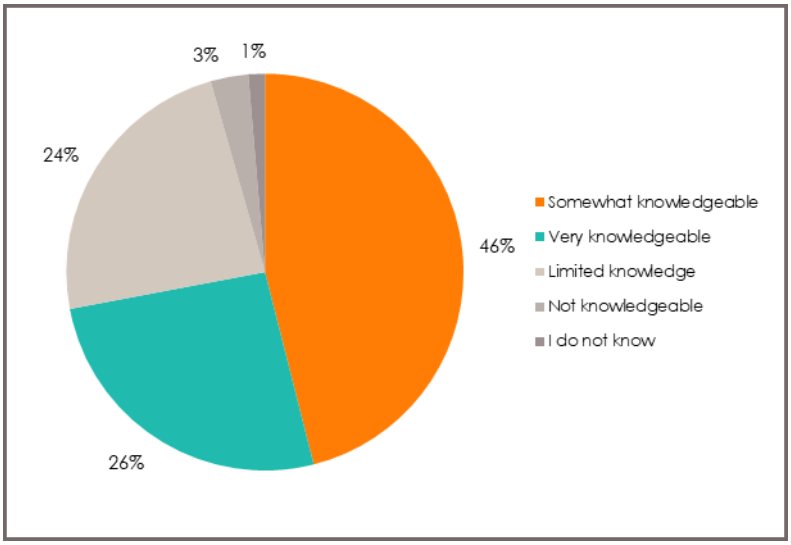
In terms of professional experience in their respective fields, most of respondents declared that they had at least 20 years of experience (52%) (up to 70% in the audiovisual sector). In contrast, in the videogames sector no respondents had more than 15 years of experience. Moreover, 70% of authors in this sector stated that they had between five and nine years of experience.

Figure 33: Years of respondents' professional experience



Finally, when asked about their level of understanding and awareness of their contractual practices and rights, over 70% of respondents consider that they are somewhat or very knowledgeable (49% and 24% respectively). On the other hand, 24% of respondents declared that they had limited knowledge, while only 3% stated that they had no knowledge at all (up to 10% in the videogames sector).

Figure 34: Level of respondents' understanding and awareness of contractual practices and rights



Annex III- Overview of the international and EU copyright legal framework

Table21: Overview of the international and EU legal framework establishing rules that are relevant to rights transfers and remuneration

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
International instruments		
The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention)	The WIPO Berne Convention establishes several principles of copyright law, such as the principle of national treatment (Article 5(1)), the no formalities rule (Article 5(2)) and the rule on the limited term of protection, which is 50 years after the death of the author (Article 7). It also encompasses certain minimum standards for the protection of moral and economic rights, such as the assertion of authorship, stating that irrespective of the author's economic rights, and even after the transfer of said rights, the author retains the prerogative to claim authorship of the work and to contest 'any distortion, mutilation, or other alteration thereof' (Article 6bis (1)). Finally, it provides for special provisions concerning cinematographic (audiovisual) works by allowing countries to decide how to handle the rights of authors of contributions (e.g., screenwriters, composers) when their work is included in a cinematographic or audiovisual production. (Article 14bis (2)(b)).	In accordance with Article 14ter of the Convention, authors are entitled to an interest in the resale of their artwork. This interest is inalienable and extends to original works of art and original manuscripts of writers and composers. It is enjoyed by the author or their legal successors in the event of a subsequent sale of the work following the initial transfer of the work by the author.
The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention)	The WIPO Rome Convention is the primary convention on related rights and applies to performers, phonograms producers and broadcaster organisations, that are subject to the jurisdiction of a Contracting State based on their nationality, habitual residence or establishment and the first release of the work concerned (the principle of national treatment in Article 2). Performers are granted rights over their performances (Article 3(a)). These rights include the ability to prevent unauthorised broadcasts and communication to the public of their performance, recordings and reproductions of their live performances (Article 7). The term of protection for performers is at least 20 years from the end of the year when fixation for phonograms and performances was made; for performances not incorporated in phonograms and for broadcasters – when the performance took place (Article 14(a) and (b)). Producers of phonograms have the exclusive right to permit or prevent the direct or indirect copying of their recordings (Article 10). Broadcasting organisations have the right to authorise or prohibit the rebroadcasting, fixation, reproduction of unauthorised or specific authorised fixations, and public communication of their broadcasts in venues charging an entrance fee, with conditions determined by domestic law (Article 13). Finally, Article 19 gives countries the authority to decide how to handle performers' rights when their performances are recorded for use in audiovisual works.	Article 12 of the Convention introduces the concept of a single **equitable remuneration** for the direct or indirect use of phonograms published for commercial purposes. While this article focuses specifically on phonograms (recordings of sound), it emphasises that performers (as well as phonogram producers) should receive equitable remuneration when their works are broadcast or communicated to the public.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement)	This WTO's agreement also addresses the mechanisms for the protection of copyrights without derogating from the rules of the Berne and Rome conventions. It confirms the principle of national treatment (Article 3) and the principle of most-favoured-nation treatment (Article 4). In addition, it protects performers whose performance was fixed on a phonogram by giving them the possibility to prevent unauthorised fixation, reproduction, broadcasting or communication to the public of their performances (Article 14(1)). Articles 12 and Article 14(5) regulate the term of protection, except in the case of photographic work or a work of applied art.	N/A
The WIPO Copyright Treaty (the WCT)	The WCT, a special agreement under the Berne Convention, aims to enhance and harmonise the protection of authors' rights in literary and artistic works, addressing new technological and societal changes, while balancing authors' rights with public interest in education, research and access to information. The WCT establishes certain exclusive rights such as the right of distribution for authors of literary and artistic works (Article 6(1)), which however does not impede the sovereign right of contracting parties to establish, if deemed necessary, the terms under which the exhaustion of the aforementioned right occurs subsequent to the initial sale or transfer of ownership of the original work or its copies, duly authorised by the author (Article 6(2). Furthermore, the WCT also establishes the exclusive right of authorising commercial rental for computer programs, audiovisual works and works embodied in phonograms (Article 7(1) and (2)) and the exclusive right of communication to the public of authors of literary and artistic works (Article 8). Following their national laws, Contracting States may establish provisions that restrict or provide exemptions to the privileges bestowed upon authors of literary and artistic works by the WCT, under specific circumstances that these exemptions neither hinder the customary utilisation of the work nor unjustly undermine the author's lawful interests (Article 10(1)). Articles 11 and 12 oblige Contracting States to establish protective measures under national law regarding digital rights management.	N/A

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
The World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (the WPPT)	The WPPT concerns related rights and recognises moral (Article 5) and economic rights of performers (Articles 6-10) by extending the protection granted under the Rome Convention. The former provides performers with the rights of attribution and integrity in their performances. The latter include economic rights of performers in their unfixed performances (Article 6), the right of reproduction (Article 7), the right of distribution (Article 8), the right of rental (Article 9) and the right of making available their fixed performances (Article 10). The term of protection lasts for 50 years from the end of the year in which the performance was fixed on a phonogram (Article 17(1)). The WPPT provides that national legislation may extend this protection to literary and artistic works (Article 16(1)). Articles 18 and 19 oblige Contracting States to establish protective measures under national law regarding digital rights management.	Article 15 of the WPPT affords performers and producers of phonograms the right to equitable remuneration for any use of published phonograms, whether directly or indirectly, for broadcasting or any form of communication to the public. It can be established that the single **equitable remuneration** can be claimed from the user by the performer or by the producer of a phonogram or by both. In the absence of an agreement between the performer and the producer of a phonogram, the terms according to which performers and producers of phonograms share the single equitable remuneration can be set.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Beijing Treaty on Audiovisual Performances (the Beijing Treaty)	This WIPO Treaty provides that, independent of a performer's economic rights, and even after the transfer of those rights, the performer retains certain moral rights regarding their live performances or performances fixed in audiovisual recordings (Article 5). Under the Beijing Treaty, performers are granted the following moral rights: (a) right of attribution (paternity), which ensures that performers are credited for their work, with exceptions where identification is impractical; (b) right of Integrity, which allows performers to object to modifications that harm their reputation, acknowledging the necessity of some changes in audiovisual productions. These rights aim to protect the personal and professional interests of performers while considering the collaborative and adaptive nature of audiovisual works. As for their economic rights, performers are granted several exclusive rights, such as the right of authorising the broadcasting and communication to the public of their performances (Articles 6 and 11), the right of authorising reproduction of their performances in audiovisual fixations (Article 7), the privilege of permitting the public access to the original and duplicates of their performances captured in audiovisual recordings, whether through sale or other forms of ownership transfer (Article 8 - right to distribution), the right of commercial rental (Article 9), and the right of making available of fixed performances (Article 10). The rights bestowed upon a performer remain in force for a period of 50 years after the fixation of the performance (Article 14). For rights transfers, the Treaty allows Contracting States to stipulate that once a performer has agreed to have their performance fixed in an audiovisual recording, the exclusive rights may be transferred to the producer (including in the form of transfer of ownership rights) of said audiovisual recording (Article 12(1)). This transfer is subject to the lack of any contractual arrangements to the contrary between the performer and the producer, as determined by national law (Article 12(1)). The WIPO Treaty also ensures that the rights of performers, both economic and moral, are independent of the rights granted to authors of the audiovisual work.	Article 12(3) of the Treaty establishes that, irrespective of the transfer of exclusive rights, national legislation or individual, collective or other agreements may provide performers with the **right to receive royalties or equitable remuneration** for any use of their performance. In accordance with Article 11(2), States may opt to declare that, instead of conferring the exclusive right to authorise the broadcasting and communication to the public of their performances fixed in audiovisual fixations for performers, they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Furthermore, they may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration.
EU acquis		

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Satellite and Cable Directive 93/83/EEC (SatCab)	The primary objective of this directive is to standardise copyright and associated rights in satellite broadcasting and cable retransmission within the EU, whilst guaranteeing equitable remuneration for rightholders. A pivotal tenet introduced by the Directive is the 'country-of-origin principle' for satellite broadcasting. Under this principle, a satellite broadcaster is only required to obtain rights clearance for their broadcasts within their native jurisdiction, with these rights subsequently extending across the entirety of the EU (Recital 18). This streamlined approach is aimed at simplifying the procedures for broadcasters and alleviates administrative burdens.	In accordance with Article 2, the author is granted an exclusive right to authorise the communication to the public by satellite of copyright works. Article 8 stipulates that when programmes from other Member States are retransmitted by cable in the territory of another Member State, the applicable copyright and related rights must be observed. Furthermore, such retransmission must occur on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.
Satellite and Cable II Directive (SatCab II Directive)	SatCab II Directive is specifically tailored to govern the retransmission of television and radio programmes, alongside the exercise of copyright and associated rights applicable to certain online transmissions of broadcasting organisations (Article 1). The overarching objective of the SatCab II is to standardise the rules governing the retransmission of television and radio programmes across the EU, thereby ensuring that rightholders receive appropriate remuneration for the utilisation of their creations (see Recitals 4, 15 and 18).	In accordance with Article 3(2), when determining the remuneration for rights falling under the country-of-origin principle (in the country where the broadcasting organisation has its principal establishment), the parties must consider all aspects of the ancillary online service. These include the characteristics of the service, such as the duration of the online availability of the programmes provided, the audience and the language versions offered. Article 4(1) specifies that the authorisation for the retransmission of programmes must be granted by the holders of the exclusive right of communication to the public. Rightholders are only permitted to exercise their right to grant or refuse authorisation for a retransmission through a CMO. As set forth in Recital 15, those who hold the rights to a work or other protected subject matter should receive an appropriate remuneration for the retransmission of their work. In establishing reasonable licensing terms, including the licence fee, it is essential to consider the economic value of the use of the rights in question, including the value attributed to the means of retransmission. This should be done without prejudice to the collective exercise of the right to payment of a single equitable remuneration for performers and phonogram producers for the communication to the public of commercial phonograms.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Directive 2001/29/EC (InfoSoc Directive)	The InfoSoc Directive contributes to the achievement of internal market objectives through the harmonisation of the laws of the Member States on copyright and related rights. This directive implements the WCT and the WPPT into EU law. In particular, it aimed to adapt legislation on copyright and related rights to technological developments and to the information society, while providing for a high level of protection of intellectual property. Among others, InfoSoc Directive harmonises rights for authors and performers, encompassing right of reproduction, communication to the public and distribution of their creations (Articles 2 – 4). Article 2 grants authors and performers the exclusive right to authorise or prohibit the direct or indirect, temporary or permanent, reproduction of their protected works or other subject matter by any means and in any form. Article 3 states that authors and performers have the exclusive right to authorise or prohibit the communication of their works to the public, including via digital means such as online streaming or broadcasting. The provision specifically covers the making available right, which allows works to be accessed by the public at a place and time of their choosing (e.g. on-demand services). Finally, Article 4 establishes the exclusive right of authors and performers to authorise or prohibit any form of distribution to the public of the original or copies of their works, including through sale or other transfers of ownership. As is the case for other IP rights, the distribution right granted under copyright law is limited by the principle of exhaustion. **These rights can be further transferred**, meaning that authors/performers may transfer the ownership of their rights, assign these rights to CMOs or grant licences (Recital 30). Finally, Article 5 provides an exhaustive list of possible exceptions to these exploitation rights that may be included in national law.	As indicated in Recital 38, an exception or limitation to the reproduction right for specific types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation, is to be provided. This may entail the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Directive 2001/84/EC[680] (Resale Right Directive)	The Resale Right Directive is primarily designed to protect the interests of visual artists by granting them a resale right, which aims to ensure that 'authors of graphic and plastic works of art' share in the economic success of their works (Recital 3) and to harmonise this right across the EU.	The **resale right** (often referred to as the *droit de suite*) allows the author of an artwork to receive **a royalty for subsequent sales of the work**. This right pertains to the physical object, specifically the medium that contains the protected artwork (Recital 2). This right ensures that artists benefit from the increased value of their works over time, providing them with a continuous economic benefit that reflects their ongoing success in the art market. Member States may establish a minimum sale price below which the resale right does not apply. This may not exceed EUR 3,000 (Article 3) or EUR 10,000 in cases where the seller has acquired the work of art directly from the artist within the preceding three years (Article 1). Furthermore, a rate of 5% to the lowest portion of the resale price might also be applied (Article 4(2)). The resale right is granted to the author of the original artwork. After the author's death, this right can be passed on to their heirs or legal successors. However, the resale right does not apply to the first sale of the artwork by the artist or to private sales between individuals without the involvement of an art market professional (art dealer, auctioneer or art gallery).

[680] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32–36, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0084.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Directive 2006/115/EC (Rental and Lending Directive)	The Rental and Lending Directive affords authors and performers the right to permit or disallow the rental and lending of both original works and copies protected by copyright, along with other subject matter (Article 1). The rental and lending rights are in principle **exclusive rights, which may be transferred**, either in the form of a transfer of ownership, assignment to CMOs or by granting a licence (Article 3). Performers may authorise or prevent the broadcasting by wireless means and the communication to the public of their live performance, which largely equates to an unwaivable remuneration right, subject to mandatory collective management (Article 8). Finally, Article 9 regulates the distribution right. Exceptions to these rights are included in Article 10.	In the case of a transfer of the **rental right**, Article 5 establishes an unwaivable right to **equitable remuneration** for authors and performers for the transfer or assignment of their rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer. The administration of this right may be entrusted to CMOs representing authors or performers. Article 6, which regulates the **lending right**, allows Member States to derogate from the exclusive public lending right applicable to copyright-protected works. It leaves room for qualification of the lending right as a remuneration right, provided that at least authors receive remuneration for such lending. In the event that a Member State does not apply the exclusive lending right to phonograms, films and computer programs they must introduce a remuneration scheme, again at least for authors. Furthermore, certain categories of establishments may be exempted from the payment of the remuneration. In accordance with Article 8(2), Member States are obliged to provide a right that ensures a **single equitable remuneration** is paid by the user in the event that a phonogram published for commercial purposes, or a reproduction of such a phonogram, is used for broadcasting by wireless means or for any communication to the public. Furthermore, this remuneration must be shared between the relevant performers and phonogram producers. In the absence of an agreement between performers and phonogram producers, Member States may determine the conditions governing the distribution of this remuneration.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Directive 2006/116/EC (Copyright Term Directive), as amended by Directive 2011/77/EU (Copyright Term Extension Directive)	The Copyright Term Directive harmonises the term of protection at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running, such as the date of the performance (Articles 1 and 3). It also confirms the rights of the authors for producers of phonograms, producers of the first film fixation, broadcasting organisations, protection of previously unpublished works, critical and scientific publications, as well as the protection of photographs. An amendment dating from 2011 extends the term of protection for phonograms (Article 1 of the Term Extension Directive).	Article 3(2b) states that in the event that a contract covering transfer or assignment affords the performer the right to claim a non-recurring remuneration, the performer will be entitled to obtain **an annual supplementary remuneration** from the phonogram producer for each full year that immediately follows the 50th year after the phonogram was lawfully published, or, in the event that such publication did not occur, the 50th year after it was lawfully communicated to the public. Performers are not permitted to waive their right to obtain such annual supplementary remuneration. Article 3(2c) specifies that the total amount to be set aside by a phonogram producer for the payment of the annual supplementary remuneration is equivalent to 20% of the revenues generated by the phonogram producer during the preceding year. The remuneration is paid from the reproduction, distribution and making available of the phonogram in question following the 50th year after it was lawfully published, or in the absence of such publication, the 50th year after it was lawfully communicated to the public. Member States must ensure that phonogram producers are obliged to provide performers who are entitled to the annual supplementary remuneration with any information that may be necessary to secure payment of that remuneration upon request.

Directive (EU) 2019/790 (the DSM Directive)	The DSM Directive aimed at adapting copyright rules to the EU's Digital Single Market was adopted on 17 April 2019 as part of the Digital Single Market Strategy. The new copyright rules ensure fairer remuneration for creators and rightholders, press publishers and journalists, in particular when their works are used online. These rules introduce more legal certainty and create more remuneration opportunities in the relationships with online platforms, rebalancing bargaining power.	Title IV - Chapter 3 (Articles 18-20) introduces rules on fair remuneration in exploitation contracts of authors and performers. It establishes the principle of appropriate and proportional remuneration in Article 18 and lays down obligations which include increased transparency (Article 19) and mechanisms for adjusting contracts when the initial remuneration is disproportionately low compared with subsequent revenues from exploitation (Article 20). Under Article 18(2), Member States can use various mechanisms and must take into account the principle of contractual freedom and a fair balance of rights and interests when implementing the principle of appropriate and proportional remuneration. Recital 72 points out that while a lump-sum payment can be considered proportionate remuneration, such a payment should not be the rule. Recital 73 of the Directive further clarifies that the remuneration should be proportionate to the economic value of the licensed or transferred rights, considering the author's or performer's contribution to the work or subject matter and all relevant circumstances, such as market practices or the actual exploitation of the work. The transparency obligation under Article 19 requires authors and performers to receive regular updates, at least once a year, from the parties to which they have licensed or transferred their rights, or their successors in title. The information provided should be up-to-date, relevant and comprehensive, and should include details on the exploitation of the works and performances in question, including the modes of exploitation, all revenues generated and the remuneration due. Where rights have subsequently been licensed, authors and performers or their representatives can request additional information from sub-licensees if their first contractual counterparty does not hold all the required information. In this case, the first contractual counterparty of authors and performers must provide information on the identity of those sub-licensees. The request to sub-licensees can be made directly or indirectly through the contractual counterparty of the author or the performer. In duly justified cases, where the administrative burden resulting from the transparency obligation would become disproportionate in the light of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases (Article 19(3). When the contribution of the author or performer is not significant having regard to the overall work or performance, Member States may decide to not apply the transparency obligation (Article 19(4)).

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
		The transparency rules set forth in the relevant collective bargaining agreement may be applicable to agreements subject to them. The transparency obligation stemming from Article 19 of the DSM Directive does not apply to agreements concluded by CMOs and IMEs as defined in the Collective Rights Management Directive (CRM Directive), as the CRM Directive provides for an equivalent obligation in Article 18. In accordance with Article 20, Member States are obliged to guarantee that, in the event that no applicable collective bargaining agreement exists, which provides for a comparable mechanism, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, in instances where the remuneration originally agreed upon is found to be disproportionately low in comparison to all subsequent relevant revenues derived from the exploitation of the works or performances in question.

Name of the legal instrument	Summary of the relevant provisions addressing rights transfers	Summary of the relevant provisions addressing remuneration
Collective Rights Management Directive (CRM Directive)	This Directive aimed to improve the functioning of CMOs across the EU and to facilitate the multi-territorial licensing of rights in musical works for online use, with the ultimate objective of promoting a well-functioning internal market.	In accordance with Article 16(2), rightholders are entitled to receive an appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration must be reasonable in relation to the economic value of the use of the rights in question, taking into account the nature and scope of the use of the work and other subject matter, as well as the economic value of the service provided by the CMO. Furthermore, CMOs must inform the user concerned of the criteria used for the setting of those tariffs. Article 18 requires that, at least once a year, the CMOs make available to each rightholder to which they have attributed rights revenues or made payments in the period to which the information relates, at least the following information: • any contact details which the rightholder has authorised the CMO to use in order to identify and locate the rightholder; • the rights revenues attributed to the rightholder; • the amounts paid by the CMO to the rightholder per category of rights managed and per type of use; • the period during which the use took place for which amounts were attributed and paid to the rightholder, unless objective reasons relating to reporting by users prevent the CMO from providing this information; • deductions made in respect of management fees; • deductions made for any purpose other than in respect of management fees, including those that may be required by national law for the provision of any social, cultural or educational services; • any rights revenues attributed to the rightholder which is outstanding for any period. Moreover, in accordance with Article 18(2), a CMO that has attributed rights revenues and whose members are responsible for distributing such revenues to rightholders, is obliged to provide the relevant information to those entities at least once a year. This obligation extends to each rightholder to which the CMO has attributed rights revenues or made payments during the period to which the information relates.

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